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STUDY MATERIALS
PART IX

Codification Division of the United Nations Office of Legal Affairs

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Agreement Establishing the World Trade Organization, 1994
AGREEMENT ESTABLISHING THE
WORLD TRADE ORGANIZATION

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,

Recognizing further 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,

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 trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. 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.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. 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, 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 (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV

Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.
3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex IA. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

**Article V**

*Relations with Other Organizations*

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

**Article VI**

*The Secretariat*

1. There shall be a Secretariat of the WTO (hereinafter referred to as “the Secretariat”) headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

**Article VII**

*Budget and Contributions*

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

   (a) the scale of contributions apportioning the expenses of the WTO among its Members; and

   (b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.
Article VIII
Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Article IX
Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. When a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference, the General Council or the Council for Trade in Goods, the Council for Trade in Services, or the Council for TRIPS, respectively, for consideration during a time period, which shall not exceed 90 days, at the end of the time period, the relevant Council shall submit a report to the Ministerial Conference, and the Conference shall consider the report. In exceptional circumstances, if consensus is not reached during the time period, any decision to grant a waiver shall be taken by three fourths of the Members.

2. Where the provisions of paragraphs 1 and 2 are not applicable, the Conference or the relevant Council shall decide by three fourths of the Members, unless otherwise provided for in this paragraph.

(a) A waiver concerning the operation of this Agreement or the operation of a plurilateral trade agreement in Annex A shall be initiated by a Member, subject to the Ministerial Conference, the General Council, the Council for Trade in Goods, the Council for Trade in Services, or the Council for TRIPS, respectively, for consideration during a time period, which shall not exceed 90 days. At the end of the time period, any decision to grant a waiver shall be taken by three fourths of the Members.

(b) A waiver concerning the operation of this Agreement shall be submitted to the Ministerial Conference, the General Council, the Council for Trade in Goods, the Council for Trade in Services, or the Council for TRIPS, respectively, for consideration during a time period, which shall not exceed 90 days. At the end of the time period, any decision to grant a waiver shall be taken by three fourths of the Members.

3. The WTO may determine a headquarters agreement.
Article IX of this Agreement; 
Articles I and II of GATT 1994; 
Article II:1 of GATS; 
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.
**Article XIV**

Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

**Article XV**

Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

**Article XVI**

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.
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Agreement on the Application of Sanitary and Phytosanitary Measures
Agreement on Textiles and Clothing
Agreement on Technical Barriers to Trade
Agreement on Trade-Related Investment Measures
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
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Note: Asterisks mark the portions of the text which should be read in conjunction with notes and supplementary provisions in Annex I of the Agreement.
The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:

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, developing the full use of the resources of the world and expanding the production and exchange of goods,

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,

Have through their Representatives agreed as follows:

PART I

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.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(c) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5 of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947; and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraph (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that

* The authentic text erroneously reads "subparagraph 5 (a)".

"
Article II: Schedules of Concessions

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) 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 accorded treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule relating to each of the other contracting parties which are the producers of that product, subject to the provisions of paragraph 2.

(c) The products described in Part II of the Schedule relating to any contracting party, which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates, shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be accorded treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule relating to each of the other contracting parties which are the producers of that product, subject to the provisions of paragraph 2.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III, in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(b) any anti-dumping or countervailing duty, consistent with the provisions of Article VI, applied to an imported product or to an article from which the imported product has been manufactured or produced in whole or in part;

(c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to the Agreement, such monopoly shall not impair the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for or urgency of such adjustments.

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the second contracting party. If the latter party receives notification by the contracting party concerned of a matter of which it is interested, it shall enter promptly into further negotiations with a view to an amicable settlement of the matter.

PART II

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 quantitative regulations, 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 another contracting party, shall not be subject, directly or indirectly, to internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

3. With respect to any existing internal tax which is inconsistent with the principles of paragraph 2, but which is illegal under the internal laws of any contracting party, the importation of such tax shall be bound against increases, the increases in such tax being fixed at the highest rate applicable to imported products.

4. If any contracting party, after imposition of such tax, shall impose any other internal taxes or other internal charges against imported products in a manner contrary to the principles set forth in paragraph 2, such taxes or other internal charges shall be rescinded and the taxes so rescinded shall be compensated by the contracting party imposing such tax.

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the second contracting party. If the latter party receives notification by the contracting party concerned of a matter of which it is interested, it shall enter promptly into further negotiations with a view to an amicable settlement of the matter.

PART III

Article IV: Measures Affecting Trade

1. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

2. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

3. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

4. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

5. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

6. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

7. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

8. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

9. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

10. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

11. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

12. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

13. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

14. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

15. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

16. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

17. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

18. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.

19. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial exports of all goods of their respective territories.

20. The contracting parties agree to eliminate all obstacles to the entry and movement for the purposes of trade of normal commercial imports of all goods of their respective territories.
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Article IV: Freedom of Transit

1. Goods (including baggage) and also vessels and other means of transport when the passage across such territory, is only a part of a complete journey from one place outside the territory to another such place, shall be accorded treatment no less favourable than that accorded to like products of national origin or of other means of transport.

2. There shall be freedom of transit through the territory of each contracting party, via the route most convenient for international transit, for traffic in transit to or from the territory of other contracting parties or any third country.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper customs house, but except in cases of failure to comply with applicable customs laws and regulations, such unnecessary delay or restrictions shall be exempt from customs duties and other charges.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations, and formalities in connection with transit, such contracting parties shall accord to traffic in transit to or from the territories of other contracting parties treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

6. Each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

Article V: Special Provisions relating to Cinematograph Films

1. The provisions of paragraph II shall not apply to laws, regulations, or requirements affecting the establishment or maintenance of internal quantitative regulations relating to exposed cinematograph films.

2. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper customs house, but except in cases of failure to comply with applicable customs laws and regulations, such unnecessary delay or restrictions shall be exempt from customs duties and other charges.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations, and formalities in connection with transit, such contracting parties shall accord to traffic in transit to or from the territories of other contracting parties treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

6. Each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.
6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the net effect of the dumping or subsidization is to cause or threaten material injury to an established domestic industry, or that such injury is being reasonably foreseeable. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if the dumping or subsidization is substantial and otherwise serious to the domestic industry concerned.

(b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party that causes or threatens material injury to an established domestic industry of that contracting party. The CONTRACTING PARTIES could agree to a schedule of such temporary measures, which shall be published periodically with respect to any product of the territory of another contracting party exporting the product concerned to the territory of any contracting party.

7. A system for the stabilization of the domestic price or of the return of domestic producers of primary commodities, independently of the movements of the export price, which results in the price charged for the like product in the domestic market, and in the price of the product exported from one country to another, is determined by consultation among the contracting parties, substantially interested in the commodity concerned. The COUNTERVAILING DUTIES provisions shall not apply to the stabilization of such prices.

8. No anti-dumping duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that dumping, by which products of one country are introduced into the territory of another country, is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if dumping or otherwise serious is substantial to the domestic industry concerned.

9. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that a subsidy is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if a subsidy is substantial and otherwise is serious to the domestic industry concerned.

10. No anti-dumping or countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that the net effect of the dumping or subsidization is to cause or threaten material injury to an established domestic industry, or that such injury is being reasonably foreseeable. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if the dumping or subsidization is substantial and otherwise serious to the domestic industry concerned.

11. No anti-dumping or countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that dumping, by which products of one country are introduced into the territory of another country, is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if dumping or otherwise serious is substantial to the domestic industry concerned.

12. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that a subsidy is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if a subsidy is substantial and otherwise is serious to the domestic industry concerned.

13. No anti-dumping or countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that dumping, by which products of one country are introduced into the territory of another country, is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if dumping or otherwise serious is substantial to the domestic industry concerned.

14. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that a subsidy is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if a subsidy is substantial and otherwise is serious to the domestic industry concerned.

15. No anti-dumping or countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that dumping, by which products of one country are introduced into the territory of another country, is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if dumping or otherwise serious is substantial to the domestic industry concerned.

16. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that a subsidy is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if a subsidy is substantial and otherwise is serious to the domestic industry concerned.

17. No anti-dumping or countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that dumping, by which products of one country are introduced into the territory of another country, is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if dumping or otherwise serious is substantial to the domestic industry concerned.

18. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that a subsidy is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if a subsidy is substantial and otherwise is serious to the domestic industry concerned.

19. No anti-dumping or countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that dumping, by which products of one country are introduced into the territory of another country, is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if dumping or otherwise serious is substantial to the domestic industry concerned.

20. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party unless it determines that a subsidy is causing or threatening material injury to an established domestic industry of that contracting party. Provided that such a determination shall be made promptly by the CONTRACTING PARTIES if a subsidy is substantial and otherwise is serious to the domestic industry concerned.
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are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

**Article X:** Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impose law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (a) Each contracting party 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 contracting party 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. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.

**Article XI:** General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

(i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*

(ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

(iii) not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.*

(f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balance of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

Article XIII*; Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting
A contracting party which applies such restrictions shall, in a manner having effect equivalent to restrictions, ensure that the product or other trade measure taken is consistent with the provisions of Article XIII, in respect of a small part of its external trade where the benefits of the provisions of Article XII of this Agreement are not so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and

4. A contracting party applying import restrictions under Article XII or under Section B of Article XVII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

5. A contracting party applying import restrictions under Article XII or under Section B of Article XVII of this Agreement from applying quantitative restrictions, (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article XVII of the Agreement, (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the conclusion of the arrangements referred to in paragraph 1 of Article XVI of this Agreement.

6. A contracting party applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

7. A contracting party applying import restrictions under Article XII or under Section B of Article XVII of this Agreement from applying quantitative restrictions, (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article XVII of the Agreement, (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the conclusion of the arrangements referred to in paragraph 1 of Article XVI of this Agreement.

8. A contracting party applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

9. A contracting party applying import restrictions under Article XII or under Section B of Article XVII of this Agreement from applying quantitative restrictions, (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article XVII of the Agreement, (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the conclusion of the arrangements referred to in paragraph 1 of Article XVI of this Agreement.

10. A contracting party applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

11. A contracting party applying import restrictions under Article XII or under Section B of Article XVII of this Agreement from applying quantitative restrictions, (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article XVII of the Agreement, (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the conclusion of the arrangements referred to in paragraph 1 of Article XVI of this Agreement.

12. A contracting party applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.
2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

4. Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.

6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

7. (a) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide for the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.

(b) The terms of any such agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on members of the Fund.

8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.

9. Nothing in this Agreement shall preclude:

(a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or

(b) the use by a contracting party of restrictions or controls in imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

**Article XVI**: Subsidies

Section A - Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B - Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party 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 contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties 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.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

**Article XVII**: State Trading Enterprises

1. (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
The contracting parties, recognizing that the establishment of a particular industry may require special provisions for the development of that industry, may, in accordance with the principles of paragraph (a) of this Article, allow the national treatment in the case of such imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for other purposes.

3. The contracting parties, recognizing that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade, may, in accordance with the principles of paragraphs (a) and (b) of this paragraph, request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

4. (a) A contracting party, the economy of which is in the process of development, but which does not have a substantial interest therein, may refer the matter to the contracting party concerned, at the request of any contracting party which has a substantial interest therein. If agreement is reached between such contracting parties, the contracting parties shall, at the request of the contracting party concerned, be free to modify or withdraw concessions under the appropriate Schedules to Article XVIII:

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (a) of this Article, may be affected by the export earnings of such countries. Accordingly, when such exports are found to be substantially affected by measures taken by another contracting party, it may make a request to the other contracting parties to reconsider the terms on which such concessions were made.

6. The contracting parties shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.
compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in sub-paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; Provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

(a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or

(b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; Provided that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and Provided further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; Provided that no consultation under this sub-paragraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a continuing and serious trade, that the restrictions are so applied as to avoid unnecessary damage to the trade and to prevent the imposition of multiple or discriminatory measures.

1 By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".
In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and Section C. The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

13. If a contracting party coming within the scope of paragraph 4(a) of this Article finds that it shall not apply the proposed measure provided

14. The contracting party concerned shall notify the CONTRACTING PARTIES.*

Section C

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule... party for approval of such measure. The CONTRACTING PARTIES shall promptly*

22. A contracting party coming within the scope of paragraph 1(b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry* may apply to the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur* in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

23. Any measure applied under this Section must comply with the provisions of paragraph 20 of this Article.

Provided the proposal submitted to the CONTRACTING PARTIES has not concurred in such measure, the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

The contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.
obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES and the other contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

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 contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(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;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;* 

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXII: Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII: Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary of the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

PART III

Article XXIV: Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that:

(a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement 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 or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of sub-paragraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVI shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

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1 By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".
7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(a) 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) subject to the provisions of paragraph 9, 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;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

Article XXV: Joint Action by the Contracting Parties

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph.1

Article XXVI: Acceptance, Entry into Force and Registration

1. The date of this Agreement shall be 30 October 1947.

2. This Agreement shall be open for acceptance by any contracting party which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.

3. This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary-General of the United Nations, who shall furnish certified copies thereof to all interested governments.

4. Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary¹ to the CONTRACTING PARTIES, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.

¹The authentic text erroneously reads “sub-paragraph”.

5. (a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary1 to the CONTRACTING PARTIES at the time of its own acceptance.

(b) Any government, which has so notified the Executive Secretary1 under the exceptions in sub-paragraph (a) of this paragraph, may at any time give notice to the Executive Secretary1 that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary.1

(c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

6. This Agreement shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with Executive Secretary1 to the CONTRACTING PARTIES on behalf of governments named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.

7. The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

Article XXVII: Withholding or Withdrawal of Concessions

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

Article XXVIII*: Modification of Schedules

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concession, modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement.

2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize* a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

(a) Such negotiations* and any related consultations shall be conducted in accordance with the provisions of paragraph 1 and 2 of this Article.

(b) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (b) of this Article shall apply.

(c) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days* after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.

(d) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (b) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation.* If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4 (a) to have a principal supplying interest and any contracting party determined under paragraph 4 (a) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant
contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

Article XXVIII bis: Tariff Negotiations

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (a) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding of duties increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

(b) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

(a) the needs of individual contracting parties and individual industries;

(b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and

(c) all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned.

Article XXIX: The Relation of this Agreement to the Havana Charter

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.*

2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.

3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force: Provided that the provisions of Part II other than Article XXIII shall be replaced, mutatis mutandis, in the form in which they then appeared in the Havana Charter; and Provided further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

Article XXX: Amendments

1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

Article XXXI: Withdrawal

Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or of paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement, or may separately withdraw on behalf of any of the separate customs territories for which it has international responsibility and which at the time possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement. The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Secretary-General of the United Nations.

Article XXXII: Contracting Parties

1. The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.
2. At any time after the entry into force of this Agreement pursuant to paragraph 6 of Article XXVI, those contracting parties which have accepted this Agreement pursuant to paragraph 4 of Article XXVI may decide that any contracting party which has not so accepted it shall cease to be a contracting party.

Article XXXIII: Accession

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

Article XXXIV: Annexes

The annexes to this Agreement are hereby made an integral part of this Agreement.

Article XXXV: Non-application of the Agreement between Particular Contracting Parties

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

   (a) the two contracting parties have not entered into tariff negotiations with each other, and

   (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

PART IV*: TRADE AND DEVELOPMENT

Article XXXVI: Principles and Objectives

1.* The contracting parties,

   (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;

   (b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;

   (c) noting that there is a wide gap between standards of living in less-developed countries and in other countries;

   (d) recognizing that individual 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;

   (e) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures and measures in conformity with such rules and procedures as are consistent with the objectives set forth in this Article;

   (f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. 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.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.
**Article XXXV: Commitments**

1. The developed contracting parties shall to the fullest extent possible, that is, except when compelling reasons, which may include legal reasons, make it impossible, give effect to the following provisions:

   (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;*

   (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and

   (c) (i) refrain from imposing new fiscal measures, and

   (ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

2. (a) Whenever it is considered that effect is not being given to any of the provisions of sub-paragraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

   (b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of sub-paragraph (a), (b) or (c) of paragraph 1 shall be examined.

   (ii) As the implementation of the provisions of sub-paragraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

   (iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

   (a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;

   (b) give active consideration to the adoption of other measures* designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;

   (c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

5. In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

**Article XXXVIII: Joint Action**

1. The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.

2. In particular, the CONTRACTING PARTIES shall:

   (a) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

   (b) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;

   (c) collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;

   (d) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;

   (e) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and
regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; and

(f) establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part.

ANNEX A: List of Territories referred to in Paragraph 2 (a) of Article I

United Kingdom of Great Britain and Northern Ireland
Dependent territories of the United Kingdom of Great Britain and Northern Ireland
Canada
Commonwealth of Australia
New Zealand
Dependent territories of New Zealand
Union of South Africa including South West Africa
Ireland
India (as on April 10, 1947)
Newfoundland
Southern Rhodesia
Burma
Ceylon

Certain of the territories listed above have two or more preferential rates in force for certain products. Any such territory may, by agreement with the other contracting parties which are principal suppliers of such products at the most-favoured-nation rate, substitute for such preferential rates a single preferential rate which shall not on the whole be less favourable to suppliers at the most-favoured-nation rate than the preferences in force prior to such substitution.

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on April 10, 1947 exclusively between two or more of the territories listed in this Annex or to replace the preferential quantitative arrangements described in the following paragraph, shall not be deemed to constitute an increase in a margin of tariff preference.

The preferential arrangements referred to in paragraph 5 (b) of Article XIV are those existing in the United Kingdom on 10 April 1947, under contractual agreements with the Governments of Canada, Australia and New Zealand, in respect of chilled and frozen beef and veal, frozen mutton and lamb, chilled and frozen pork and bacon. It is the intention, without prejudice to any action taken under sub-paragraph (h) of Article XX, that these arrangements shall be eliminated or replaced by tariff preferences, and that negotiations to this end shall take place as soon as practicable among the countries substantially concerned or involved.

The film hire tax in force in New Zealand on 10 April 1947, shall, for the purposes of this Agreement, be treated as a customs duty under Article I. The renters' film quota in force in New Zealand on April 10, 1947, shall, for the purposes of this Agreement, be treated as a screen quota under Article IV.

The Dominions of India and Pakistan have not been mentioned separately in the above list since they had not come into existence as such on the base date of April 10, 1947.

ANNEX B: List of Territories of the French Union referred to in Paragraph 2 (b) of Article I

France
French Equatorial Africa (Treaty Basin of the Congo and other territories)

1 The authentic text erroneously reads “part I (b)”.
2 For imports into Metropolitan France and Territories of the French Union.
French West Africa
Cameroons under French Trusteeship
French Somali Coast and Dependencies
French Establishments in Oceania
French Establishments in the Condominium of the New Hebrides
Indo-China
Madagascar and Dependencies
Morocco (French zone)
New Caledonia and Dependencies
Saint-Pierre and Miquelon
Togo under French Trusteeship
Tunisia

ANNEX C: List of Territories referred to in Paragraph 2 (b) of Article I as respects the Customs Union of Belgium, Luxemburg and the Netherlands

The Economic Union of Belgium and Luxemburg
Belgian Congo
Ruanda Urundi
Netherlands
New Guinea
Surinam
Netherlands Antilles
Republic of Indonesia

For imports into the territories constituting the Customs Union only.

ANNEX D: List of Territories referred to in Paragraph 2 (b) of Article I as respects the United States of America

United States of America (customs territory)
Dependent territories of the United States of America
Republic of the Philippines

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on 10 April, 1947, exclusively between two or more of the territories listed in this Annex shall not be deemed to constitute an increase in a margin of tariff preference.

ANNEX E: List of Territories covered by Preferential Arrangements between Chile and Neighbouring Countries referred to in Paragraph 2 (d) of Article I

Preferences in force exclusively between Chile on the one hand, and

1. Argentina
2. Bolivia
3. Peru

on the other hand.

ANNEX F: List of Territories covered by Preferential Arrangements

ANNEX G: Dates establishing Maximum Margins of Preference referred to in Paragraph 41 of Article I

Australia        October 15, 1946
Canada         July 1, 1939
France         January 1, 1939
Lebano-Syrian Customs Union   November 30, 1938
Union of South Africa     July 1, 1938
Southern Rhodesia      May 1, 1941

ANNEX H: Percentage Shares of Total External Trade to be used for the Purpose of Making the Determination referred to in Article XXVI

If, prior to the accession of the Government of Japan to the General Agreement, the present Agreement has been accepted by contracting parties the external trade of which under Column I accounts for the percentage of such trade specified in paragraph 6 of Article XXVI, column I shall be applicable for the purposes of that paragraph. If the present Agreement has not been so accepted prior to the accession of the Government of Japan, column II shall be applicable for the purposes of that paragraph.

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia      3.1  3.0</td>
<td></td>
</tr>
<tr>
<td>Austria       0.9  0.8</td>
<td></td>
</tr>
<tr>
<td>Belgium-Luxemburg   4.3  4.2</td>
<td></td>
</tr>
<tr>
<td>Brazil        2.5  2.4</td>
<td></td>
</tr>
<tr>
<td>Burma         0.3  0.3</td>
<td></td>
</tr>
<tr>
<td>Canada        6.7  6.5</td>
<td></td>
</tr>
<tr>
<td>Ceylon         0.5  0.5</td>
<td></td>
</tr>
<tr>
<td>Chile         0.6  0.6</td>
<td></td>
</tr>
<tr>
<td>Cuba          1.1  1.1</td>
<td></td>
</tr>
<tr>
<td>Czechoslovakia 1.4  1.4</td>
<td></td>
</tr>
<tr>
<td>Denmark        1.4  1.4</td>
<td></td>
</tr>
<tr>
<td>Dominican Republic 0.1  0.1</td>
<td></td>
</tr>
</tbody>
</table>

1 The authentic text erroneously reads "Paragraph 3".
Finland       1.0  1.0
France       8.7  8.5
Germany, Federal Republic of 5.3  5.2
Greece       0.4  0.4
Haiti       0.1  0.1
India       2.4  2.4
Indonesia      1.3  1.3
Italy       2.9  2.8
Netherlands, Kingdom of the 4.7  4.6
New Zealand      1.0  1.0
Nicaragua       0.1  0.1
Norway       1.1  1.1
Pakistan       0.9  0.8
Peru       0.4  0.4
Rhodesia and Nyasaland 0.6  0.6
Sweden       2.5  2.4
Turkey       0.6  0.6
Union of South Africa 1.8  1.8
United Kingdom 20.3 19.8
United States of America 20.6 20.1
Uruguay       0.4  0.4
Japan        _  2.3

100.0  100.0

Note: These percentages have been computed taking into account the trade of all territories in respect of which the General Agreement on Tariffs and Trade is applied.

ANNEX I: Notes and Supplementary Provisions

Ad Article I

Paragraph 1

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 (b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.1

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

(1) If the most-favoured-nation rate were 36 per cent ad valorem and the preferential rate were 24 per cent ad valorem, the margin of preference would be 12 per cent ad valorem, and not one-third of the most-favoured-nation rate;

(2) If the most-favoured-nation rate were 36 per cent ad valorem and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 per cent ad valorem;

(3) If the most-favoured-nation rate were 2 francs per kilogramme and the preferential rate were 1.50 francs per kilogramme, the margin of preference would be 0.50 franc per kilogramme.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

(i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and

(ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

Ad Article II

Paragraph 2 (a)

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.1

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

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1 This Protocol entered into force on 14 December 1948.
Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

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.

Paragraph 5

Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

Ad Article V

Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

Ad Article VI

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

Ad Articles XI, XII, XIII, XIV and XVIII

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.
Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

Ad Article XI

Paragraph 2 (c)

The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last sub-paragraph

The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

Ad Article XII

Paragraph 3

Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4 (b)

It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this sub-paragraph at the time envisaged, they may determine a later date; Provided that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4 (e)

It is agreed that paragraph 4 (e) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

Ad Article XIII

Paragraph 2 (d)

No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to "special factors" in connection with the last sub-paragraph of paragraph 2 of Article XI.

Ad Article XIV

Paragraph 1

The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.

Paragraph 2

One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.

Ad Article XV

Paragraph 4

The word "frustrate" is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

Ad Article XVI

Paragraph 4

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.

2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3
1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and

(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

**Paragraph 4**

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

**Ad Article XVII**

**Paragraph 1**

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

**Paragraph 1 (a)**

Governmental measures imposed to insure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

**Paragraph 1 (b)**

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

**Paragraph 2**

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

**Paragraph 3**

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

**Paragraph 4 (b)**

The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

**Ad Article XVIII**

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

**Paragraphs 1 and 4**

1. When they consider whether the economy of a contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.

2. The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.

**Paragraphs 2, 3, 7, 13 and 22**

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

**Paragraph 7 (b)**

A modification or withdrawal, pursuant to paragraph 7 (b), by a contracting party, other than the applicant contracting party, referred to in paragraph 7 (a), shall be made within six months of the
day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

Paragraph 11

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

Paragraph 12 (b)

The date referred to in paragraph 12 (b) shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4 (b) of Article XII of this Agreement.

Paragraphs 13 and 14

It is recognized that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

Paragraphs 15 and 16

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

Paragraphs 16, 18, 19 and 22

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.

2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 18 and 22

The phrase "that the interests of other contracting parties are adequately safeguarded" is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 18 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would have the right to safeguard its interests through such a temporary suspension of a concession; Provided that this right will not be exercised when, in the case of a measure imposed by a contracting party coming within the scope of paragraph 4 (a), the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

Paragraph 19

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the "reasonable period of time" referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4 (a) of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance of payments import restrictions.

Paragraph 21

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

Ad Article XX

Sub-paragraph (h)

The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is ... already paid and any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

Ad Article XXVIII

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting
of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.

Paragraph 4

1. Any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.

2. It is recognized that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and re-adjusting the tariff as an important aid for the development and adjustment of their economies or in their efforts to meet the requirements of the bananas round negotiations, to make modifications or withdrawals which in the longer run would prove necessary. To avoid such a situation the CONTRACTING PARTIES may also, if they consider this would result in, or contribute to, tariff levels as to threaten the stability of the schedules of this Agreement or to give undue discrimination of international trade.

3. It is expected that negotiations authorized under paragraphs 4 (a) shall be made by the CONTRACTING PARTIES so as to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

4. The determination referred to in paragraph 4 (a) shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them, unless the applicant contracting party agrees to a longer period.

5. In determining under paragraph 4 (a) whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to the extent has less scope than other contracting parties to make compensatory adjustments.

Paragraph 5

1. The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party "may ... modify or withdraw a concession" means that on such day, and on the first day after such period, if a contracting party is notified that the negotiations referred to in paragraph 1 shall take place. Any notice so giving must be in writing and shall specify the terms and conditions under which the negotiations or consultations referred to in paragraph 1 shall take place. The CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the expiration of such period, a significant share in the market of the contracting party seeking to modify or withdraw the concession. It is understood that the reference to fiscal needs would include the revenues aspect of duties and particularly duties imposed primarily for revenue purposes or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

3. The CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the expiration of such period, a significant share in the market of the contracting party seeking to modify or withdraw the concession. It is understood that the reference to fiscal needs would include the revenues aspect of duties and particularly duties imposed primarily for revenue purposes or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

4. The object of providing for the participation in the negotiations of any contracting party with which the negotiations or consultations referred to in paragraph 1 shall take place is to ensure that the negotiations so determined are effective to meet the purposes of this Article. The CONTRACTING PARTIES in making such a determination for the participation of such a contracting party may have regard to any other pertinent matter.
they generally deal with the organization, functions and procedures of the International Trade Organization.

**Ad Part IV**

The words "developed contracting parties" and the words "less-developed contracting parties" as used in Part IV are to be understood to refer to developed and less-developed countries which are parties to the General Agreement on Tariffs and Trade.

**Ad Article XXXVI**

**Paragraph 1**

This Article is based upon the objectives set forth in Article I as it will be amended by Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX when that Protocol enters into force.\(^1\)

**Paragraph 4**

The term "primary products" includes agricultural products, vide paragraph 2 of the note ad Article XVI, Section B.

**Paragraph 5**

A diversification programme would generally include the intensification of activities for the processing of primary products and the development of manufacturing industries, taking into account the situation of the particular contracting party and the world outlook for production and consumption of different commodities.

**Paragraph 8**

It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII \(bis\) (Article XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective\(^1\)), Article XXXIII, or any other procedure under this Agreement.

**Ad Article XXXVII**

**Paragraph 3 (b)**

The other measures referred to in this paragraph might include steps to promote domestic structural changes, to encourage the consumption of particular products, or to introduce measures of trade promotion.

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\(^1\) This Protocol was abandoned on 1 January 1968.
PROTOCOL OF PROVISIONAL APPLICATION OF THE
GENERAL AGREEMENT ON TARIFFS AND TRADE

1. The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM (in respect of its metropolitan territory), CANADA, the FRENCH REPUBLIC (in respect of its metropolitan territory), the GRAND-DUCY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS (in respect of its metropolitan territory), the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (in respect of its metropolitan territory), and the UNITED STATES OF AMERICA undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November 1947, to apply provisionally on and after 1 January 1948:

(a) Parts I and III of the General Agreement on Tariffs and Trade, and

(b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

2. The foregoing Governments shall make effective such provisional application of the General Agreement, in respect of any of their territories other than their metropolitan territories, on or after 1 January 1948, upon the expiration of thirty days from the day on which notice of such application is received by the Secretary-General of the United Nations.

3. Any other government signatory to this Protocol shall make effective such provisional application of the General Agreement, on or after 1 January 1948, upon the expiration of thirty days from the day of signature of this Protocol on behalf of such Government.

4. This Protocol shall remain open for signature at the Headquarters of the United Nations (a) until 15 November 1947, on behalf of any government named in paragraph 1 of this Protocol which has not signed it on this day, and (b) until 30 June 1948, on behalf of any other Government signatory 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 which has not signed it on this day.

5. Any government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations.

6. The original of this Protocol shall be deposited with the Secretary-General of the United Nations, who will furnish certified copies thereof to all interested Governments.

In WITNESS WHEREOF the respective Representatives, after having communicated their full powers, found to be in good and due form, have signed the Protocol.

DONE at Geneva, in a single copy, in the English and the French languages, both texts authentic, this thirtieth day of October one thousand nine hundred and forty-seven.
General Agreement on Tariffs and Trade, 1994
GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:

(a) the provisions in 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 (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

(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:

(i) protocols and certifications relating to tariff concessions;

(ii) protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);

(iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement; 1

(iv) other decisions of the CONTRACTING PARTIES to GATT 1947;

(c) the Understandings set forth below:

(i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;

(ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;


(iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;

(v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;

(vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and

(d) the Marrakesh Protocol to GATT 1994.

2. Explanatory Notes

(a) The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The references to "less-developed contracting party" and "developed contracting party" shall be deemed to read "developing country Member" and "developed country Member". The references to "Executive Secretary" shall be deemed to read "Director-General of the WTO".

(b) The references to the CONTRACTING PARTIES acting jointly in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to refer to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.

(c) (i) The text of GATT 1994 shall be authentic in English, French and Spanish.

(ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.

(iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.

(d) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years for as long as the exemption is in force for the purpose of examining whether the conditions which created the need for the exemption still prevail.

(e) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.

(f) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.

(g) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.

1The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994. The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.
UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(b)
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".

2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.

3. "Other duties or charges" shall be recorded in respect of all tariff bindings.

4. Where a tariff item has previously been the subject of a concession, the level of "other duties or charges" recorded in the appropriate Schedule shall not be higher than the level obtaining at the time of the first incorporation of the concession in that Schedule. It will be open to any Member to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the time of the original binding of the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the date of entry into force of the WTO Agreement or three years after the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994, if that is a later date.

5. The recording of "other duties or charges" in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.

6. For the purposes of this Understanding, the provisions of Articles XXII and XXII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply.

7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.

8. The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 275/24).

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XVII
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Noting that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

Noting further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;

Recognizing that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;

Hereby agree as follows:

1. In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 98/184-185), it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

4. Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.

5. A working party shall be set up, on behalf of the Council for Trade in Goods, to review notifications and counter-notifications. In the light of this review and without prejudice to paragraph 4(c) of Article XVII, the Council for Trade in Goods may make recommendations.
with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the above-mentioned questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the Secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all Members indicating their wish to serve on it. It shall meet within a year of the date of entry into force of the WTO Agreement and thereafter at least once a year. It shall report annually to the Council for Trade in Goods.¹

1The activities of this working party shall be coordinated with those of the working group provided for in Section III of the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions³;

Hereby agree as follows:

Application of Measures

1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.

2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.

3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.

4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII

³Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.
and paragraph of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs and which contribute to the fulfillment of a country's development efforts. Members may, therefore, exclude or limit the application of surcharges or other measures applied for balance-of-payments purposes in the case of certain essential products, provided that such products only meet basic consumption needs and contribute to the fulfillment of a country's development efforts.

5. Procedures for Balance-of-Payments Consultations

5.1. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The term "consultations" shall include all procedures established for the purpose of reviewing restrictive import measures taken for balance-of-payments purposes. Such procedures may be established by the Committee by agreement on a case-by-case basis or by the provisions set out below.

6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraphs 12(a) of Article XII or under paragraphs 12(b) of Article XVIII. The Committee shall follow the procedures established for consultations under paragraphs 5.2, 5.3 and 5.5 of this Understanding as appropriate. If no such request has been made, the Committee may examine the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects.

7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraphs 12(a) of Article XII or under paragraphs 12(b) of Article XVIII. The Committee shall hold such a consultation within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraphs 12(a) of Article XII or under paragraphs 12(b) of Article XVIII as appropriate. If no such request has been made, the Committee may examine the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects. The measures taken to liberalize import restrictions in the light of the conclusions of the Committee may be made, when relevant, to the information provided by the Member applying the measures.

8. All consultations shall be based on the principles of good faith, transparency, and the establishment of a level playing field. Members shall provide the Committee with all information necessary for the Committee to conduct its consultations effectively. The Committee shall ensure that consultations are conducted in a timely and efficient manner, taking into account the specific circumstances of each consultation. The Committee shall, when relevant, make changes in the level of protection applied, provided that such changes are consistent with the principles of good faith, transparency, and the establishment of a level playing field.

9. The Committee shall report on its consultations to the General Council. When full consultation procedures have been used, the report shall indicate the Committee's conclusions on the different elements of the plan for consultations. In the case of developing country Members, the Secretary-General may be invited to co-sponsor the report. The report shall be made available to the Members and the public, and shall be published in the WTO. The technical assistance services of the Committee shall, at the request of developing country Members, assist in preparing the documentation for the consultations.

10. The Committee shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. The Committee may, when relevant, make changes in the level of protection applied, provided that such changes are consistent with the principles of good faith, transparency, and the establishment of a level playing field.

11. The Committee shall, when relevant, make changes in the level of protection applied, provided that such changes are consistent with the principles of good faith, transparency, and the establishment of a level playing field. The Committee shall ensure that consultations are conducted in a timely and efficient manner, taking into account the specific circumstances of each consultation. The Committee shall, when relevant, make changes in the level of protection applied, provided that such changes are consistent with the principles of good faith, transparency, and the establishment of a level playing field.
been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required.

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXIV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby agree as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, inter alia, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. 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. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized 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.
3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. 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 GATT 1994 taken within the territory of the former.
UNDERSTANDING IN RESPECT OF WAIVERS OF OBLIGATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby agree as follows:

1. A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.

2. Any waiver in effect on the date of entry into force of the WTO Agreement shall terminate, unless extended in accordance with the procedures above and those of Article IX of the WTO Agreement, on the date of its expiry or two years from the date of entry into force of the WTO Agreement, whichever is earlier.

3. Any Member considering that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of:
   
   (a) the failure of the Member to whom a waiver was granted to observe the terms or conditions of the waiver, or
   
   (b) the application of a measure consistent with the terms and conditions of the waiver

may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding.

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXVIII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby agree as follows:

1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27/S/26-28) shall apply in these cases.

3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the product which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the new product (i.e. a product for which three years' trade statistics are not available) shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, inter alia, production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the above-mentioned "Procedures for Negotiations under Article XXVIII" shall apply in these cases.

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the...
amount by which future trade prospects exceed the level of the quota. It is understood that
the calculation of future trade prospects should be based on the greater of:

(a) the average annual trade in the most recent representative three-year period,
    increased by the average annual growth rate of imports in that same period,
or by 10 per cent, whichever is the greater; or

(b) trade in the most recent year increased by 10 per cent.

In no case shall a Member’s liability for compensation exceed that which would be entailed
by complete withdrawal of the concession.

7. Any Member having a principal supplying interest, whether as provided for in paragraph
1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn
shall be accorded an initial negotiating right in the compensatory concessions, unless another
form of compensation is agreed by the Members concerned.

MARRAKESH PROTOCOL TO THE
GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

 Members,

 Having carried out negotiations within the framework of GATT 1947, pursuant to the Ministerial
Declaration on the Uruguay Round,

Hereby agree as follows:

1. The schedule annexed to this Protocol relating to a Member shall become a Schedule to
GATT 1994 relating to that Member on the day on which the WTO Agreement enters into force
for that Member. Any schedule submitted in accordance with the Ministerial Decision on measures
in favour of least-developed countries shall be deemed to be annexed to this Protocol.

2. The tariff reductions agreed upon by each Member shall be implemented in five equal rate
reductions, except as may be otherwise specified in a Member’s Schedule. The first such reduction
shall be made effective on the date of entry into force of the WTO Agreement, each successive reduction
shall be made effective on 1 January of each of the following years, and the final rate shall become
effective no later than the date four years after the date of entry into force of the WTO Agreement,
except as may be otherwise specified in that Member’s Schedule. Unless otherwise specified in its
Schedule, a Member that accepts the WTO Agreement after its entry into force shall, on the date that
Agreement enters into force for it, make effective all rate reductions that have already taken place together
with the reductions which it would under the preceding sentence have been obligated to make effective
on 1 January of the year following, and shall make effective all remaining rate reductions on the schedule
specified in the previous sentence. The reduced rate should in each stage be rounded off to the first
decimal. For agricultural products, as defined in Article 2 of the Agreement on Agriculture, the staging
of reductions shall be implemented as specified in the relevant parts of the schedules.

3. The implementation of the concessions and commitments contained in the schedules annexed
to this Protocol shall, upon request, be subject to multilateral examination by the Members. This
would be without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the
WTO Agreement.

4. After the schedule annexed to this Protocol relating to a Member has become a Schedule to
GATT 1994 pursuant to the provisions of paragraph 1, such Member shall be free at any time to withhold
or to withdraw in whole or in part the concession in such Schedule with respect to any product for
which the principal supplier is any other Uruguay Round participant the schedule of which has not yet
become a Schedule to GATT 1994. Such action can, however, only be taken after written notice
of any such withholding or withdrawal of a concession has been given to the Council for Trade in Goods
and after consultations have been held, upon request, with any Member, the relevant schedule relating
to which has become a Schedule to GATT 1994 and which has a substantial interest in the product
involved. Any concessions so withheld or withdrawn shall be applied on and after the day on which
the schedule of the Member which has the principal supplying interest becomes a Schedule to

5. (a) Without prejudice to the provisions of paragraph 2 of Article 4 of the Agreement on
Agriculture, for the purpose of the reference in paragraphs 1(b) and 1(c) of Article II
of GATT 1994 to the date of that Agreement, the applicable date in respect of each
product which is the subject of a concession provided for in a schedule of concessions
annexed to this Protocol shall be the date of this Protocol.
6. In cases of modification or withdrawal of concessions relating to non-tariff measures as contained in Part III of the schedules, the provisions of Article XXVIII of GATT 1994 and the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26-28) shall apply. This would be without prejudice to the rights and obligations of Members under GATT 1994.

7. In each case in which a schedule annexed to this Protocol results for any product in treatment less favourable than was provided for such product in the Schedules of GATT 1947 prior to the entry into force of the WTO Agreement, the Member to whom the schedule relates shall be deemed to have taken appropriate action as would have been otherwise necessary under the relevant provisions of Article XXVIII of GATT 1947 or 1994. The provisions of this paragraph shall apply only to Egypt, Peru, South Africa and Uruguay.

8. The Schedules annexed hereto are authentic in the English, French or Spanish language as specified in each Schedule.

9. The date of this Protocol is 15 April 1994.

[The agreed schedules of participants will be annexed to the Marrakesh Protocol in the treaty copy of the WTO Agreement.]
Agreement on the Application of Sanitary and Phytosanitary Measures, 1994
AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

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;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b);

Hereby agree as follows:

Article 1
General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

3. The annexes are an integral part of this Agreement.

4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

Basic Rights and Obligations

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

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

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

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

Harmonization

1. 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.

2. 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.

3. 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. 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.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

**Article 4**

**Equivalence**

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

**Article 5**

**Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection**

1. 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.

2. 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.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. 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.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such 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.

7. 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.

8. 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.

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3For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.
Article 6

Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Article 7

Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Article 8

Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Article 9

Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.

2. Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

Article 10

Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

Article 11

Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

2. 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.

3. Nothing in this Agreement shall impair the rights of Members under other international
agreements, including the right to resort to the good offices or dispute settlement mechanisms of other
international organizations or established under any international agreement.

Article 12

Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular
forum for consultations. It shall carry out the functions necessary to implement the provisions of this
Agreement and the furtherance of its objectives, in particular with respect to harmonization. The
Committee shall reach its decisions by consensus.

2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members
on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international
standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical
consultation and study with the objective of increasing coordination and integration between international
and national systems and approaches for approving the use of food additives or for establishing tolerances
for contaminants in foods, beverages or feedstuffs.

3. The Committee shall maintain close contact with the relevant international organizations in
the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission,
the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention,
with the objective of securing the best available scientific and technical advice for the administration
of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.

4. The Committee shall develop a procedure to monitor the process of international harmonization
and the use of international standards, guidelines or recommendations. For this purpose, the Committee
should, in conjunction with the relevant international organizations, establish a list of international
standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the
Committee determines to have a major trade impact. The list should include an indication by Members
of those international standards, guidelines or recommendations which they apply as conditions for
import or on the basis of which imported products conforming to these standards can enjoy access to
their markets. For those cases in which a Member does not apply an international standard, guideline
or recommendation as a condition for import, the Member should provide an indication of the reason
therefor, and, in particular, whether it considers that the standard is not stringent enough to provide
the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following
its indication of the use of a standard, guideline or recommendation as a condition for import, it should
provide an explanation for its change and so inform the Secretariat as well as the relevant international
organizations, unless such notification and explanation is given according to the procedures of Annex B.

5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use
the information generated by the procedures, particularly for notification, which are in operation in
the relevant international organizations.

6. The Committee may, on the basis of an initiative from one of the Members, through appropriate
channels invite the relevant international organizations or their subsidiary bodies to examine specific
matters with respect to a particular standard, guideline or recommendation, including the basis of
explanations for non-use given according to paragraph 4.

7. The Committee shall review the operation and implementation of this Agreement three years
after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where
appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text
of this Agreement having regard, inter alia, to the experience gained in its implementation.

Article 13

Implementation

Members are fully responsible under this Agreement for the observance of all obligations set
forth herein. Members shall formulate and implement positive measures and mechanisms in support
of the observance of the provisions of this Agreement by other than central government bodies. Members
shall take such reasonable measures as may be available to them to ensure that non-governmental entities
within their territories, as well as regional bodies in which relevant entities within their territories are
members, comply with the relevant provisions of this Agreement. In addition, Members shall not take
measures which have the effect of, directly or indirectly, requiring or encouraging such regional or
non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the
provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental
entities for implementing sanitary or phytosanitary measures only if these entities comply with the
provisions of this Agreement.

Article 14

Final Provisions

The least-developed country Members may delay application of the provisions of this Agreement
for a period of five years following the date of entry into force of the WTO Agreement with respect
to their sanitary or phytosanitary measures affecting importation or imported products. Other developing
country Members may delay application of the provisions of this Agreement, other than paragraph 8
of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement
with respect to their existing sanitary or phytosanitary measures affecting importation or imported
products, where such application is prevented by a lack of technical expertise, technical infrastructure
or resources.
ANNEX A
DEFINITIONS

1. **Sanitary or phytosanitary measure** - Any measure applied:
   (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
   (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;
   (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
   (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

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.

2. **Harmonization** - The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.

3. **International standards, guidelines and recommendations**
   (a) 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;
   (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
   (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
   (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

4. **Risk assessment** - 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.

5. **Appropriate level of sanitary or phytosanitary protection** - The 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.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

6. **Pest- or disease-free area** - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area - whether within part of a country or in a geographic region which includes parts of or all of several countries - in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. **Area of low pest or disease prevalence** - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

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For the purpose of these definitions, "animal" includes fish and wild fauna; "plant" includes forests and wild flora; "pests" include weeds; and "contaminants" include pesticide and veterinary drug residues and extraneous matter.
ANNEX B

TRANSPARENCY OF SANITARY AND PHYTOSANITARY REGULATIONS

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

   (a) any sanitary or phytosanitary regulations adopted or proposed within its territory;

   (b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;

   (c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;

   (d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals of the Member concerned.

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

   (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

   (b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

   (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

   (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

   (a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

   (b) provides, upon request, copies of the regulation to other Members;

   (c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.

8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

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5Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

6When "nationals" are referred to in this Agreement, the term shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.
General reservations

11. Nothing in this Agreement shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or

(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

ANNEX C

CONTROL, INSPECTION AND APPROVAL PROCEDURES

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

(d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;

(e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;

(f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;

(g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;

(h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and

\(^{7}\)Control, inspection and approval procedures include, inter alia, procedures for sampling, testing and certification.
(i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.
Agreement on Technical Barriers to Trade, 1994
AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Members,

Having regard

to the Uruguay Round of Multilateral Trade Negotiations;

Desiring

to further the objectives of GATT 1994;

Recognizing

the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring

therefore to encourage the development of such international standards and conformity assessment systems;

Desiring

however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards, do not create unnecessary obstacles to international trade;

Recognizing

that no country should be prevented from taking measures necessary for the protection of human, animal or plant life or health, or the protection of the environment, or for the prevention of deceptive practices, or for the protection of essential security interests.

Recognizing

the contribution which international standardization can make to the transfer of technology from developed to developing countries.

Recognizing

that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards, and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their efforts in this regard;

Hereby

agree as follows:

ARTICLE 1

GENERAL PROVISIONS

1. Members shall ensure that trade regulations, standards and pertinent advice are in conformity with the relevant provisions of this Agreement, and shall ensure that they are not applied in such a way as to create unnecessary obstacles to international trade.

2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, Members shall ensure that the technical regulations are not more trade-restrictive than necessary to fulfill a legitimate objective.

3. Members shall ensure that technical regulations are not maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

4. Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption cease to exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

5. Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall make use of, or the relevant parts of, the international standards, as a basis for their technical regulations.

6. In applying technical regulations, Members may require the use of, or the relevant parts of, the international standards, as a basis for their technical regulations.

7. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

8. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

9. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

10. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

11. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

12. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

13. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

ARTICLE 2

PREPARATION, ADOPTION AND APPLICATION OF TECHNICAL REGULATIONS

1. Members shall ensure that technical regulations do not create unnecessary obstacles to international trade.

2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, Members shall ensure that the technical regulations are not more trade-restrictive than necessary to fulfill a legitimate objective.

3. Members shall ensure that technical regulations are not maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

4. Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption cease to exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

5. Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall make use of, or the relevant parts of, the international standards, as a basis for their technical regulations.

6. In applying technical regulations, Members may require the use of, or the relevant parts of, the international standards, as a basis for their technical regulations.

7. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

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11. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

12. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

13. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

ARTICLE 3

APPLICATION OF TECHNICAL REGULATIONS

1. Members shall ensure that technical regulations do not create unnecessary obstacles to international trade.

2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, Members shall ensure that the technical regulations are not more trade-restrictive than necessary to fulfill a legitimate objective.

3. Members shall ensure that technical regulations are not maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

4. Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption cease to exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

5. Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall make use of, or the relevant parts of, the international standards, as a basis for their technical regulations.

6. In applying technical regulations, Members may require the use of, or the relevant parts of, the international standards, as a basis for their technical regulations.

7. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

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10. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

11. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

12. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.

13. Members preparing, adopting or applying technical regulations shall be subject to the provisions of this Agreement.
2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early stage, in such a way as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall be made as soon as possible;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise, Members may, in consultation with other Members, including the Secretariat, and after considering the views of interested parties, introduce technical regulations which deviate from relevant international standards, provided that the Member, upon adoption of such a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the results of these discussions into account;

2.10.2 without discrimination, allow other Members with copies of the technical regulation, and those Members with copies of the technical regulation, and provide the results of these discussions into account;

2.11 Members shall ensure that all technical regulations which have been adopted and which are relevant to products or services which are in commerce or which could become subject to international trade are promptly, otherwise made available to interested parties in such a manner as to enable interested parties to become acquainted with them.

Article 3
Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

3.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards. The Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.
4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, inter alia, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;

5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;

5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;

5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;

5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;

5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;

5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.

5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.

5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or inter alia, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.

5.5 With a view to harmonizing conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of guides and recommendations for conformity assessment procedures.

5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;

5.7.2 upon request, provide other Members with copies of the rules of the procedure;

5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Article 6

Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:

6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;

6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfill the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

Article 7

Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.

7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

Article 8

Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly
or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

Article 9

International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

INFORMATION AND ASSISTANCE

Article 10

Information About Technical Regulations, Standards and Conformity Assessment Procedures

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants; and

10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants; and

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals 1 of the Member concerned or of any other Member.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing

1"Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.
and conformity assessment bodies, and draw the attention of developing country Members to any
notifications relating to products of particular interest to them.

10.7 Whenever a Member has reached an agreement with any other country or countries on issues
related to technical regulations, standards or conformity assessment procedures which may have a
significant effect on trade, at least one Member party to the agreement shall notify other Members through
the Secretariat of the products to be covered by the agreement and include a brief description of the
agreement. Members concerned are encouraged to enter, upon request, into consultations with other
Members for the purposes of concluding similar agreements or of arranging for their participation in
such agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member
except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary
to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

10.10 Members shall designate a single central government authority that is responsible for the
implementation on the national level of the provisions concerning notification procedures under this
Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures
is divided among two or more central government authorities, the Member concerned shall provide
to the other Members complete and unambiguous information on the scope of responsibility of each
of these authorities.

Article 11

Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members,
on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members,
and shall grant them technical assistance on mutually agreed terms and conditions regarding the
establishment of national standardizing bodies, and participation in the international standardizing bodies,
and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to
arrange for the regulatory bodies within their territories to advise other Members, especially the
developing country Members, and shall grant them technical assistance on mutually agreed terms and
conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with
technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to
arrange for advice to be given to other Members, especially the developing country Members, and shall
grant them technical assistance on mutually agreed terms and conditions regarding the establishment
of bodies for the assessment of conformity with standards adopted in the territory of the requesting
Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members,
and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps
that should be taken by their producers if they wish to have access to systems for conformity assessment
operated by governmental or non-governmental bodies within the territory of the Member receiving
the request.

11.6 Members which are members or participants of international or regional systems for conformity
assessment shall, if requested, advise other Members, especially the developing country Members, and
shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment
of the institutions and legal framework which would enable them to fulfill the obligations of membership
or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members
or participants of international or regional systems for conformity assessment to advise other Members,
especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the requesting Member.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7,
Members shall give priority to the needs of the least-developed country Members.

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members
to this Agreement, through the following provisions as well as through the relevant provisions of other
Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing
country Members’ rights and obligations and shall take into account the special development, financial
and trade needs of developing country Members in the implementation of this Agreement, both nationally
and in the operation of this Agreement’s institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and
conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist,
in their particular technological and socio-economic conditions, developing country Members adopt
certain technical regulations, standards or conformity assessment procedures aimed at preserving
indigenous technology and production methods and processes compatible with their development needs.
Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

Article 13

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.

13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

Article 14

Consultation and Dispute Settlement

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, mutatis mutandis, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

FINAL PROVISIONS

Article 15

Reservations

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.
Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.

15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, inter alia, to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

Annexes

15.5 The annexes to this Agreement constitute an integral part thereof.

ANNEX 1

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. **Technical regulation**

   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.

   **Explanatory note**

   The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. **Standard**

   Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not 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.

   **Explanatory note**

   The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. **Conformity assessment procedures**

   Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

   **Explanatory note**

   Conformity assessment procedures include, inter alia, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.
4. **International body or system**

   Body or system whose membership is open to the relevant bodies of at least all Members.

5. **Regional body or system**

   Body or system whose membership is open to the relevant bodies of only some of the Members.

6. **Central government body**

   Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

   **Explanatory note:**

   In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. **Local government body**

   Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. **Non-governmental body**

   Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

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**ANNEX 2**

**TECHNICAL EXPERT GROUPS**

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel’s authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.

4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.
CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS

ANNEX 3

APPLICATION OF STANDARDS

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO or any governmental regional standardizing body or any non-governmental body. The notification shall include the name and address of the organization or body concerned and the scope of its standardized activities. The notification shall be submitted in any language acceptable to the ISO/IEC Information Centre in Geneva.

C. The notification shall contain the name and address of the standardizing body, the name and address of the ISO/IEC Information Centre, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member organization or international affiliate of ISO/IEC, as appropriate.

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products originating in the territory of any other country, according to need and to the extent practicable. The standardizing body shall also take into account the rules of procedure of the relevant international organization.

E. With a view to harmonizing standards, the standardizing body shall adopt, adapt or otherwise make use of relevant international standards, except where the adoption of such international standards would be inappropriate or inappropriate because of climatic or geographical factors or fundamental technological problems.

F. The standardizing body shall ensure that standards are not prepared, adopted or applied in such a way as to create unnecessary obstacles to international trade.

G. In respect of international standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products originating in any other country, according to need and to the extent practicable. The standardizing body shall also take into account the rules of procedure of the relevant international organization.

H. The standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing the name, address, and subject matter of the standards which it has prepared or adopted in the preceding period. A standard is under preparation from the moment a decision to prepare it has been taken upon request, be published in any language acceptable to the ISO/IEC Information Centre in Geneva. A notice of the existence of the standardizing body's work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall provide a copy of the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the period for commenting, the standardizing body shall submit a draft standard to the ISO/IEC Information Centre in Geneva. Once the standard has been adopted, it shall be promptly published. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of the draft standard or the adopted standard by interested parties within the territory of a Member of the WTO. No later than at the start of the period for commenting, the standardizing body shall submit a copy of the draft standard to the ISO/IEC Information Centre in Geneva. Once the standard has been adopted, it shall be promptly published. The notification shall contain the name and address of the standardizing body, the name and address of the ISO/IEC Information Centre, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member organization or international affiliate of ISO/IEC, as appropriate.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall provide, or arrange to provide, a copy of the draft standard or the adopted standard by interested parties within the territory of a Member of the WTO. Once the standard has been adopted, it shall be promptly published. The notification shall contain the name and address of the standardizing body, the name and address of the ISO/IEC Information Centre, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member organization or international affiliate of ISO/IEC, as appropriate.

N. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall provide, or arrange to provide, a copy of the draft standard or the adopted standard by interested parties within the territory of a Member of the WTO. Once the standard has been adopted, it shall be promptly published. The notification shall contain the name and address of the standardizing body, the name and address of the ISO/IEC Information Centre, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member organization or international affiliate of ISO/IEC, as appropriate.

O. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall provide, or arrange to provide, a copy of the draft standard or the adopted standard by interested parties within the territory of a Member of the WTO. Once the standard has been adopted, it shall be promptly published. The notification shall contain the name and address of the standardizing body, the name and address of the ISO/IEC Information Centre, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member organization or international affiliate of ISO/IEC, as appropriate.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall provide, or arrange to provide, a copy of the draft standard or the adopted standard by interested parties within the territory of a Member of the WTO. Once the standard has been adopted, it shall be promptly published. The notification shall contain the name and address of the standardizing body, the name and address of the ISO/IEC Information Centre, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member organization or international affiliate of ISO/IEC, as appropriate.
programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994
AGREEMENT ON IMPLEMENTATION OF ARTICLE VI
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby agree as follows:

PART I

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit fixed and variable costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not

1 The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

2 Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

3 When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

4 The extended period of time should normally be one year but shall in no case be less than six months.

5 Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

6 The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.
resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowances shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3

Determination of Injury

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic products.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption.
trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

Article 4

Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence,
cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on whose behalf the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed\(^\text{13}\) by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.\(^\text{14}\) The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.\(^\text{15}\) Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5

\(^{13}\) In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

\(^{14}\) Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

\(^{15}\) As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.
to the known exporters\textsuperscript{16} and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of the information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.\textsuperscript{17}

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.\textsuperscript{18}

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

\textsuperscript{16} It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

\textsuperscript{17} Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

\textsuperscript{18} Members agree that requests for confidentiality should not be arbitrarily rejected.
6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8

Price Undertakings

8.1 Proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfillment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

19 The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.
Article 9

Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this subparagraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisal and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

20 It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.
10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

**Article 11**

**Duration and Review of Anti-Dumping Duties and Price Undertakings**

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.\(^{21}\) Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.\(^{22}\) The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

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\(^{21}\) A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

\(^{22}\) When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

\(^{23}\) Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.
subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law on which the determination is based, as well as the reasons for the imposition of such measures on dumping and injury. The notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
(ii) a description of the product which is sufficient for customs purposes;
(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
(iv) considerations relevant to the injury determination as set out in Article 3;
(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all the information which has led to the conclusion or suspension of the investigation within the meaning of Article 11. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments made under paragraphs 12.2.1(ii) and (v) of this undertaking.

12.2.3 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13
Adjudicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose of reviewing final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.
subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted. Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and (b) its domestic procedures governing the initiation and conduct of such investigations.

Article 17
Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it directly or indirectly, under this Agreement has been nullified or impaired, or that the achievement of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

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;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III
Final Provisions

Article 18

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

24 This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.
The authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a computerized format requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the Member in question and (b) the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the

2. The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a computerized format requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.
Agreement on Subsidies and Countervailing Measures, 1994
Members hereby agree as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, guarantees, payments);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchase goods,

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iv) above which would normally be vested in the government, and which if done by the government would not otherwise be done by the granting authority, i.e. there is a transfer of resources from the government to the recipient body (e.g. a grant or loan); or

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Note: In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI), the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to certain enterprises (or to a certain level or geographical area) within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) When the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the criteria and conditions are clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the criteria and conditions are clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

2.2 Subject to the provisions of paragraph 2, the following principles shall apply:

(a) A subsidy which is limited to certain enterprises located within a designated geographical region shall not be deemed specific for the purposes of this Agreement.

(b) Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

Note: In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.
PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

3.1 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, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 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.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body for the immediate establishment of a panel, unless the DSB decides by consensus to not establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE’s conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel’s terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel’s report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. If the Appellate Body considers that it cannot provide its report within 30 days, 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. In no case shall the proceedings exceed 60 days. The appellate 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 report within 20 days following its issuance to the Members.

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel’s report or the Appellate Body’s report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding, the arbitrator shall determine whether the countermeasures are appropriate.

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

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4This 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.

5Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

6Any time-periods mentioned in this Article may be extended by mutual agreement.

7As established in Article 24.
PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

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.:

(a) injury to the domestic industry of another Member;11
(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 199412;
(c) serious prejudice to the interests of another Member.13

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization14 of a product exceeding 5 per cent;15
(b) subsidies to cover operating losses sustained by an industry;
(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.16

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
(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;
(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 commodity17 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.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, 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 of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information.

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11The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.
12The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.
13The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.
14The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.
15Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.
16Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.
17Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.
that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, inter alia, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice 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.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7

Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel’s terms of reference.

7.6 Within 30 days of the issuance of the panel’s report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, 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. In no case shall the proceedings exceed 90 days. The appellate 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 report within 20 days following its issuance to the Members.

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

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19The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

20Any time-periods mentioned in this Article may be extended by mutual agreement.

21If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

22If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.
7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of
the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree
and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the
conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research
establishments on a contract basis with firms if:

- the assistance covers not more than 75 per cent of the costs of industrial research or
50 per cent of the costs of pre-competitive development activity

(b) assistance to disadvantaged regions within the territory of a Member given pursuant
to a general framework of regional development and non-specific (within the meaning
of Article 2) within eligible regions provided that:

- each disadvantaged region must be a clearly designated contiguous geographical
area with a definable economic and administrative identity;

- the region is considered as disadvantaged on the basis of neutral and objective
criteria;

- the criteria shall include a measurement of economic development which shall
be based on at least one of the following factors:

  - one of either income per capita or household income per capita, or GDP

- the assistance covers not more than 75 per cent of the costs of industrial research or
50 per cent of the costs of pre-competitive development activity.

8.3 Assistance to a disadvantaged region shall be non-actionable only if:

(a) it is provided in accordance with an approved eligibility criteria program that
includes:

- a clear statement of the objective of the assistance;

- the criteria for eligibility of the assistance;

- the amount of assistance provided;

- the use to which the assistance is to be put;

- the administrative arrangements for the implementation of the assistance;

- the expected benefits of the assistance;

(b) it is provided pursuant to a general framework of regional development and
non-specific (within the meaning of Article 2) within eligible regions provided that:

- each disadvantaged region must be a clearly designated contiguous geographical
area with a definable economic and administrative identity;

- the region is considered as disadvantaged on the basis of neutral and objective
criteria;

- the criteria shall include a measurement of economic development which shall
be based on at least one of the following factors:

  - one of either income per capita or household income per capita, or GDP

The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher
education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical
knowledge not linked to industrial or commercial objectives.

The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the
total eligible costs incurred over the duration of an individual project.

The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with
the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a
significant improvement to existing products, processes or services.

The term "pre-competitive development activity" means the translation of industrial research findings into plan, blueprint or
design for new, modified or improved products, processes or services whether intended for sale or use, including the creation
of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and
design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects
cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic
alterations to existing products, processes, and other on-going operations even though those alterations may represent improvements.

In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of
non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to
the above two categories, calculated on the basis of all eligible costs set forth in items (i) to (v) of this subparagraph.

A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent
and generally applicable regional development policy and that regional development subsidies are not granted in isolated
geographical points having no, or virtually no, influence on the development of a region.

Neutral and objective criteria means criteria which do not favour certain regions beyond what is appropriate for the elimination
or reduction of regional disparities within the framework of the regional development policy. In this regard, regional
subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such
ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed
in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently
broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy
to, certain enterprises as provided for in Article 2.
unemployment rate, which must be at least 110 per cent of the average for the territory concerned; as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities\(^{33}\) to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.\(^{34}\)

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9
Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

\(^{33}\)The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

\(^{34}\)It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.
PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994

1.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

1.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have evidence that the allegedly subsidized imports have caused injury to a domestic industry.

1.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(a) the identity of the applicant and a description of the domestic production of the like product accounted for by such producers;

(b) a description of the volume and value of domestic production of the like product accounted for by such producers;

(c) a description of the volume and value of domestic production of the like product accounted for by such producers;

(d) a description of the volume and value of domestic production of the like product accounted for by such producers.

1.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of the domestic industry, the application shall contain such information as is reasonably available to the applicant on the following:

(a) a description of the volume and value of domestic production of the like product accounted for by such producers;

(b) a description of the volume and value of domestic production of the like product accounted for by such producers;

(c) a description of the volume and value of domestic production of the like product accounted for by such producers.

1.7 The evidence of both subsidy and injury shall be considered simultaneously whether or not to initiate an investigation and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement the authorities shall be required to take decision on the imposition of a countervailing duty.

1.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transactions or the purposes of the importing Member, as having taken place between the country of origin and the importing Member.

1.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated in accordance with the provisions of this Agreement, provided that the application is rejected and an investigation shall be terminated in accordance with the provisions of this Agreement.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have evidence that the allegedly subsidized imports have caused injury to a domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(a) the identity of the applicant and a description of the volume and value of domestic production of the like product accounted for by such producers;

(b) a description of the volume and value of domestic production of the like product accounted for by such producers;

(c) a description of the volume and value of domestic production of the like product accounted for by such producers.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of the domestic industry, the application shall contain such information as is reasonably available to the applicant on the following:

(a) a description of the volume and value of domestic production of the like product accounted for by such producers;

(b) a description of the volume and value of domestic production of the like product accounted for by such producers;

(c) a description of the volume and value of domestic production of the like product accounted for by such producers.

11.7 The evidence of both subsidy and injury shall be considered simultaneously whether or not to initiate an investigation and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement the authorities shall be required to take decision on the imposition of a countervailing duty.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transactions or the purposes of the importing Member, as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated in accordance with the provisions of this Agreement, provided that the application is rejected and an investigation shall be terminated in accordance with the provisions of this Agreement.
Any information which is by nature confidential (for example, because its disclosure would confer a significant competitive advantage on a competitor) or which is obtained on a confidential basis by a person to an investigation shall not be disclosed without specific permission of the party submitting it.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in the context of a countervailing duty investigation shall be given an opportunity to examine the information contained therein at the expense of the investigating authority. The investigating authority shall, if requested, make copies of any material furnished in the investigation available to interested Members.

12.2 The authorities shall, subject to the protection of confidential information, evidence presented in writing by interested Members or interested parties, make copies available promptly to other interested Members or interested parties participating in the investigation. Any decision of the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.3 The authorities shall be required to reduce such submissions to writing. Any decision of the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.5 Except in circumstances provided for in paragraph 7, the authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is, to the authorities of the exporting Member and shall make it available, to parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.7 In cases in which any interested Member or interested party refrains access to, or otherwise the disclosure of information to the investigating authorities, the authorities shall notify the interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.9 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.10 An investigation shall not hinder the procedures for customs clearance.

12.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 30 months, after their initiation.

12.12.1 Subject to the requirement to protect confidential information, evidence presented in writing by interested Members or interested parties shall be made available promptly to other interested Members or interested parties participating in the investigation. Any decision of the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.12.2 The authorities shall, subject to the protection of confidential information, make copies available promptly to other interested Members or interested parties participating in the investigation. Any decision of the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.13 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application, or the application as received under paragraph 1 of Article 11 to the known exporters and potential exporters involved, and shall make it available to the exporters who have submitted it.

12.14 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.
12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 13
Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.44

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

Article 14
Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless there is a difference in remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 15
Determination of Injury45

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and

44It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

45Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.
the effect of the subsidized imports on prices in the domestic market for like products. The change in circumstances which would create a situation in which the subsidy or its effect is likely to arise.

15.2 With regard to the cumulation of subsidies in the various territories of a Member, the investigating authorities shall consider whether the subsidized imports are significant and whether the total of all such imports into the various territories is significant. In this context, the investigating authorities shall consider whether the imports are entering at prices that will have a significant depressing or supporting effect on domestic prices, and whether the total of all such imports is significant. No one or several of these factors can necessarily give decisive guidance.

15.3 The examination of the impact of the subsidized imports shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, as well as the effects of the subsidized imports, in particular, on the levels of production, employment, wages, and the like. The effects on cash flow, inventories, and the profitability of the industry shall be considered. The effects on the profitability of the industry shall be considered.

15.4 To the extent that the effects of the subsidized imports on prices in the domestic market for like products can be demonstrated, the subsidies shall be considered to be injurious. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry, shall be based on an examination of all relevant evidence, including, but not limited to, the following factors:

(a) the volume of imports from each country in relation to the domestic production of the like product, when available data permit the separate identification of that production from imports of the same or a like product from other countries, the term "domestic industry" may be interpreted as referring to those producers which are engaged in the production of such products;

(b) the volume of imports from each country, when the domestic production of the like product is not available for examination,

(c) the volume of imports from each country, when the domestic production of the like product is available for examination,

(d) the volume of imports from each country, when the domestic production of the like product is not available for examination.

15.5 It must be demonstrated that the subsidized imports are entering at prices that will have a significant depressing or supporting effect on domestic prices, and whether the total of all such imports is significant. No one or several of these factors can necessarily give decisive guidance.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product, for which information can be provided.
Article 18

Undertakings

18.1 Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary determination that the injurious effect of the subsidy is caused by subsidized imports and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfillment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with the exporting Member.

Note: The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.
Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of a subsidy, it may impose a countervailing duty on the product

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed is appropriate, shall be taken in accordance with the provisions of this Article unless the subsidy is the subject of a dispute.

19.3 When a countervailing duty is imposed in respect of a product, the duty shall be levied on imports of such product from the country in question on a non-discriminatory basis. The amount of the duty shall be determined in accordance with the provisions of this Article.

19.4 No countervailing duty shall be imposed on any product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the decision under paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material reduction of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have been a material reduction of the establishment of an industry, countervailing duties may be imposed retroactively for the period for which provision has been made.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of the amount of a countervailing duty may be imposed only after the expiration of the period for which provision has been made, a countervailing duty shall be imposed for the period from the date of application of provisional measures.

20.5 Where a determination of injury is negative, any cash deposit made during the period of application of provisional measures shall be refunded and any bonds released in an expeditious manner.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract the subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the duty and of the undertaking under the terms of this Agreement, at the request of interested parties.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not more than five years after its imposition or from the date of the most recent review of the need for its continued imposition, whichever is earlier.

21.4 Any undertaking accepted under the terms of this Agreement which has been found to be ineffective shall be terminated on a date not later than two years from the date of the most recent review of the need for its continued imposition.

Article 22

Homage of Rates

22.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of a subsidy, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy is the subject of a dispute.

22.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed is appropriate, shall be taken in accordance with the provisions of this Article unless the subsidy is the subject of a dispute.

22.3 When a countervailing duty is imposed in respect of a product, the duty shall be levied on imports of such product from the country in question on a non-discriminatory basis. The amount of the duty shall be determined in accordance with the provisions of this Article.

22.4 No countervailing duty shall be imposed on any product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
or recurrence of subsidization and injury. The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply mutatis mutandis to undertakings accepted under Article 18.

**Article 22**

**Public Notice and Explanation of Determinations**

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report\(^53\), adequate information on the following:

(i) the name of the exporting country or countries and the product involved;  
(ii) the date of initiation of the investigation;  
(iii) a description of the subsidy practice or practices to be investigated;  
(iv) a summary of the factors on which the allegation of injury is based;  
(v) the address to which representations by interested Members and interested parties should be directed; and  
(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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\(^{52}\)When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

\(^{53}\)Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;  
(ii) a description of the product which is sufficient for customs purposes;  
(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;  
(iv) considerations relevant to the injury determination as set out in Article 15; and  
(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

**Article 23**

**Judicial Review**

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.
PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies, Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);
(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);
(iii) policy objective and/or purpose of a subsidy;
(iv) duration of a subsidy and/or any other time-limits attached to it;
(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

*The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 98/193-194.*
25.12 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and (b) its domestic procedures governing the initiation and conduct of such investigations.

**Article 26**

**Surveillance**

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

**PART VIII: DEVELOPING COUNTRY MEMBERS**

**Article 27**

**Special and Differential Treatment of Developing Country Members**

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies55, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

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55For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.
27.12 The provisions of paragraphs 10 and 11 shall govern any determination of de minimis under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

- Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;
- With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. 32.

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32 This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.
32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

57 The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

58 For the purpose of this Agreement:
   The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;
   The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;
   The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;
   "Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;
   "Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;
   "Remission" of taxes includes the refund or rebate of taxes;
   "Remission or drawback" includes the full or partial exemption or deferral of import charges.

59 The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.
(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) 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.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product.

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.
3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

6. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as the imported inputs, or where the import of the former product is subject to a drawback or deduction of import duties. In such circumstances, if the same goods which were imported as inputs in the production of the domestic product are subsequently exported, the amount of drawback or deduction of import duties should be treated as a subsidy.

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to the agreements, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for import inputs in the production of a product for export provided such inputs are equal in quantity to and have the same quality and characteristics as the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to verify whether the volume of inputs claimed for drawback is genuine and not a mere device for evading normal drawback rules. Where such a system or procedure is not employed for the product for which an input is claimed to be substituted, the amount of drawback on the claimed substitution should be examined carefully to determine whether it is consistent with the amount for which drawback is normally paid. It should be noted that drawback on an input claimed for substitution should not exceed the amount of drawback paid on the input which is the subject of substitution. If the amount of drawback on the claimed substitution exceeds drawback of import charges of the original input, the investigating authority should consider whether a subsidy has been given.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where a system or procedure is determined not to exist, the normal procedure should be followed to determine whether a subsidy has been given by other means.

3. Where there are no verification procedures, or where they are not reasonable, or where such procedures are not effective for the purpose intended and based on generally accepted commercial practices in the country of export, the investigating authorities should be presumed to exist. In such cases a further examination by the investigating authorities in the exporting Member should be carried out to determine whether an excessive drawback rate has been set.

4. Where there are no verification procedures, or where they are not reasonable, or where such procedures are not effective for the purpose intended and based on generally accepted commercial practices in the country of export, the investigating authorities should be presumed to exist. In such cases a further examination by the investigating authorities in the exporting Member should be carried out to determine whether an excessive drawback rate has been set.

5. Where there are no verification procedures, or where they are not reasonable, or where such procedures are not effective for the purpose intended and based on generally accepted commercial practices in the country of export, the investigating authorities should be presumed to exist. In such cases a further examination by the investigating authorities in the exporting Member should be carried out to determine whether an excessive drawback rate has been set.

6. Where there are no verification procedures, or where they are not reasonable, or where such procedures are not effective for the purpose intended and based on generally accepted commercial practices in the country of export, the investigating authorities should be presumed to exist. In such cases a further examination by the investigating authorities in the exporting Member should be carried out to determine whether an excessive drawback rate has been set.
5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION
(PARAGRAPH 1(A) OF ARTICLE 6)

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of 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.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

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62 An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

63 The recipient firm is a firm in the territory of the subsidizing Member.

64 In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

65 Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.
ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product. This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyze adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g., market statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, inter alia, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), 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. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party’s position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

66 In cases where the existence of serious prejudice has to be demonstrated.

67 The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.
ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the government of the Member in question and (b) the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum68: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

68The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.
Agreement on Safeguards, 1994
AGreement on Safeguards

Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;

Hereby agree 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.

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.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Article 3
Investigation

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 prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

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 be based on facts and not merely on allegation, conjecture or remote possibility; and

(b) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

Article 4
Determination of Serious Injury or Threat Thereof

1. For the purposes of this Agreement:

(a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;

(b) "threat of serious injury" shall be understood to mean 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; and

(c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

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 levels 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.

Article 5
Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

Article 6
Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

Article 7
Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

Article 8
Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To
achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

Article 9

Developing Country Members

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.2

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

Article 10

Pre-existing Article XIX Measures

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

Article 11

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 and applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.3,4 These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to no more than one specific measure per importing Member, the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

Article 12

Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased

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2 A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

3 An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

4 Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

5 The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.
imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 13

Surveillance

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

(b) to find, upon request of an affectedMember, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

Article 14

Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.
### ANNEX
### EXCEPTION REFERRED TO IN PARAGRAPH 2 OF ARTICLE 11

<table>
<thead>
<tr>
<th>Members concerned</th>
<th>Product</th>
<th>Termination</th>
</tr>
</thead>
<tbody>
<tr>
<td>EC/Japan</td>
<td>Passenger cars, off road vehicles, light commercial vehicles, light trucks (up to 5 tonnes), and the same vehicles in wholly knocked-down form (CKD sets).</td>
<td>31 December 1999</td>
</tr>
</tbody>
</table>
Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994
UNDERSTANDING ON RULES AND PROCEDURES
GOVERNING THE SETTLEMENT OF DISPUTES

("Dispute Settlement Understanding" or "DSU")

Article 1: Coverage and Application

Members hereby agree as follows:

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2: Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.
3. The DSB shall meet as often as necessary to carry out its functions within the timeframes provided in this Understanding.

4. In cases where there is an infringement of the obligations assumed under a covered agreement or where the dispute settlement procedures provided in this Understanding are not sufficient to address the matter, the Member against whom the complaint has been brought may seek authorization, through the procedures provided in Articles 4, 5, 6 and 12, to impose special duties on the goods in dispute. If, under any other previous agreement in which the Member is a party, the complaining party has the right to impose special duties on the goods in dispute, the decision of the panel shall be binding on the Member against whom the complaint has been brought.

5. Notwithstanding paragraph 1, if a Member brings a complaint on behalf of a third party, the panel shall consider only the facts and issues specifically raised by the Member and the covered agreement in question. Any decision of the panel shall be binding on the Member against whom the complaint has been brought, and the complaining party shall not seek to enforce any decision of the panel against the country in question.

6. Each Member undertakes to accord sympathetic consideration to any representations made by another Member and to take account of those representations in the consultation and dispute settlement procedures.
10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

**Article 5: Good Offices, Conciliation and Mediation**

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

**Article 6: Establishment of Panels**

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.

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3Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

4The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment...
2. 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.

**Article 7: Terms of Reference of Panels**

1. 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).”

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

**Article 8: Composition of Panels**

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. 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.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists’ expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

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*In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets. 6*
Article 9: Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. 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.

Article 10: Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11: Function of Panels

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.

Article 12: Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, 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. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of
Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

**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.

**Article 14: Confidentiality**

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

**Article 15: Interim Review Stage**

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

**Article 16: Adoption of Panel Reports**

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

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*If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.*
Article 17: Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, 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. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, 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. In no case shall the proceedings exceed 90 days.

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

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The 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.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. 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. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 18: Communications with the Panel or Appellate Body

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19: Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

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8 If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.
9 The “Member concerned” is the party to the dispute to which the panel or Appellate Body recommendations are directed.
10 With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.
2. In 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.

Article 20: Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21: Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

   (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

   (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

   (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations shall not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. 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 this 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.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB’s agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22: Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures,
with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:
   (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
   (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time, the requesting party shall submit the request to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies.

(f) for purposes of this paragraph, "sector" means:
   (i) with respect to goods, all goods;
   (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;
   (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or

(g) for purposes of this paragraph, "agreement" means:
   (i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;
   (ii) with respect to services, the GATS;
   (iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that these principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

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The list in document MTN.GNS/W/120 identifies eleven sectors.

The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

The expression "arbiter" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.
8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as 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. In accordance with paragraph 6 of Article 21, the DSU shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSU has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.  

Article 23: Strengthening of the Multilateral System

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 DSU 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 DSU 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.

Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

Article 24: Special Procedures Involving Least-Developed Country Members

1. At 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. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSU shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSU, in providing the above assistance, may consult any source which either deems appropriate.

Article 25: Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSU and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

Article 26

1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and
recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned may make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27: Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members’ experts to be better informed in this regard.
APPENDIX 1: AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods
Annex 1B: General Agreement on Trade in Services
Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

APPENDIX 2: SPECIAL OR ADDITIONAL RULES AND PROCEDURES CONTAINED IN THE COVERED AGREEMENTS

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The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.
APPENDIX 3: WORKING PROCEDURES

1.  In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2.  The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3.  The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4.  Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5.  At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6.  All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7.  Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8.  The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9.  The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a) Receipt of first written submissions of the parties:
   (1) complaining Party: _______ 3-6 weeks
   (2) Party complained against: _______ 2-3 weeks

(b) Date, time and place of first substantive meeting with the parties; third party session: _______ 1-2 weeks

(c) Receipt of written rebuttals of the parties: _______ 2-3 weeks

(d) Date, time and place of second substantive meeting with the parties: _______ 1-2 weeks

(e) Issuance of descriptive part of the report to the parties: _______ 2-4 weeks

(f) Receipt of comments by the parties on the descriptive part of the report: _______ 2 weeks

(g) Issuance of the interim report, including the findings and conclusions, to the parties: _______ 2-4 weeks

(h) Deadline for party to request review of part(s) of report: _______ 1 week

(i) Period of review by panel, including possible additional meeting with parties: _______ 2 weeks

(j) Issuance of final report to parties to dispute: _______ 2 weeks

(k) Circulation of the final report to the Members: _______ 3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.
APPENDIX 4: EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.
World Trade Organization

United States — Standards for Reformulated and Conventional Gasoline

Report of the Appellate Body, 29 April 1996
United States - Standards for Reformulated and Conventional Gasoline

AB-1996-1

I. Introductory

The United States appeals from certain conclusions on issues of law and certain legal interpretations contained in the Panel Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996 (the "Panel Report"). That Panel had been established to consider a dispute between the United States, on the one hand, and Venezuela, later joined by Brazil, on the other. The dispute related to the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 (the "CAA") and, more specifically, to the regulation enacted by the United States' Environmental Protection Agency (the "EPA") pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. This regulation is formally entitled "Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline", Part 80 of Title 40 of the Code of Federal Regulations,¹ and is commonly referred to as the Gasoline Rule.

A. Procedural Matters

On 21 February 1996, the United States notified the Dispute Settlement Body of its decision to appeal certain conclusions on issues of law and legal interpretations in the Panel Report pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and simultaneously filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the Working Procedures for Appellate Review (the "Working Procedures"). Thereafter, on 4 March 1996, the United States filed its Submission as Appellant. Venezuela in turn filed, on 18 March 1996, its Appellee’s Submission; Brazil filed on the same day its Appellee’s Submission. The third participants followed, the European Communities and Norway filing Submissions, on 18 March 1996. The complete record of the Panel proceedings was duly transmitted to the Appellate Body.

The oral hearing contemplated by Rule 27 of the Working Procedures was held on 27 and 28 March 1996. At the hearing, oral arguments were made respectively by the participants and the third participants. Questions were put to them by the Members of the Appellate Body hearing the appeal. Most of these questions were answered orally, and some were responded to in writing with the responses being furnished both to the Appellate Body and the other participants and third participants. In addition, the participants and third participants were invited to provide, and did provide, the Appellate Body and each other with final written statements of their respective positions. All the participants and third participants responded positively and punctually, which was a source of satisfaction for the Appellate Body.

1. The Reformulated Gasoline Program

The CAA established certain compositional and performance specifications for reformulated gasoline. Thus, the oxygen content must not be less than 2.0 per cent by weight, the benzene content must not exceed 1.0 per cent by volume and the gasoline must be free of heavy metals, including lead or manganese. The performance specifications of the CAA require a 15 per cent reduction in the emissions of volatile organic compounds ("VOCs") and toxic air pollutants ("toxics"), and no increase in emissions of nitrogen oxides ("NOx").

References:

1. WT/DS2/6.
2. WT/AB/WP/1, 15 February 1996.
7. Section 211(k).
8. WT/DS2/AB/R
comply with the "Complex Model", which more accurately predicts emissions performance. The Complex Model is not in issue in the present dispute.

2. The Conventional Gasoline Program

In order to prevent the "dumping" of pollutants extracted from reformulated gasoline into conventional gasoline, the CAA requires that conventional gasoline sold by domestic refiners, blenders and importers in the United States remains as clean as 1990 baseline levels. Unlike the Simple Model for reformulated gasoline, the "non-degradation" from 1990 baseline requirements for conventional gasoline applies in respect of all conventional gasoline qualities, and not only sulphur, olefins and T-90. Compliance is measured by comparing emissions from the conventional gasoline sold by domestic refiners, blenders and importers against emissions from a 1990 baseline and is assessed on an annual average basis.14

3. Baseline Establishment Rules

In respect of both reformulated gasoline (for sulphur, olefins and T-90 requirements under the Simple Model) and conventional gasoline (for all requirements), 1990 baselines are an integral element of the Gasoline Rule enforcement process. Accordingly, the Gasoline Rule contains detailed baseline establishment rules. Baselines can be either individual (established by the entity itself) or statutory (established by the EPA and intended to reflect average 1990 United States gasoline quality), depending on the nature of the entity concerned.

(i) domestic refiners

Any domestic refiner which was in operation for at least six months in 1990 must establish an individual baseline representing the quality of gasoline produced by that refiner in 1990. The Gasoline Rule provides three methods of establishment to be used for this purpose. Under Method 1, the domestic refiner must use the quality data and volume records of its 1990 gasoline. If Method 1 data is not available, the domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that Method 2 data is not available, the domestic refiner must establish an individual 1990 baseline on the basis of its post-1990 gasoline blendstock and/or gasoline quality data modeled in the light of refinery changes to show 1990 gasoline composition (Method 3).

Domestic refiners that were in operation for at least six months in 1990 are not permitted to forego their individual baseline and use the statutory baseline established by the EPA. However, domestic refiners that commenced operations after 1990, or operated for less than six months during 1990, are required to use the statutory baseline established by the EPA.

(ii) blenders

Blenders are required to establish an individual baseline representing the quality of their 1990 gasoline using Method 1 above. Failing this, they must use the statutory baseline established by the EPA. Blenders may not apply an individual baseline using Methods 2 or 3.

(iii) importers

Importers of foreign gasoline are required to establish an individual baseline in respect of gasoline imported by them during 1990, using Method 1. Like blenders, importers become subject to the statutory baseline if, as anticipated by the EPA, the data necessary for Method 1 is unavailable.

The Gasoline Rule does not provide for foreign refiner individual baselines, although the possible use of individual baselines for foreign refiners was examined by the EPA while drafting the Gasoline Rule. Indeed, the EPA continued to examine the possible use of individual baselines for foreign refiners after the adoption of the Gasoline Rule, and prepared its May 1994 proposal16 as a result. The May 1994 proposal provided for limited use by importers of individual baselines established for foreign refineries in order to demonstrate that gasoline produced at that foreign refinery complied with the reformulated (but not conventional) gasoline standards. The individual baselines would be determined using Methods 1, 2 or 3, as for domestic refineries under the Gasoline Rule. However, the use of individual baselines in such cases would be conditioned and limited in a number of ways. The EPA’s May 1994 proposal never entered into force, as the United States Congress enacted legislation in September 1994 denying the funding necessary for its implementation.

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13Section 211(k)(8) of the CAA.
14Section 80.90 of the Gasoline Rule.
15Section 80.91.
C. The Panel Report: Its Findings and Conclusions

The Panel’s overall conclusions and its recommendation are set out in the following terms:

8.1 In the light of the findings above, the Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement.

8.2 The Panel recommends that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.17

On route to its overall conclusions, the Panel made the following principal findings:

(i) that the Panel’s terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been mentioned in the terms of reference, and that, in any case, it was unnecessary, in view of findings (ii), (iv), (v) and (vii) below, to determine whether the measure at issue was inconsistent with Article I:1 of the General Agreement on Tariffs and Trade 1994 (the "General Agreement");21

(ii) that imported and domestic gasoline were "like products" and that since, under the baseline establishment rules of the Gasoline Rule, imported gasoline was effectively prevented from benefitting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated "less favourably" than domestic gasoline. The baseline establishment rules of the Gasoline Rule were accordingly inconsistent with Article III:4 of the General Agreement;23

(iii) that, in view of finding (ii), it was not necessary to examine the consistency of the Gasoline Rule with Article III:1;20

(iv) that the "aspect of the baseline establishment methods" found inconsistent with Article III:4 was not justified under Article XX(b) of the General Agreement as "necessary to protect human, animal or plant life or health";21

(v) that the "maintenance of discrimination between imported and domestic gasoline" contrary to Article III:4 was not justified under Article XX(d) as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the General Agreement];"22

(vi) that clean air was an exhaustible natural resource within the meaning of Article XX(g) of the General Agreement;25

(vii) that the baseline establishment rules found to be inconsistent with Article III:4 could not be justified under Article XX(g) as a measure "relating to" the conservation of exhaustible natural resources;24

(viii) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption";25

(ix) that it was unnecessary, in the light of finding (vii), to determine whether the measure at issue met the conditions in the introductory clause of Article XX (sometimes referred to as the chapeau of Article XX);

(x) that it was unnecessary, in view of findings (ii), (iv), (v) and (vii), to determine whether the measure at issue was inconsistent with Article XXIII:1(b) as having nullified and impaired benefits accruing under the General Agreement;26 and

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17Panel Report at p. 47.
19Panel Report, para. 6.16.
21Panel Report, para. 6.29.
22Panel Report, para. 6.33.
26Panel Report, para. 6.42.
that it was unnecessary, in the light of findings (ii), (iv), (v) and (vii), to determine whether the measure at issue was inconsistent with Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement").

II. Issues Raised In This Appeal

A. The Claims of Error by the United States

It is important to focus upon the subject matter of this appeal. We seek to do this first by identifying the issues which have been raised by the Appellant, the United States. In what follows, we highlight those same issues by listing other issues dealt with in the Panel proceedings but which have not been brought before the Appellate Body in this appeal, and which we accordingly exclude from consideration in this Appellate Report.

In its Notice of Appeal, dated 21 February 1996, and its Appellant’s Submission, dated 4 March 1996, the United States claims that the Panel erred in law, firstly, in holding that the baseline establishment rules of the Gasoline Rule are not justified under Article XX(g) of the General Agreement and, secondly, in its interpretation of Article XX as a whole.

More specifically, the United States assigns as error the ruling of the Panel that the baseline establishment rules do not constitute a "measure" "relating to" the conservation of clean air within the meaning of Article XX(g) of the General Agreement and, secondly, in its interpretation of Article XX as a whole.

The sharply limited scope of this appeal is underscored by noting the number of findings which the Panel had made but which have not been appealed from by the United States. Very briefly, the United States does not appeal from the findings or rulings made by the Panel on, or in respect of, the consistency of the baseline establishment rules with Article I:1, Article III:1, Article III:4, and Article XXIII:1(b) of the General Agreement and the applicability of Article XX(b) and Article XX(d) of the General Agreement and of the TBT Agreement. Understandably, the United States has also not appealed from the Panel’s ruling that clean air is an exhaustible natural resource within the meaning of Article XX(g) of the General Agreement.

B. The Claims of the Appellees and the Arguments of the Third Participants

The Appellees, Venezuela and Brazil, submit that the Appellate Body should dismiss the United States’ appeal and uphold the Panel’s findings and conclusions concerning Article XX(g). In particular, Venezuela and Brazil support the Panel’s finding that the measure at issue before the Panel was not one "relating to" the conservation of exhaustible natural resources. Venezuela also states that a measure can only be "relating to" or "primarily aimed at" conservation if the measure was both: (i) primarily intended to achieve a conservation goal; and (ii) had a positive conservation effect.

Venezuela argues that, as the United States has not met its burden with respect to the "relating to" requirement of Article XX(g) in this appeal, the Appellate Body may uphold the Panel Report on this issue alone, and it is not necessary to address the additional requirements of Article XX(g), nor the requirements in the Article XX chapeau.

If the Appellate Body overturns the Panel’s findings on the "relating to" component of Article XX(g) and does proceed to examine the other requirements of Article XX(g), Venezuela and Brazil submit that the United States has also failed to demonstrate that those requirements have been satisfied. They argue that the measure in issue is not "made effective in conjunction with restrictions on domestic production or consumption" as the restrictions are not imposed as direct limits on the production or consumption of clean air, but rather upon the consumption of certain kinds of gasoline. They further submit that clean air does not qualify as an "exhaustible natural resource" within the meaning of Article XX(g).

With regard to the requirements in the chapeau to Article XX, Venezuela and Brazil submit that the measure is applied in a manner which constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." Venezuela argues that the measure constitutes a "disguised restriction on international trade" as well.

The Appellees also raise the conditional argument that, if the Appellate Body were to overturn the Panel’s findings on Article XX(g), and not find in favour of Venezuela and Brazil as to the other requirements of Article XX, it would then need to examine their claims under the TBT Agreement.
The third participants, the European Communities and Norway, endorse the Panel’s interpretation of "relating to" and the Panel’s findings under Article XX(g). They find it difficult to accept the United States’ arguments that the measure at issue was "made effective in conjunction with restrictions on domestic production or consumption," as the measure in issue did not impose restrictions on clean air. With regard to the Article XX chapeau criteria, the European Communities and Norway both submit that the measure is applied in a manner constituting "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on international trade."

C. The Preliminary Question

A preliminary question was raised by the United States at the oral hearing concerning arguments made by Venezuela and Brazil in their respective Appellees’ Submissions on the issues of whether clean air is an exhaustible natural resource within the meaning of Article XX(g) and whether the baseline establishment rules are consistent with the TBT Agreement. The gist of the preliminary question is that the above issues and the related arguments made by Venezuela and Brazil were not properly brought before the Appellate Body in this appeal in accordance with the Working Procedures. It was underscored by the United States that Venezuela and Brazil had not appealed from the ruling of the Panel on the clean air issue or from the non-ruling of the Panel on the applicability of the TBT Agreement. Venezuela and Brazil had not filed Appellants’ Submissions under Rule 23(1) of the Working Procedures. Neither had Venezuela nor Brazil filed separate appeals under Rule 23(4) of the Working Procedures. Their arguments on these two matters had been made in their Appellees’ Submissions pursuant to Rule 22 and, as Appellees, Venezuela and Brazil could not challenge the Panel’s finding on the clean air issue and its non-finding on the TBT Agreement’s applicability.

At the oral hearing, in response to questions posed by the Appellate Body, Venezuela and Brazil confirmed that they, indeed, were not appealing the mentioned two matters. They went on, however, to state that they believed it would be within the scope of authority of the Appellate Body, if it found it necessary to do so, to address the results of the Panel’s examination of those two issues.

In its Post-Hearing Memorandum, the United States asserted, among other things, that were the Appellate Body to take up the above two matters in the present appeal, unfairness would be generated sinner the United States and it would encourage a disregard of the Working Procedures. Such disregard by the Appellate Body would, it was further stated, create difficulties for third parties who would have to make up their minds to become third participants or not on the basis of the issues raised on appeal as set out in the Notice of Appeal and the Appellant’s Submission. The United States itself had not raised the clean air issue and the applicability of the TBT Agreement in its appeal, and the United States was the only Appellant in AB-1996-1.

We find the United States’ submissions on this preliminary question persuasive. The arguments raised by Venezuela and Brazil on the clean air and TBT issues may be seen to be, in effect, conditional appeals, that is, conditional on the Appellate Body’s overturning the Panel’s overall findings on Article XX(g) and not finding in favour of Venezuela and Brazil as to the other requirements of Article XX. This condition is not fulfilled. Even if this condition had been fulfilled, the Appellate Body would have been most reluctant to pass upon these two issues. We observe, in the first place, that the issues in fact raised by the Appellant, the United States, are not of the kind which cannot be decided without at the same time necessarily resolving the clean air issue or the applicability of the TBT Agreement. In the second place, to deal with those two issues, under the circumstances of this appeal, would have required the Appellate Body casually to disregard its own Working Procedures and to do so in the absence of a compelling reason grounded on, for instance, fundamental fairness or force majeure. Venezuela and Brazil could have appealed the Panel’s finding and non-finding on the two matters by taking advantage of Rules 23(1) or 23(4) of the Working Procedures and thereby placing the Appellate Body in a position to dispose of those issues directly in one and the same appellate proceeding.

The acceptance by Venezuela and Brazil of the Working Procedures, and their commitment to them, is not in question. We have no option, however, but to find that the route they chose for addressing the two issues in question is not contemplated by the Working Procedures, and therefore, these issues are not properly the subject of this appeal.
III. The Issue of Justification Under Article XX(g) of the General Agreement

Article XX(g) needs to be set out in full:

**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 contracting party of measures:

- relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

**A. "Measures"**

The initial issue we are asked to look at relates to the proper meaning of the term "measures" as used both in the chapeau of Article XX and in Article XX(g). The question is whether "measures" refers to the entire Gasoline Rule or, alternatively, only to the particular provisions of the Gasoline Rule which deal with the establishment of baselines for domestic refiners, blenders and importers.

Cast in the foregoing terms, the issue does not appear to be a live one. True enough the Panel Report used differing terms, or terms of shifting reference, in designating the "measures" in different parts of the Report. The Panel Report, however, held only the baseline establishment rules of the Gasoline Rule to be inconsistent with Article III:4, to the extent that such rules provided "less favourable treatment" for imported than for domestic gasoline. These are the same provisions which the Panel evaluated, and found wanting, under the justifying provisions of Article XX(g). The Panel Report did not purport to find the Gasoline Rule itself as a whole, or any part thereof other than the baseline establishment rules, to be inconsistent with Article III:4; accordingly, there was no need at all to examine whether the whole of the Gasoline Rule or any of its other rules, was saved or justified by Article XX(g).

The Panel here was following the practice of earlier panels in applying Article XX to provisions found to be inconsistent with Article III:4: the "measures" to be analyzed under Article XX are the same provisions infringing Article III:4. These earlier panels had not interpreted "measures" more broadly under Article XX to include provisions not themselves found inconsistent with Article III:4. In the present appeal, no one has suggested in their final submissions that the Appellate Body should examine under Article XX any portion of the Gasoline Rule other than the baseline establishment rules held to be in conflict with Article III:4. No one has urged an interpretation of "measures" which would encompass the Gasoline Rule in its totality.

At the oral hearing and in its Post-Hearing Memorandum, the United States complained about the designation of the baseline establishment rules in the Panel Report and by the Appelies Venezuela and Brazil, in such terms as "the difference in treatment", "the less favourable treatment" or "the discrimination." It is, of course, true that the baseline establishment rules had been found by the Panel to be inconsistent with Article III:4 of the General Agreement. The frequent designation of those provisions by the Panel in terms of its legal conclusion in respect of Article III:4, in the Appellate Body's view, did not serve the cause of clarity in analysis when it came to evaluating the same baseline establishment rules under Article XX(g).

**B. "relating to the conservation of exhaustive natural resources"**

The Panel Report took the view that clean air was a "natural resource" that could be "depleted." Accordingly, as already noted earlier, the Panel concluded that a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX(g). Shortly thereafter, however, the Panel Report also concluded that "the less favourable baseline establishments methods" were not primarily aimed at the conservation of exhaustible natural resources and thus fell outside the justifying scope of Article XX(g).

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29Although, in earlier submissions to the Appellate Body, the United States suggested that "the Gasoline Rule" should be examined in the context of Article XX(g), in its Post-Hearing Memorandum, dated 1 April 1996, the United States confirmed its understanding that the "measures" in issue are the baseline establishment rules contained in the Gasoline Rule.

Brazil stated, in its final submission to the Appellate Body, dated 1 April 1996, that "the ‘measure’ with which this appeal is concerned is the baseline methodology of the Gasoline Rule, not the entire rule itself." This would suggest a position similar to that adopted by the United States. Thereafter, Brazil continued to state that Brazil and Venezuela did not challenge all portions of the Rule; they challenged only the discriminatory methods of establishing baselines.

Venezuela stated, in its summary statement, dated 29 March 1996, that "the measure to be examined is the discriminatory measure, that is, the aspect of the Gasoline Rule that denies imported gasoline the right to use the same regulatory system of baselines applicable to U.S. gasoline, namely, the system of individual baselines."
The Panel, addressing the task of interpreting the words "relating to", quoted with approval the following passage from the panel report in the 1987 *Herring and Salmon case*:\(^{30}\)
as the preamble of Article XX indicates, the purpose of including Article XX:(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources. The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be *primarily aimed at* the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX:(g). (emphasis added by the Panel)

The Panel Report then went on to apply the 1987 *Herring and Salmon* reasoning and conclusion to the baseline establishment rules of the Gasoline Rule in the following manner:\(^{31}\)

The Panel then considered whether the precise aspects of the Gasoline Rule that it had found to violate Article III -- the less favourable baseline establishments methods that adversely affected the conditions of competition for imported gasoline -- were primarily aimed at the conservation of natural resources. The Panel saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States. Indeed, in the view of the Panel, being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule. Accordingly, it could not be said that the baseline establishment methods that afforded less favourable treatment to imported gasoline were primarily aimed at the conservation of natural resources. In the Panel's view, the above-noted lack of connection was underscored by the fact that affording treatment of imported gasoline consistent with its Article III:4 obligations would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule. Indeed, the United States remained free to regulate in order to obtain whatever air quality it wished. The Panel therefore concluded that the less favourable baseline establishments methods at issue in this case were not primarily aimed at the conservation of natural resources.

It is not easy to follow the reasoning in the above paragraph of the Panel Report. In our view, there is a certain amount of opaqueness in that reasoning. The Panel starts with positing that there was "no direct connection" between the baseline establishment rules which it characterized as "less favourable treatment" of imported gasoline that was chemically identical to the domestic gasoline and "the US objective of improving air quality in the United States." Shortly thereafter, the Panel went on to conclude that "accordingly, it could not be said that the baseline establishment rules that afforded less favourable treatment to imported gasoline were *primarily aimed at* the conservation of natural resources" (emphasis added). The Panel did not try to clarify whether the phrase "direct connection" was being used as a synonym for "primarily aimed at" or whether a new and additional element (on top of "primarily aimed at") was being demanded.

One problem with the reasoning in that paragraph is that the Panel asked itself whether the "less favourable treatment" of imported gasoline was "primarily aimed at" the conservation of natural resources, rather than whether the "measure", i.e. the baseline establishment rules, were "primarily aimed at" conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided "less favourable treatment" under Article III:4 before the Panel examined the "General Exceptions" contained in Article XX. That, however, is a conclusion of law. The chapeau of Article XX makes it clear that it is the "measures" which are to be examined under Article XX(g), and not the legal finding of "less favourable treatment."

Furthermore, the Panel Report appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules did not fall within the justifying terms of Articles XX(b); i.e. that the baseline establishment rules were not "necessary" for the protection of human, animal or plant life. The Panel Report, it will be recalled, found that the baseline establishment rules had not been shown by the United States to be "necessary" under Article XX(b) since alternative measures either consistent or less inconsistent with the General Agreement were reasonably available to the United States for achieving its aim of protecting human, animal or plant life.\(^{32}\) In other words, the Panel Report appears to have applied the "necessary" test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g).

A principal difficulty, in the view of the Appellate Body, with the Panel Report's application of Article XX(g) to the baseline establishment rules is that the Panel there overlooked a fundamental rule of treaty interpretation. This rule has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")\(^{33}\) which provides in relevant part:


\(^{31}\)Panel Report, para. 6.40.

\(^{32}\)Panel Report, paras. 6.25-6.28.

\(^{33}\)(1969), 8 International Legal Materials 679.
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.

The "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of theDSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.

Applying the basic principle of interpretation that the words of a treaty, like the General Agreement, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

"necessary" - in paragraphs (a), (b) and (d); "essential" - in paragraph (j);
"relating to" - in paragraphs (c), (e) and (g); "for the protection of" - in paragraph (f);
"in pursuance of" - in paragraph (h); and "involving" - in paragraph (i).


35Done at Marrakesh, Morocco, 15 April 1994.


37We note that the same interpretation has been applied in two recent unadopted panel reports: United States - Restrictions on Imports of Tuna, DS29/R (1994); United States - Taxes on Automobiles, DS31/R (1994).
that the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).

Against this background, we turn to the specific question of whether the baseline establishment rules are appropriately regarded as "primarily aimed at" the conservation of natural resources for the purposes of Article XX(g). We consider that this question must be answered in the affirmative.

The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline), need to be related to the "non-degradation" requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. 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. The relationship between the baseline establishment rules and the "non-degradation" requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. 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).

C. "if such measures are made effective in conjunction with restrictions on domestic production or consumption"

The Panel did not find it necessary to deal with the issue of whether the baseline establishment rules "are made effective in conjunction with restrictions on domestic production or consumption", since it had earlier concluded that those rules had not even satisfied the preceding requirement of "relating to" in the sense of being "primarily aimed at" the conservation of clean air. Having been unable to concur with that earlier conclusion of the Panel, we must now address this second requirement of Article XX(g), the United States having, in effect, appealed from the failure of the Panel to proceed further with its inquiry into the availability of Article XX(g) as a justification for the baseline establishment rules.

The claim of the United States is that the second clause of Article XX(g) requires that the burdens entailed by regulating the level of pollutants in the air emitted in the course of combustion of gasoline, must not be imposed solely on, or in respect of, imported gasoline.

On the other hand, Venezuela and Brazil refer to prior panel reports which include statements to the effect that to be deemed as "made effective in conjunction with restrictions on domestic production or consumption", a measure must be "primarily aimed at" making effective certain restrictions on domestic production or consumption. Venezuela and Brazil also argue that the United States has failed to show the existence of restrictions on domestic production or consumption of a natural resource under the Gasoline Rule since clean air was not an exhaustible natural resource within the meaning of Article XX(g). Venezuela contends, finally, that the United States has not discharged its burden of showing that the baseline establishment rules make the United States' regulatory scheme "effective." The claim of Venezuela is, in effect, that to be properly regarded as "primarily aimed at" the conservation of natural resources, the baseline establishment rules must not only "reflect a conservation purpose" but also be shown to have had "some positive conservation effect." 39

The Appellate Body considers that the basic international law rule of treaty interpretation, discussed earlier, that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here, too. Viewed in this light, the ordinary or natural meaning of "made effective" when used in connection with a measure - a governmental act or regulation - may be seen to refer to such measure being "operative", as "in force", or as having "come into effect." 40 Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with." 41 Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" 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.

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41Id., p. 481.
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.

There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.

In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for - generally speaking - individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of "dirty" gasoline are established jointly with corresponding restrictions with respect to imported gasoline. That imported gasoline has been determined to have been accorded "less favourable treatment" than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also be noted that the second clause of Article XX(g) speaks disjunctively of "domestic production or consumption."

We do not believe, finally, that the clause "if made effective in conjunction with restrictions on domestic production or consumption" was intended to establish an empirical "effects test" for the availability of the Article XX(g) exception. In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, 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. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been "primarily aimed at" conservation of natural resources at all.


Having concluded, in the preceding section, that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g), we come to the question of whether those rules also meet the requirements of the chapeau of Article XX. 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.

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 that measure is applied. 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 [what was later to become] Article [XX]." This insight drawn from the drafting history of Article XX is a valuable one. 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.

The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute

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42 Some illustration is offered in the *Herring and Salmon* case which involved, *inter alia*, a Canadian prohibition of exports of unprocessed herring and salmon. This prohibition effectively constituted a ban on purchase of certain unprocessed fish by foreign processors and consumers while imposing no corresponding ban on purchase of unprocessed fish by domestic processors and consumers. The prohibitions appeared to be designed to protect domestic processors by giving them exclusive access to fresh fish and at the same time denying such raw material to foreign processors. The Panel concluded that these export prohibitions were not justified by Article XX(g). BISD 35S/98, para. 5.1, adopted 22 March 1988. See also the Panel Report in the *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD 29S/91, paras. 4.10-4.12; adopted on 22 February 1982.

43 This was noted in the Panel Report *United States - Imports of Certain Automotive Spring Assemblies*, BISD 30S/107, para. 56; adopted on 26 May 1983.

abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the General Agreement. 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. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. 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. 45

The chapeau, it will be seen, prohibits such application of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute

(a) "arbitrary discrimination" (between countries where the same conditions prevail);
(b) "unjustifiable discrimination" (with the same qualifier); or
(c) "disguised restriction" on international trade.

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards it contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application. Such a question was put to the United States in the course of the oral hearing. It was asked whether the words incorporated into the first two standards "between countries where the same conditions prevail" refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries. It also said that the language spoke for itself, but there was no reference to third parties; while some thought that this was only between exporting countries inter se, there is no support in the text for that view. No such question was put to the United States concerning the field of application of the third standard - disguised restriction on international trade. But the United States put forward arguments designed to show that in the case under appeal, it had met all the standards set forth in the chapeau. In doing so, it clearly proceeded on the assumption that, whatever else they might relate to in another case, they were relevant to a case of national treatment where the Panel had found a violation of Article III:4. At no point in the appeal was that assumption challenged by Venezuela or Brazil. Venezuela argued that the United States had failed to meet all the standards contained in the chapeau. So did Norway and the European Communities as third participants. In short, the field of application of these standards was not at issue.

The assumption on which all the participants proceeded is buttressed by the fact that the chapeau says that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ..." The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words "nothing in this Agreement", and Article XX as a whole including its chapeau more easily integrated into the remainder of the General Agreement, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed.

Against this background, we see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants. 46


46We note in this connection that two previous panels had occasion to apply the chapeau. In United States - Imports of Certain Automotive Spring Assemblies, BISD 30S/107; adopted on 26 May 1983, the panel had before it a ban on imports, and an exclusion order of the United States International Trade Commission, of certain automotive spring assemblies which the Commission had found, under Section 337 of the Tariff Act of 1930, to have infringed valid United States patents. The panel held that the exclusion order had not been applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination against countries where the same conditions prevail," because that order was directed against imports of infringing assemblies "from all foreign sources, and not just from Canada." At the same time, the same order was also examined and found not to be "a disguised restriction on international trade." Id., paras. 54-56. See also United States - Prohibition of Imports of Tuna and Tuna Products, BISD 29S/91, para. 4.8; adopted 22 February 1982.

It may be observed that the term "countries" in the chapeau is textually unqualified; it does not say "foreign countries", as did Article 4 of the 1927 League of Nations International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 97 L.N.T.S. 393. Neither does the chapeau say "third countries" as did, e.g., bilateral trade agreements which also refer to them as the chapeau of a multilateral agreement; see, e.g., United States - Canadian Sugar Agreement, BISD 30S/316, para 12; adopted 4 December 1983.
“Arbitrary discrimination”, "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners. The United States has put forward a series of reasons why either of these courses was not, in its view, realistically open to it and why, instead, it had to devise and apply the baseline establishment rules contained in the Gasoline Rule.

In explaining why individual baselines for foreign refiners had not been put in place, the United States laid heavy stress upon the difficulties which the EPA would have had to face. These difficulties related to anticipated administrative problems that individual baselines for foreign refiners would have generated. This argument was made succinctly by the United States in the following terms:

Verification on foreign soil of foreign baselines, and subsequent enforcement actions, present substantial difficulties relating to problems arising whenever a country exercises enforcement jurisdiction over foreign persons. In addition, even if individual baselines were established for several foreign refiners, the importer would be tempted to claim the refinery of origin that presented the most benefits in terms of baseline restrictions, and tracking the refinery or origin would be very difficult because gasoline is a fungible commodity. The United States should not have to prove that it cannot verify information and enforce its regulations in every instance in order to show that the same enforcement conditions do not prevail in the United States and other countries … The impracticability of verification and enforcement of foreign refiner baselines in this instance shows that the "discrimination" is based on serious, not arbitrary or unjustifiable, concerns stemming from different conditions between enforcement of its laws in the United States and abroad.47

Thus, according to the United States, imported gasoline was relegated to the more exacting statutory baseline requirement because of these difficulties of verification and enforcement. The United States stated that verification and enforcement of the Gasoline Rule’s requirements for imported gasoline are "much easier when the statutory baseline is used" and that there would be a "dramatic difference" in the burden of administering requirements for imported gasoline if individual baselines were allowed.48

While the anticipated difficulties concerning verification and subsequent enforcement are doubtless real to some degree, the Panel viewed them as insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners. The Panel said:

While the Panel agreed that it would be necessary under such a system to ascertain the origin of gasoline, the Panel could not conclude that the United States had shown that this could not be achieved by other measures reasonably available to it and consistent or less inconsistent with the General Agreement. Indeed, the Panel noted that a determination of origin would often be feasible. The Panel examined, for instance, the ease of a direct shipment to the United States. It considered that there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.49

In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve U.S. purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel’s view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject

46(...continued)

agreements negotiated by the United States under the 1934 Reciprocal Trade Agreements Act, e.g. the Trade Agreement between the United States of America and Canada, 15 November 1935, 168 L.N.T.S. 356 (1936). These earlier treaties are here noted, not as pertaining to the travaux preparatoires of the General Agreement, but simply to show how in comparable treaties, a particular intent was expressed with words not found in printer’s ink in the General Agreement.

47Para. 55 of the Appellant’s Submission, dated 4 March 1996. The United States was in effect making the same point when, at pages 11 and 12 of its Post-Hearing Memorandum, it argued that the conditions were not the same as between the United States, on the one hand, and Venezuela and Brazil on the other.

48Supplementary responses by the United States to certain questions of the Appellate Body, dated 1 April 1996.

to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data.\(^5\)

We agree with the finding above made in the Panel Report. There are, as the Panel Report found, established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade - trade between territorial sovereigns - to go on and grow. The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate. At the oral hearing, in the course of responding to an enquiry as to whether the EPA could have adapted, for purposes of establishing individual refinery baselines for foreign refiners, procedures for verification of information found in U.S. antidumping laws, the United States said that "in the absence of refinery cooperation and the possible absence of foreign government cooperation as well", it was unlikely that the EPA auditors would be able to conduct the on-site audit reviews necessary to establish even the overall quality of refineries' 1990 gasoline.\(^5\) From this statement, there arises a strong implication, it appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.\(^5\) The fact that the United States Congress might have intervened, as it did later intervene, in the process by denying funding, is beside the point: the United States, of course, carries responsibility for actions of both the executive and legislative departments of government.

In its submissions, the United States also explained why the statutory baseline requirement was not imposed on domestic refiners as well. Here, the United States stressed the problems that domestic refiners would have faced had they been required to comply with the statutory baseline. The Panel Report summarized the United States' argument in the following terms:

The United States concluded that, contrary to Venezuela's and Brazil's claim, Article XX did not require adoption of the statutory baseline as a national standard even if the difficulties associated with the establishment of individual baselines for importers were insurmountable. Application of the statutory baseline to domestic producers of reformulated and conventional gasoline in 1995 would have been physically and financially impossible because of the magnitude of the changes required in almost all US refineries: it thus would have caused a substantial delay in the programme. Weighing the feasibility of policy options in economic or technical terms in order to meet an environmental objective was a legitimate consideration, and did not, in itself, constitute protectionism, as alleged by Venezuela and Brazil. Article XX did not require a government to choose the most expensive possible way to regulate its environment.\(^5\)

Clearly, the United States did not feel it feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The United States wished to give domestic refiners time to restructure their operations and adjust to the requirements in the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. At the same time we are bound to note that, while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light

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\(^5\) Supplementary responses to the United States to certain questions of the Appellate Body, dated 1 April 1996.

\(^\text{5}\) While it is not for the Appellate Body to speculate where the limits of effective international cooperation are to be found, reference may be made to a number of precedents that the United States (and other countries) have considered it prudent to use to help overcome problems confronting enforcement agencies by virtue of the fact that the relevant law and the authority of the enforcement of the agency does not hold sway beyond national borders. During the course of the oral hearing, attention was drawn to the fact that in addition to the antidumping law referred to by the Panel in the passage cited above, there were other US regulatory laws of this kind, e.g., in the field of anti-trust law, securities exchange law and tax law. There are cooperative agreements entered into between the US and other governments to help enforce regulatory laws of the kind mentioned and to obtain data from abroad. There are such agreements, \textit{inter alia}, in the anti-trust and tax areas. There are also, within the framework of the WTO, the Agreement on the Implementation of Article VI of GATT 1994 (the "Antidumping Agreement"), the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and the Agreement on Pre-Shipment Inspection, all of which constitute recognition of the frequency and significance of international cooperation of this sort.

\(^3\) Panel Report, para. 3.52.
of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute "unjustifiable discrimination" and a "disguised restriction on international trade." We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.

V. FINDINGS AND CONCLUSIONS

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 the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations did not fall within the terms of Article XX(g) of the General Agreement;

(b) the Panel accordingly also erred in law in failing to decide whether the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fell within the ambit of the chapeau of Article XX of the General Agreement;

(c) the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fail to meet the requirements of the chapeau of Article XX of the General Agreement, and accordingly are not justified under Article XX of the General Agreement.

The foregoing legal conclusions modify the conclusions of the Panel as set out in paragraph 8.1 of its Report. The Appellate Body’s conclusions leave intact the conclusions of the Panel that were not the subject of appeal.

The Appellate Body recommends that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the General Agreement.

It is of some importance that the Appellate Body point out what this does not mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the General Agreement contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.

Signed in the original at Geneva this 22nd day of April 1996 by:

___________________________
Florentino P. Feliciano
Presiding Member

___________________________
Christopher Beeby
Member

___________________________
Mitsuo Matsushita
Member

54Adopted by Ministers at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.
World Trade Organization

Japan — Taxes on Alcoholic Beverages

Report of the Appellate Body, 4 October 1996
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* (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").

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

1) 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.

2) 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.

The Panel made the following recommendations:

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1WT/DS8/R, WT/DS10/R, WT/DS11/R.
2Norway 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.
3Panel Report, para. 7.1.
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 Av 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.

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"). 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-
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" 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 of the Panel Report and in paragraphs 6.286-33 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"). 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)(vi) 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; the terms "principle of like products" and "principle of like treatment" 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. 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 "like" 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 reviewable by the Appellate Body, which is limited to the consideration of issues of law under Article 17.6 of the DSU.

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)(vi) 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.

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._

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’ 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’ the determination that directly competitive or substitutable products are ‘not similar taxed’; second, the Panel had sufficient evidence before it to conclude that differential tax treatment under the Liquor Tax Law favours domestic alcohol production; third, the Panel 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 10(b)(i) 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;
ARTICLE 31
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." The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions." A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (tot res magis vateq quam percuter). 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."  

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(1)(b) of GATT 1947 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’.

Article 31(1)(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. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.  

24That 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., 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."


17See, 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."

25See 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."


21Panel Report, para. 6.10.


24Sinclair, supra., footnote 24, p. 137.

Although GATT 1947 panel reports were adopted by decisions of the CONTRACTING PARTIES, 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.

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 5.9 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 Multilateral Trade Agreement.

Article XVI of the WTO Agreement and paragraph 1(h) 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. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.

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 or WTO Members". 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."

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 changes to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

27By 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.

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


30It is worth noting that the Statue 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.

31Panel Report, para. 6.10.

32Ibid.
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 "internal measures" in the Article III:1, which contains several principles, and Article III:2, which provides for specific obligations regarding internal taxes and internal charges, are interpreted differently in different cases where competition was involved with provisions of the Agreement, and the exact context and the exact purpose of Article III must be considered.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. 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 with provisions of the Agreement, and the exact context and the exact purpose of Article III must be considered.

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 with provisions of the Agreement, and the exact context and the exact purpose of Article III must be considered.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. 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 with provisions of the Agreement, and the exact context and the exact purpose of Article III must be considered.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. 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 with provisions of the Agreement, and the exact context and the exact purpose of Article III must be considered.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. 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 with provisions of the Agreement, and the exact context and the exact purpose of Article III must be considered.
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.\(^4\)

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947.\(^4\) 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 - Alkohol), 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.”\(^4\)

(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.\(^4\)

\(^4\)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.

\(^4\)Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34S/83, para. 5.5(c).

\(^4\)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."

This approach was followed in almost all adopted panel reports after Border Tax Adjustments. 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 been used as a criterion for determining "like products" in several previous adopted panel reports. For example, in the 1987 Japan - Alcohol Panel Report, the panel examined certain wines and alcoholic beverages. 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.

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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 23S/49, 63), such as 
the Customs Cooperation Council Nomenclature (CCCN) for the 
classification of goods in customs tariffs which has been accepted by 
Japan.

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. 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."

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.

(a) "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" 
or is it qualified by a de minimis standard." 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.

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 
on-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 81/181, para. 16; United States - Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, para. 5.1.9; 
Japan - Customs Duties, Taxes and Labeling 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 Article does not replace or modify the language contained in Article III:2, second sentence, but in fact, clarifies its meaning. 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, specifically invokes Article III:1. The Panel concluded in paragraph 7.1(ii) on “directly competitive or substitutable products” to the second sentence would also give them their proper meaning.

The negotiating history of Article III:2 confirms that the second sentence and the Ad Article to the second sentence were added during the Havana Conference, along with other provisions and interpretative notes concerning Article 18 of the draft ITO Charter. Article III:2, 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 would also replace or modify the language contained in Article III:2, second sentence, but in fact, clarifies its meaning.

To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase “in excess of” must be given the meaning that it has in the context in which it appears in the first sentence. The phrase “not similarly taxed” in the Ad Article to the second sentence must therefore mean something quite different. It requires a different standard, as it is used here to refer to two products in the same market and not simply tax differences between two products in different markets. The phrase “not similarly taxed” in the Ad Article to the first sentence, corresponds to “in excess of” in the first sentence because it refers to differences in taxation between two products in different markets.

In both cases, the phrase “not similarly taxed” in the Ad Article to the first sentence and the phrase “in excess of” in the first sentence mean that the tax on imported products is higher than the tax on domestic products. However, they are used in different contexts and have different meanings. The phrase “not similarly taxed” in the Ad Article to the first sentence refers to the fact that the tax on imported products is higher than the tax on domestic products, while the phrase “in excess of” in the first sentence refers to the fact that the tax on imported products is higher than the tax on domestic products by a certain amount. In both cases, the phrase “not similarly taxed” refers to differences in taxation between two products, but the meaning of the phrase differs in each context.

The phrase “not similarly taxed” in the Ad Article to the second sentence requires a different standard than the phrase “in excess of” in the first sentence. The phrase “not similarly taxed” in the Ad Article to the second sentence refers to the fact that the tax on imported products is not the same as the tax on domestic products. In both cases, the phrase “not similarly taxed” refers to differences in taxation between two products, but the meaning of the phrase differs in each context. The phrase “not similarly taxed” in the Ad Article to the second sentence refers to the fact that the tax on imported products is not the same as the tax on domestic products by a certain amount, while the phrase “in excess of” in the first sentence refers to the fact that the tax on imported products is higher than the tax on domestic products by a certain amount. In both cases, the phrase “not similarly taxed” refers to differences in taxation between two products, but the meaning of the phrase differs in each context.

The phrase “not similarly taxed” in the Ad Article to the second sentence requires a different standard than the phrase “in excess of” in the first sentence. The phrase “not similarly taxed” in the Ad Article to the second sentence refers to the fact that the tax on imported products is not the same as the tax on domestic products. In both cases, the phrase “not similarly taxed” refers to differences in taxation between two products, but the meaning of the phrase differs in each context. The phrase “not similarly taxed” in the Ad Article to the second sentence refers to the fact that the tax on imported products is not the same as the tax on domestic products by a certain amount, while the phrase “in excess of” in the first sentence refers to the fact that the tax on imported products is higher than the tax on domestic products by a certain amount. In both cases, the phrase “not similarly taxed” refers to differences in taxation between two products, but the meaning of the phrase differs in each context.
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 compete a conclusion that “directly competitive or substitutable 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. And, like the Panel, we believe that whether any particular differential amount of taxation is 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 products” are “not similarly taxed” for the purposes of Article III:2, second sentence. We agree with the Panel that the amount of any particular differential taxation on imported products, therefore, must be more than de minimis to be deemed not similarly taxed. And, like the Panel, we believe that whether any particular differential amount of taxation is 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.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless, its protective application is most often be discerned from the design, the architecture, and the revealing structure of the measure. As such, we believe that an examination in any case of whether dissimilar taxation has been applied, as to afford protection, requires a comprehensive and objective analysis of the structure and application of the measure in question, as compared in a particular measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

In this respect, we note and agree with the Panel’s acknowledgment in the 1987 Japan - Alcohol Report:

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Panel Report, paras. 3.33, 3.35.

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... 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."

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:

"... 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.”

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’.

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’
domestically produced shochu from foreign competition, be it foreign produced shochu or any other of the mentioned white and brown spirits."

Our interpretation of Article III is faithful to the "customary rules of interpretation of public international law." 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." 

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 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 III:2 of the DSU.
67 Ibid.
World Trade Organization

European Communities — Measures Concerning Meat and Meat Products (Hormones)

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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). 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. 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:


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 zootecanical purposes and administered by a veterinarian or under a veterinarian’s responsibility. The other exception related to three natural hormones (oestra diol - 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, 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,

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1Complaint by the United States, WT/DS26/R/USA, (the US Panel Report) and Complaint by Canada, WT/DS48/R/CAN, (the Canada Panel Report).

2As the composition of both Panels was identical, we will refer to the Panels as "the Panel".


6It 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.
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"). 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 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.

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 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 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. 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. 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. 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 condemning the refusal by Canada and the United States to submit all studies available.

13. The European Communities claims that the Panel erred in law 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.

15. The European Communities asserts that GATT 1947 panel reports rejected a de novo standard of review in relation to fact-finding, and that this approach has been maintained by panels established under the DSU. It is contended that the "reasonable deference standard of review" has been given expression in the Marrakesh Agreement Establishing the World Trade Organization (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").

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16Done at Marrakesh, Morocco, 15 April 1994.
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. 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 and Dr. André. According to the European 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") 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. 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

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19The 1987 Monographs of the IARC on the Evaluation of Carcinogenic Risks to Humans, Supplement 7 (the "1987 IARC Monographs").
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. 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.

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, it is clear 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, 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, 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

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22Para. 11 of this Report.


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.

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\(^\text{26}\) (the "Lamming Report") and the JECFA Reports\(^\text{27}\), 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.\(^\text{27}\) 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"\(^\text{28}\), and contends that this finding is manifestly wrong, certainly as regards the so-called Pimenta Report.\(^\text{29}\)


\(^{28}\)US Panel Report, paras. 8.127 and 8.130; Canada Panel Report, paras. 8.130 and 8.133.


28. Third, the Panel's interpretation that "based on" within the meaning of Article 5.1 means "in conformity with" is mistaken.\(^\text{30}\) 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.\(^\text{31}\) "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 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\(^\text{32}\), 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.

\(^{30}\)US Panel Report, para. 8.117; Canada Panel Report, para. 8.120.


\(^{32}\)US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.
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.\textsuperscript{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.\textsuperscript{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\textsuperscript{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, the European Communities argues that, contrary to what the Panel found\textsuperscript{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".\textsuperscript{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\textsuperscript{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

\textsuperscript{34}US Panel Report, para. 8.176; Canada Panel Report, para. 8.179.
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. 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 deprived the European 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/IECFA 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 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

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40US Panel Report, para. 8.7; Canada Panel Report, para. 8.7.

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.

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. 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.

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

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**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. The United States believes that there were strong reasons to provide it with extended third party rights in the Canadian panel proceeding.

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43The 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").
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

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. 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”. 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 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.

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

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*Adopted 23 May 1997, WT/DS33/AB/R.

*Canada’s appellee’s submission, para. 59.

*Adopted 25 September 1997, WT/DS27/AB/R.
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. Article 2.2 requires the European 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 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,

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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." 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.

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. 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 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 zootecchnical 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, 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.

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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 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 Appellate Body Report in Japan - Alcoholic Beverages 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 A.


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.

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"94, 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 Blouses35, which the Panel invokes and which embodies a rule applicable in any adversarial proceedings.

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).36

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".37 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.38

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 ..."39, 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.

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

38US Panel Report, para. 8.54; Canada Panel Report, para. 8.57.
39SPS Agreement, Article 2.2.
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.\(^6\) (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)\(^4\) 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.\(^5\) It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below\(^6\), 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 "strict" 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 defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.\(^6\)

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.\(^5\)

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).\(^6\)

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.\(^5\)

... 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

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\(^4\)US Panel Report, paras. 8.86 and 8.87; Canada Panel Report, paras. 8.89 and 8.90.

\(^5\)US Panel Report, para. 8.86; Canada Panel Report, para. 8.89.

\(^6\)US Panel Report, footnote 288; Canada Panel Report, footnote 393.

\(^6\)Para. 102 of this Report.

\(^6\)See para. 103 of this Report.

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 5.6.48

108. To the extent that the Panel49 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.

109. In accordance with our ruling in United States - Shirts and Blouses50, 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 Panel72 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;
- 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

51Our 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.
53EC's appellant's submission, para. 140.
54EC's appellant's submission, para. 139.
is being reviewed. A panel would have to "verify whether the determination by the national authority was 'correct' both factually and procedurally". 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.

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" is applicable in "all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants," 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 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.

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. 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

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76EC’s appellant’s submission, para. 122.
77EC’s appellant’s submission, para. 123.
78EC’s appellant’s submission, para. 128.
79EC’s appellant’s submission, para. 127.

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76On 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. (underlined 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.

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 novo review\(^{41}\), 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".\(^{42}\)

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.\(^{43}\) 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.\(^{44}\) 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.

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.\(^{45}\) (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".\(^{46}\) 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


\(^{42}\)Panel Report, United States - Underwear, adopted 25 February 1997, WT/DS24/R, para. 7.10

\(^{43}\)DSU, Article 3.2.

\(^{44}\)Paras. 131-144 of this Report.


\(^{46}\)EC’s appellant’s submission, para. 91.
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. 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. 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.

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." 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.

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 law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. 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.

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-ending, 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.

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In Case Concerning the Gabčíkovo-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 Gabčíkovo-Nagymaros System of Locks. See Case Concerning the Gabčíkovo-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/files/case73.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 held⁴⁸ that, in line with Article 28 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")⁵⁰, 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.⁵⁶

127. The European Communities submits that this conclusion of the Panel is "too sweeping"⁵⁷ 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.⁵⁸

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 1995.⁵⁹ 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:

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").⁶⁰

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

⁵¹EC's appellant's submission, para. 264.
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.

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 willful 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. 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 is manifestly not true. 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". We note that Dr. Ritter clearly stated with regard to MGA that he had "no information other than of a

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80It 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.


82EC's appellant's submission, para. 168.

83EC's appellant's submission, para. 170, quoting Annex to the US and Canada Panel Reports, para. 852.
proprietary nature which [he] did not use” 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”. 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.

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.

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. First, the European Communities submits that the Panel incorrectly quotes some of the statements of Dr. Lucier and totally ignores other more relevant statements he made. 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.

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. To the contrary, according to the European Communities, the views expressed by Dr. André support the scientific opinions presented by the EC scientists. 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 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

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105 Annex to the US and Canada Panel Reports, para. 352.
106 EC’s appellant’s submission, para. 350.
assessment. The Panel includes this Conference in the listing of scientific evidence concerning the hormones at issue referred to by the European Communities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{122} However, as the Panel explains, the scientific evidence included in these 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\textsuperscript{123} and ignored statements made by some of its own experts.\textsuperscript{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\textsuperscript{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

\textsuperscript{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.


\textsuperscript{116}US Panel Report, para. 8.123; Canada Panel Report, para. 8.126.

\textsuperscript{117}EC's appellant's submission, para. 368.

\textsuperscript{118}US Panel Report, para. 8.127; Canada Panel Report, para. 8.130.

\textsuperscript{119}US Panel Report, para. 8.129; Canada Panel Report, para. 8.132.

\textsuperscript{120}EC's appellant's submission, para. 380.

\textsuperscript{121}US Panel Report, para. 8.108; Canada Panel Report, para. 8.111.


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{125}US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.
evidence. The Panel, it appears, excluded that evidence on the legal ground of non-relevancy; as will be seen later, the Panel errored in law in holding the evidence non-relevant. Nevertheless, it did examine the evidence.\footnote{US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.}

144. The European Communities also claims that the Panel incorrectly quoted the statements of its experts.\footnote{EC's appellant's submission, para. 419.} Referring to a number of specific statements\footnote{US Panel Report, footnote 362; Canada Panel Report, footnote 469.}, 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 unjustifiable,\footnote{US Panel Report, para. 8.238; Canada Panel Report, para. 8.241.} the Panel did not take into account the evidence before it.\footnote{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.} 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.\footnote{See paras. 227-235 of this Report.} 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.\footnote{US Panel Report, paras. 8.231-8.238; Canada Panel Report, paras. 8.234-8.240.}

IX. Certain Procedures Adopted by the Panel

A. The Selection and Use of Experts

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.\footnote{EC's appellant's submission, para. 587.} 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.\footnote{US Panel Report, para. 8.7; Canada Panel Report, para. 8.7.}

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.

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. 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. 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.

140EC's appellant's submission, paras. 605 and 612.

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 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.

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 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:

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


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 rulings.


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 appellate’s submission, para. 216.

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 - Bananas143, 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.

142 Canada Panel Report, para. 8.20.

143 Adopted 25 September 1997, WT/DS27/AB/R.

144 EC’s appellant’s submission, paras. 493 and 594.
156. Considering that in the request for the establishment of a panel in the proceeding initiated by the United States, as well as in the proceeding started by Canada, 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 stated:

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 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.\(^{147}\)

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.

\(^{146}\)WT/DS26/5, 25 April 1996.
\(^{147}\)WT/DS48/5, 17 September 1996.

157. The Interpretation of Articles 3.1 and 3.3 of the SPS Agreement

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 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. (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. 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". 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. 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 "to harmonize [SPS] measures on as wide a basis as possible ...". The preamble of the SPS Agreement also records that the Members "[d]esir[e] 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 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) 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. 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.

Accordingly, we disagree with the Panel’s interpretation that “based on” means the same thing as “conform to”.

After having erroneously “equated” measures “based on” an international standard with measures that “conform to” that standard, 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”.

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. 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

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.

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.

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

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157The 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."


158US Panel Report, para. 8.72; Canada Panel Report, para. 8.75.

159US Panel Report, para. 8.73; Canada Panel Report, para. 8.76.
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; (underlined)

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.

²For 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, the 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.¹⁷ 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".¹¹⁸ 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 2.2.¹¹⁹

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".

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]

¹⁷EC's appellant's submission, paras. 240-244.
¹¹⁸*SPS Agreement*, Article 3.3.
¹¹⁹EC's appellee's submission, para. 88.
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.

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.

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\textsuperscript{106}, 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

\textsuperscript{106}US Panel Report, para. 8.93; Canada Panel Report, para. 8.96.
not, in the view of the Panel, a "policy" exercise involving social value judgments made by political bodies.181 The Panel describes the latter as "non-scientific" and as pertaining to "risk management" rather than to "risk assessment".182 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 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". 183

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 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".184 "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 1997,185 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".186 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.187

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"188, 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.189 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 5.1.180 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"

182US Panel Report, para. 8.95; Canada Panel Report, para. 8.98.
184The 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, or exist, or to happen": Id., p. 2362.
185Para. 819 of the Annex to the US and Canada Panel Reports.
187EC's appellant's submission, paras. 392-397.
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.

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". 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. 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". 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". (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.

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

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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.

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 fulfill 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. 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.

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 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

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175US Panel Report, para. 8.117; Canada Panel Report, para. 8.120.
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. Adlerner, 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.\(^{180}\)

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


\(^{178}\)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.

\(^{180}\)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 estrogens from every
source, including eggs, meat, phyto-oestrogens, fungal oestrogens, the whole body
burden of exogenous oestrogens. And by my estimate 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.
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. 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 IECFA Reports and that the conclusions reached by the 1987 IARC Monographs are complementary to, rather than contradictory of, the conclusions of the IECFA Reports. 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 these 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, in other words, relevant but do not appear to be sufficiently specific to the case at hand.

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. 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. 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.

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198EC’s appellant’s submission, para. 179 ff.

198Although the term used in the Codex Standards for the three natural hormones is good animal husbandry practice (Section 1, 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.
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)

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 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

188US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.
189EC's appellant's submission, paras. 399 and 401.
191This 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".
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 the 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

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.

194See para. 177 of this Report.
195EC's appellant's submission, para. 448.
196US 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.

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.

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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{197}US Panel Report, para. 8.176; Canada Panel Report, para. 8.179.

\textsuperscript{198}EC's appellant's submission, para. 455.
218. In examining the EC measures here involved\textsuperscript{189} and at least one other SPS measure of the European Communities\textsuperscript{200}, the Panel finds that several different levels of protection were projected by the European Communities:

(i) the level of protection in respect of natural hormones when used for growth promotion\textsuperscript{201};
(ii) the level of protection in respect of natural hormones occurring endogenously in meat and other foods\textsuperscript{202};
(iii) the level of protection in respect of natural hormones when used for therapeutic or zootechnical purposes\textsuperscript{203};
(iv) the level of protection in respect of synthetic hormones (zearanol and trenbolone) when used for growth promotion\textsuperscript{204}; and
(v) the level of protection in respect of carbadox and olaquindox.\textsuperscript{206}

C. \textit{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 also arbitrary and unjustifiable.\textsuperscript{207} In contrast, the Panel does not undertake to compare level of protection (iii) with level of protection (i).\textsuperscript{208} We examine below \textit{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 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{211} The Panel 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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{189}See paras. 2-5 of this Report.
\textsuperscript{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.
\textsuperscript{203}US Panel Report, para. 8.212; Canada Panel Report, para. 8.215.
\textsuperscript{204}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.
\textsuperscript{208}US Panel Report, para. 8.200; Canada Panel Report, para. 8.203.
\textsuperscript{209}US Panel Report, para. 8.193; Canada Panel Report, para. 8.196.
\textsuperscript{210}US Panel Report, para. 8.194; Canada Panel Report, para. 8.197.
\textsuperscript{211}US Panel Report, para. 8.195; Canada Panel Report, para. 8.198.
\textsuperscript{212}US Panel Report, para. 8.196; Canada Panel Report, para. 8.199.
foods. In respect of the latter, the European Communities simply takes no regulatory action\textsuperscript{244}; 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{218} Therapeutic use is occasional as opposed to regular and continuous use that characterizes growth promotion.\textsuperscript{219} Therapeutic use is selective as it concerns only individual sick or diseased animals; growth 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.\textsuperscript{220} Zootechnical use may relate to entire herds but would occur only once a year\textsuperscript{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.\textsuperscript{222}

224. The second difference concerns the mode of administration of hormones. In order to prevent abuse\textsuperscript{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.\textsuperscript{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).\textsuperscript{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. 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, 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. The experts advising the Panel confirmed that carbadox was genotoxic in character.

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. The Panel responds to these arguments and the European Communities has reiterated its original arguments in its appellant's submission. 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.

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.

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.

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.

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.

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, 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. In this connection, Canada volunteered the comment that, according to a 1991 study commissioned by

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298US Panel Report, para. 4.220.

299US Panel Report, para. 8.229 (with respect to carbadox only); Canada Panel Report, para. 8.232.

300JEC's appellant's submission, paras. 528-548.

301US Panel Report, para. 8.231 (with respect to carbadox only); Canada Panel Report, para. 8.234.
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 the Panel 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 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

240EC's appellant's submission, paras. 471-477.
241EC’s appellant’s submission, para. 486.
242EC's appellant’s submission, para. 491.
238. We agree with the Panel’s view that "all three elements [of Article 5.5] need to be distinguished and addressed separately".\(^{246}\) 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 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".\(^{251}\)

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


\(^{249}\)See para. 212 of this Report.


\(^{251}\)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.

\(^{252}\)US Panel Report, para. 8.241; Canada Panel Report, para. 8.244.


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 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. 234 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. 237 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. 238 Reduction of any 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.

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238Article 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.
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 2.2.

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.

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. 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. 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. Similar submissions are made by Canada as appellant.

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;

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241United States’ appellant’s submission, para. 4.
242United States’ appellant’s submission, para. 18.
243United States’ appellant’s submission, para. 20.
244Canada’s appellant’s submission, paras. 19-22.
(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*;

(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.
Signed in the original at Geneva this 5th day of January 1998 by:

Florentino Feliciano
Presiding Member

Claus-Dieter Ehlermann
Member

Mitsun Matsushita
Member
World Trade Organization

United States — Import Prohibition of Certain Shrimp and Shrimp Products

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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*. Following a joint request for consultations by India, Malaysia, Pakistan, and Thailand on 8 October 1996, Malaysia and Thailand requested in a communication dated 9 January 1997, and Pakistan asked in a communication dated 30 January 1997, 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 ("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"). 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, and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997. The Report rendered by the consolidated Panel was circulated to the Members of the World Trade Organization (the "WTO") on 15 May 1998.

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2WT/DS58/1, 14 October 1996.
3WT/DS58/6, 10 January 1997.
4WT/DS58/7, 7 February 1997.
6WT/DSB/M/29, 26 March 1997.
7WT/DS58/8, 4 March 1997.
8WT/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 21-26. 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 requiring all United States shrimp trawl vessels to use approved TEDs comparable in effectiveness to those required in the United States. 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 ... ." 22

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, 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 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 1996, the requirement that harvesting nations, details of which were further elaborated in regulatory guidelines in 1991, 1993 and 1996. First, 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 ... .

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 ... .

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 for domestic consumption or for export to a country whose regulatory program requires the use of TEDs in a manner comparable to that of the U.S. program ... . 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, and granted these nations, respectively, the opportunity to secure certification of their respective regulatory programs by the Department of State, subject to its jurisdiction. The Guidelines excluded from this process any nation whose commercial shrimp trawling operations take place exclusively in waters where the average rate ... .

7. 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. 24 On 10 April 1996, the United States Court of International Trade refused to consider the import ban impinging on the shrimp industry's ability to reconstruct mounds of dead sea turtles in the Bahamian waters of the Caribbean basin. 25
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

8. The United States claims that the Panel erred in finding that it could not accept non-requested information from non-governmental organizations. According to the United States, there is nothing in the DSU that would prevent it from considering such information. The Panel based its finding on the ordinary meaning of the term “unjustifiable discrimination”, which it interpreted as requiring that the Panel consider all relevant factors, including the environmental effects of the measure. The United States argues that the Panel’s decision is contrary to the ordinary meaning of the term and would impermissibly narrow the scope of WTO Members’ rights under Article XX of the GATT.

9. The Panel’s interpretation of Article XX is correct. The term “unjustifiable discrimination” is used to describe a situation where a measure is applied in a manner that is discriminatory and has no basis in the context of the measure. The Panel’s decision is consistent with the ordinary meaning of the term and does not impermissibly narrow the scope of WTO Members’ rights under Article XX.

II. Arguments of the Participants and Third Participants

A. Claims of Error by the United States – Appellant

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9. The Panel’s interpretation of Article XX is correct. The term “unjustifiable discrimination” is used to describe a situation where a measure is applied in a manner that is discriminatory and has no basis in the context of the measure. The Panel’s decision is consistent with the ordinary meaning of the term and does not impermissibly narrow the scope of WTO Members’ rights under Article XX.
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 Gasoline34 ("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 Allowances35 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 – Gasoline36 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 that 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 - Gasoline37 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
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

34Adopted 20 May 1996, WT/DS2/AB/R.
35Adopted 7 November 1952, BISD 1S/59.
36Adopted 20 May 1996, WT/DS2/AB/R.
37Adopted 20 May 1996, WT/DS2/AB/R.
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 sea turtles by requiring shrimp vessels to use TEDs. In the United States, data on sea turtle mortality shows that shrimp trawl fishing is a major cause of sea turtle deaths. The United States maintains that 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 is ‘necessary’ to allow sea turtles to move back from the brink of extinction.

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 XX(b) as applying to the measures taken by the United States to protect sea turtles, and thereby reaches the incorrect conclusion that Section 609 is ‘necessary’ within the meaning of Article XX(b). Joint Appellees note that the United States did not challenge the applicability of Article XX(b) before the Panel, but rather focused solely on the sufficiency of the measures taken by the United States. Joint Appellees argue that the United States’ decision to require the use of TEDs is part of the United States’ broader efforts to protect sea turtles, and that the United States’ efforts are sufficient to address the threat of sea turtle mortality. Joint Appellees further argue that the United States’ decision to require the use of TEDs is a measure ‘necessary to protect human, animal or plant life or health’ within the meaning of Article XX(b).

30. Joint Appellees point to Appendix 3 of the DSM, which sets out Working Procedures for panels, and argue that the Panel was incorrect in finding that non-requested information could be considered by the Panel. Joint Appellees argue that the Panel’s ruling is inconsistent with the principles set out in Appendix 3 of the DSM, and that the Panel’s ruling would allow the United States to submit information to the Panel that is not considered by the Panel. Joint Appellees further argue that the Panel’s ruling would allow the United States to submit information to the Panel that is not considered by the Panel. Joint Appellees further argue that the Panel’s ruling would allow the United States to submit information to the Panel that is not considered by the Panel.

31. 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 irrelevant, duplicative, or irrelevant to the case before the Panel. Joint Appellees argue that the Panel’s ruling is inconsistent with the principles set out in Appendix 3 of the DSM, and that the Panel’s ruling would allow the United States to submit information to the Panel that is not considered by the Panel. Joint Appellees further argue that the Panel’s ruling would allow the United States to submit information to the Panel that is not considered by the Panel.

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33. Joint Appellees argue as well that parties to a panel proceeding might feel obliged to respond to all submitted submissions--just as in case of the unsuccessful submissions--in light of the prevention of abuse of the Article XX exceptions, and associating the prevention of such abuse with the preservation of the multilateral trading system.

34. Joint Appellees maintain that the Panel's ruling on the chapeau of Article XX is correct and in line with the United States-Gasoline case. First, the Panel concluded that the chapeau of Article XX addresses not so much the measure itself as the manner in which it is applied--that is, whether Members have claimed a right to protection from environmentally harmful trade practices without actually applying the measure to that end. The Panel further noted that the chapeau is important to underscore that the purpose and object of Article XX is generally the prevention of abuse of the exceptions contained in Article XX with the avoidance of measures that would frustrate or defeat the purposes and objects of the General Agreement on Trade in Goods (GATT) by abusing the Article XX exception contained in Article XX. The Panel further observed that the Article XX exception is an important provision in the GATT, and that its application should be restricted to cases where the condition of Article XX is satisfied.

35. Joint Appellees submit that on the basis of the Panel's decision, the chapeau of Article XX is being interpreted as a provision that, in the absence of severe environmental concerns, the chapeau protects against threats to the multilateral trading system. The prevention of abuse of Article XX is an important provision in the GATT, and its application should be restricted to cases where the condition of Article XX is satisfied.

36. Joint Appellees submit that the Panel's decision is well-reasoned and fully supported by the文本和The Vienna Convention on the Law of Treaties. In particular, 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. Joint Appellees further argue that the Panel's decision is consistent with the principles of good faith and pacta sunt servanda, and by citing the United States-Gasoline case, the Panel correctly interpreted and applied the chapeau of Article XX.

38. Joint Appellees state that in examining Section 609, the Panel paid particular attention to the prevention of abuse of the Article XX exceptions, and associating the prevention of such abuse with the preservation of the multilateral trading system. 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.

39. Joint Appellees argue that the Panel's decision is consistent with the principles of good faith and pacta sunt servanda, and by citing the United States-Gasoline case, the Panel correctly interpreted and applied the chapeau of Article XX.

40. Joint Appellees submit that, even leaving aside the threat to the multilateral trading system, the Panel correctly interpreted and applied the chapeau of Article XX.

41. First, Section 609 is applied without a serious attempt to reach a cooperative multilateral solution 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 chapeau of Article XX permits measures justified by serious environmental concerns. The threat to the multilateral trading system cited by the Panel is unrelated to the appellant's support for TEDs or turtle conservation. The chapeau of Article XX permits measures justified by serious environmental concerns.

42. Done at Vienna, 23 May 1969, 23 May 1969, United States-Gasoline, adopted 20 May 1996, WT/DS2/AB/R.


44. Ibid.

45. Ibid.

46. IBM.

47. Ibid.


49. 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\(^5\), and was underscored by the Appellate Body in United States - Gasoline.\(^5\) 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, \textit{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\(^5\) 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 involved, all trade measures that meet the requirements of an Article XX exception would, \textit{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\(^5\) 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 \textit{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 \textit{WTO Agreement}. The Panel identified two such goals: endeavouring to find cooperative solutions to trade problems; and preventing the risk that a variety of different objects and purposes. Moreover, in Malaysia's view, the appellant misapplies the principle in \textit{India - Patent Protection for Pharmaceutical and Agricultural Chemical Products}\(^5\) to the facts of this case, and misconstrues the Panel's application of the Belgian Family Allowances\(^5\) panel report.

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 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. \textit{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 \textit{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 \textit{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 \textit{amicus curia}\(^5\) 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 \textit{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, undivided 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 \textit{WTO Agreement}, which makes reference to different objects and purposes. Moreover, in Malaysia's view, the appellant misapplies the principle in \textit{India - Patent Protection for Pharmaceutical and Agricultural Chemical Products}\(^5\) to the facts of this case, and misconstrues the Panel's application of the Belgian Family Allowances\(^5\) 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 even on TED-caught shrimp. Malaysia - Appellee

50. Second, the United States discriminated impermissibly among exporting countries, and between exporting countries and the United States in, \textit{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."


56 Adopted 7 November 1952, BISD 1S/59.
Australia agrees with the United States that the Panel failed to interpret the terms of Article XX in a manner which would continue to interpret the margin of discretion of the Panel. Where the same conditions exist, 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.

Section 609 of United States – Gasoline measures the degree to which the United States measures discriminate against Australian shrimp trawlers relative to 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, found in Malaysia and the United States, are alike -- Kemp's ridley and loggerhead. In the economy of Malaysia, only little conservation measures, as compared to the United States, have been taken. The Panel erred in law in concluding that the participation of Malaysia in a regional workshop is sufficient to show that Malaysia has taken steps to assist foreign shrimp trawlers in adopting turtle conservation measures.

Australia agrees with the United States that 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, was a procedural error. Article XX requires that measures not be applied in a manner which would constitute "a means of arbitrary or unlawful discrimination between countries where the same conditions prevail." It is preferable to begin examination of the legal issues raised by Article XX by considering the policy objective of the chapeau. This approach would enable the examination of all aspects of the case that may be relevant in determining whether a measure meets the requirements of the chapeau before considering whether it meets the requirements of any of the paragraphs of Article XX. The Panel erred in law in applying only a case-by-case basis.

Australia states that Section 609 constitutes unjustifiable discrimination because it discriminates against Australian shrimp trawlers relative to foreign shrimp trawlers. Section 609 applies to both United States and foreign shrimp trawlers, and, in particular, to Australian shrimp trawlers that harvest sea turtles, to which the United States seeks to impose sea turtle conservation measures.

Australia states that the Panel erred in law 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 that is at odds with the Ministerial Decision on Trade and Environment.

Australia submits that the Appellate Body should complete the Panel report in determining whether the United States measures, when applied to Australian shrimp trawlers, satisfy the requirements of Article XX of the GATT 1994. 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 Panel report in making this finding.

Australia maintains that Section 609 is applied in a manner constituting unjustifiable discrimination and a disguised restriction on international trade. Australia submits that the Appellate Body should complete the Panel report in determining whether Section 609 violates the chapeau prohibition of "unjustifiable discrimination between countries where the same conditions prevail" and also a disguised restriction on international trade.
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 proceeding.” 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 it. 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 the 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 between countries based on the risks posed to sea turtles in the exporting country’s shrimp fishery. The Panel focused on economic activities with respect to the EC’s position is significant respect for the environment.

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 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 international cooperation is the most effective means to address global and transboundary environmental problems.

69. To the European Communities, the approach to Article XX developed by previous panels and followed by the Appellate Body in the United States - Gasoline case makes logical sense and could reasonably have been applied in this case.

70. The European Communities agrees with the United States that it would be wrong for trade constrictions to 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.
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—is, if the test is satisfied, a factor that should be taken into account when determining whether a measure is inconsistent with the Agreement. In the view of the European Communities, the competitive conditions established as a result of the Panel's findings do not respect the principle of non-discrimination. If this requirement is satisfied, a panel then can proceed to examine whether the requirement of non-discrimination is satisfied. Paragraphs 17 and 46 of Article XX should be considered mandatory in determining whether the measure can be considered to be non-discriminatory. The Panel's findings, however, must be examined in the context of the multilateral trading system. The Panel's findings must be examined in the context of the multilateral trading system. Therefore, if the Panel's findings are based on an incorrect interpretation of Article XX, the European Communities contends that the Panel's findings are not within the scope of Article XX.

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 as a globally shared environmental resource because they are included in Annex I of the Convention on the Conservation of Migratory Species of Wild Animals. The provision of an adequate level of protection within a country is not sufficient to protect the species as a whole. Therefore, if the Panel's findings are based on an incorrect interpretation of Article XX, the European Communities contends that the Panel's findings are not within the scope of Article XX.

73. However, the European Communities would not want to exclude the possibility, as a last resort, for WTO Members, on their own initiative, to establish protective measures under the CITES framework. In view of the Annex on Multilateral Environmental Agreements, protective measures under the CITES framework, however, should be taken into account in determining whether a measure is inconsistent with the Agreement. In the view of the European Communities, a protective measure under the CITES framework should be taken into account in determining whether a measure is inconsistent with the Agreement. In the view of the European Communities, a protective measure under the CITES framework should be taken into account in determining whether a measure is inconsistent with the Agreement.

74. Given the Panel's factual findings that the United States did not enter into negotiations with the Members concerned, it would be necessary to examine whether the measure is inconsistent with the Agreement. The European Communities concludes that the United States has not demonstrated that a negotiated solution in respect of measures to protect sea turtles, as required by paragraph 169 of the Appellate Body Report, has been tried. The European Communities contends that the United States has not demonstrated that a negotiated solution in respect of measures to protect sea turtles, as required by paragraph 169 of the Appellate Body Report, has been tried.

75. Hong Kong, China states that it would be a serious misunderstanding of the role of the Panel in a dispute to suggest that the Panel's findings, if based on an incorrect interpretation of Article XX, are not within the scope of Article XX. The Panel's findings must be examined in the context of the multilateral trading system. Therefore, if the Panel's findings are based on an incorrect interpretation of Article XX, the Panel's findings are not within the scope of Article XX.

76. Hong Kong, China argues that in line with the views of the Appellate Body, the Panel of the United States – Gasoline report should be read as an examination of the consistency of measures with the provisions of Article XX. The Panel's findings must be examined in the context of the multilateral trading system. Therefore, if the Panel's findings are based on an incorrect interpretation of Article XX, the Panel's findings are not within the scope of Article XX.
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: 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 and legal 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.

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."

"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.

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 United States to file written responses to the appellees' submission. 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 ....
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 appellant'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 scope 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 "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 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 that panel's report. Second, the notice of appeal incorporated by reference all the arguments set out in the appellant's submission of 7 August 1998, and made certain additional comments in respect of each of the briefs filed by the appellees. Therefore, it is argued, the United States' notice of appeal was not vague and the appeal did not result in any unfair surprise to the appellees. 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.

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 to the Appellate Body.
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 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 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 Appellees do not assert that that is necessary.

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 a real and effective opportunity to demonstrate the error in that finding or interpretation. It is scarcely necessary to add that an appeal 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 Appellant. 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

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 See Articles 4, 6, 9 and 10 of the DSU.
68 Panel Report, para. 3.129
69 Panel Report, para. 7.8.
70 Panel Report, para. 7.8.
71See Articles 4, 6, 9 and 10 of the DSU.
submissions considered by, a panel. 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 "enable[s] panels to seek information and advice as they deem appropriate in a particular case." 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 panel 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.

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 DSU, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself of both 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.

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71Articles 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 DSU of their substantial interest in the matter to make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

72As well as Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures.


74Adopted 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." 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 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.

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.

... Section 609, as applied, is a measure conditioning access to the US market for a given product on the adoption by the exporting Members of conservation policies that the United States considers to be comparable to its own in terms of regulatory programmes and incidental taking.

... 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.

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75Panel Report, para. 7.8.
76The 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.
77Panel Report, para. 7.44.
78Panel Report, para. 7.45.
79Panel Report, para. 7.48.
80Panel Report, para. 7.49.
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, 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.

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." (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." (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" must be regarded as "not within the scope of measures permitted under the chapeau of Article XX." 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'," (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."
in order that the justifying protection of Article XX may be extended to 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, two-tiered: first, introductory provisions apply to any of the paragraphs of Article XX, it seems equally appropriate to analyze first the introductory provision of Article XX. Secondly, the particular exceptions listed under Article XX are examined. Paragraphs (a) to (j) comprise measures that are recognized as introductory provision are in the GATT 1994, because the domestic policies embodied in such measures are recognized as important and legitimate in character. It is not a priori abhorrent to the principles of interpretation we are bound to apply.

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.

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 or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an analysis embodied therein, constitute error in legal interpretation and accordingly reverse them.

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. In certain cases, 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 standards established in the chapeau. And, in United States – Gasoline, paragraphs (a) to (j) of the Agreement on Agriculture, Measures Affecting the Importation of Certain Poultry Products, we stated:

In this case, 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 standards established in the chapeau. And, in United States – Gasoline, paragraphs (a) to (j) of the Agreement on Agriculture, Measures Affecting the Importation of Certain Poultry Products, we stated:

The Panel's conclusion that the United States measure at issue "is not justified by Article XX as interpreted by the Panel," is not warranted. The Panel erred by construing the term "the measure" as being limited to the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the conditions prevail" or "a disguised restriction on international trade." When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under justification varies. What is appropriately characterized as "arbitrary discrimination" or "unjustifiable discrimination" or "discriminatory treatment" may, in one context, be appropriate, under the same circumstances, in another context.

The Panel's conclusion that the United States measure at issue "is not justified by Article XX as interpreted by the Panel," is not warranted. The Panel erred by construing the term "the measure" as being limited to the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the conditions prevail" or "a disguised restriction on international trade." When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under justification varies. What is appropriately characterized as "arbitrary discrimination" or "unjustifiable discrimination" or "discriminatory treatment" may, in one context, be appropriate, under the same circumstances, in another context.
B. Article XX(g) Provisional Justification of Section 609

In claiming justification for its measure, the United States primarily invokes Article XX(g). Justification under Article XX(g) is claimed only if the measure is so large and extending for so long a time as to go beyond the normal period and size of measures taken for the same purpose. The United States argues that the measure in question is a temporary measure designed to conserve exhaustible natural resources.

125. 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 the text of Article XX(g) was not modified in the Uruguay Round, the preamble attached to the WTO Agreement, the objective of the WTO Agreement, explicitly acknowledges the objective of sustainable development.

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 Section 609, the phrase “exhaustible natural resources” is used to refer to resources that are limited in supply and would be depleted if uncontrolled exploitation were continued. This definition is consistent with the general concept of exhaustion as a taking, act or operation which removes resources from the economic domain. The term “exhaustible natural resources” is used in Article XX(g) to denote resources which are either exhaustible or non-exhaustible in character.

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 complaints’ principal argument cannot be one based on the exclusion of the precautionary principle. The United States cannot invoke the precautionary principle for justification under Article XX(g), because the precautionary principle is not a measure related to the conservation of exhaustible natural resources. It is a general principle of international law, which is applicable to all measures even if not directly related to the conservation of exhaustible natural resources.

We note, for example, that the World Commission on Environment and Development, in Our Common Future, 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 in 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.

108. Panel Report, para. 3.237. India, Pakistan and Thailand referred, inter alia, to the drafting history of the 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 conservation of scarce resources. For its part, Malaysia, being a mineral exporter, referred to the definition of “non-exhaustible natural resources”. It followed, according to Article XX(g), that the United States could only be considered under Article XX(g), since Article XX(g) was meant for non-exhaustible natural resources, while Article XX(b) could only be considered under Article XX(g), since Article XX(g) was meant for exhaustible natural resources. We note, however, that the United States has never invoked Article XX(g) as applied within the framework of the entire legal system prevailing at the time of the interpretation. See also National Law and Practice in International Law, 9th ed., Vol I, Elizabeth Watts (eds.), Opinioni International Law, 9th ed., Vol I, Elizabeth Watts (eds.), 1971-1982, Vol I, Elizabeth Watts (eds.), 1971-1982, p. 128, and E. Jimenez de Arces, International Law in the Past Third of the Century, 1978-1982, Vol I, Elizabeth Watts (eds.), 1971-1982, p. 128. See also National Law and Practice in International Law, 9th ed., Vol I, Elizabeth Watts (eds.), Opinioni International Law, 9th ed., Vol I, Elizabeth Watts (eds.), 1971-1982, p. 128. See also National Law and Practice in International Law, 9th ed., Vol I, Elizabeth Watts (eds.), Opinioni International Law, 9th ed., Vol I, Elizabeth Watts (eds.), 1971-1982, p. 128. See also National Law and Practice in International Law, 9th ed., Vol I, Elizabeth Watts (eds.), Opinioni International Law, 9th ed., Vol I, Elizabeth Watts (eds.), 1971-1982, p. 128.
"exhaustible natural resource" within the meaning of Article XX(g). We hold that, in line with the principle of exhaustion of remedies, the panel erred in interpreting the GATT provisions in a way that permitted the United States to impose sanctions on Pakistan for alleged violations of the GATT Agreement.

We do not consider this approach to be consistent with the GATT Agreement. First, the panel's interpretation is inconsistent with the overall objectives of the GATT Agreement, which are to promote international trade and to avoid trade barriers. The panel's interpretation would effectively prevent Pakistan from exporting its products to the United States, thereby violating the spirit of the GATT Agreement.

Second, the panel's interpretation is inconsistent with the text of the GATT Agreement. The panel's interpretation would allow the United States to impose sanctions on Pakistan for alleged violations of the GATT Agreement, even if there is no evidence of such violations. This approach would effectively enable the United States to impose sanctions on countries for alleged violations of the GATT Agreement, even if there is no evidence of such violations.

We therefore hold that the panel's interpretation of the GATT Agreement is not consistent with the overall objectives of the GATT Agreement, and that the panel erred in interpreting the GATT provisions in a way that permitted the United States to impose sanctions on Pakistan for alleged violations of the GATT Agreement.
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. None of the parties to this dispute question the genuineness of the commitment of the others to that policy. 

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. 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).

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 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. 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. This requirement is, in our view, directly connected with the policy of conservation of sea turtles. It is indisputable among the participants, and recognized by the experts consulted by the Panel, 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." 138

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, 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.

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120 See the 1996 Guidelines, p. 17343.
121 See the 1996 Guidelines, p. 17343.
122 For example, Panel Report, paras. 5.91-5.118.
123 Panel Report, para. 7.60, footnote 674.
124 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).

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

[An 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

131See the 1996 Guidelines, p. 17343.
132According 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.
133Endangered Species Act, Section 11.
134Statement by the United States at the oral hearing.
135Statement by the United States at the oral hearing.
136United States appellant's submission, para. 28.
137United 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 1949, 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 1990s. 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, …

153. We note once more143 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.144

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, …

In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development145, Agenda 21146, and "its follow-up in the GATT, as reflected in the statement of the Council of..."
Representatives to the CONTRACTING PARTIES at their 48th Session in 1992 . . .

We further note that this Decision also set out a relationship between trade measures and environmental preservation and protection should be mutually supportive. For example, paragraph 2.3 of Agenda 21 states: "The international economy should provide a supportive international climate for achieving environmental and development goals by . . . making trade and environment mutually supportive . . . ."

149 Preamble of the Decision on Trade and Environment.

150 Decision on Trade and Environment.

151 Article 12 of the Vienna Convention permits an oral declaration in the context of the relevant provisions of the GATT 1994, as well as under the GATT 1994, in particular.

152 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 1946.

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 1946, was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

154 In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 of the United States Tariff Act of 1930, which stated: . . . "the international economy should provide a supportive international climate for achieving environmental and development goals by . . . making trade and environment mutually supportive . . . ." Similarly, paragraph 2.9(d) of Agenda 21 states: . . . international measures to attain results, which are irreconcilable with the open, equitable and non-discriminatory nature of the system, as regards, in particular:

155 With these instructions, the General Council of the WTO established the CTE in 1995, and the CTE began its important role in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the WTO Agreement.

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 rights of a Member to invoke an exception under Article XX and the duties of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse the right of a Member to invoke an exception, such as Article XX(g), if its right is 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 and the duties of that same Member to respect the treaty rights of the other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent abuse of the exceptions in paragraphs (a) to (j) of Article XX, which set out the following terms of reference for the CTE:

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 entitled "General Exception" and . . . the central phrase in the introductory clause reads: "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: . . . .

158 The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional. 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.

159 In November 1946, the United Kingdom proposed . . . to identify the relationship between trade measures and environmental measures, in order to promote sustainable development in particular. The draft developed among them, and the need for rules to enhance positive interaction between trade and environmental measures, with special consideration to the need of developing countries, for the promotion of sustainable development, in particular those of the least developed among them.

160 The concept of mutual support was first introduced in Agenda 21 at the United Nations Conference on Environment and Development in 1992. It was later expressed in the adoption of Agenda 21, Agenda 21.1 and Agenda 21.2, which stated: . . . international measures to attain results, which are irreconcilable with the open, equitable and non-discriminatory nature of the system, as regards, in particular:


Article XX]

With these general considerations in mind, we address now the issue of whether the chapeau of this provision should be qualified. 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 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.

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.

According to the 1996 Guidelines, certification shall be made by the government of the United States of America in the case of a measure that is applied in an arbitrary or unjustifiable manner. In the view of the Court, a measure that is not applied in such a manner that the measure is not comparable to that of the United States, it shall not be considered as an exception under Article XX.

The location of the line of equilibrium, as expressed in the chapeau, is...
effort. 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," 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 trawler vessels.

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 trawler 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. 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 trawler 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 judgment. 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. (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;

162 Ibid.
163 Statements by the United States at the oral hearing.
164 Statement by the United States at the oral hearing.
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, and in the development of a mutually supportive relationship between them, due respect must be afforded to both.  

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. In addition to the United States, and four of these countries are currently certified under Section 609. The Inter-American 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. Such measures include, notably,

[i]the 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,

Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles (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.  

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. 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.

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 transboundary problems should, as far as possible, be based on international consensus.
devices or techniques, including the use of turtle excluder devices (TEDs) pursuant to the provisions of Annex III of the Convention. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the opening of such policies to the public, are all shaped by the Department of State bringing shrimp harvested in the United States Court of International Trade directed the Department of State to apply the import ban on all commercial shrimp-turtle trading vessels by May 1996. The United States 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. The effect of this discrimination emerges clearly when 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. The Department of State, as we have noted, has not been willing to engage in discussions with any other country group of countries before 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 the turtles. The absence of such action is, therefore, not attributable to the failure of the United States to comply with any of its obligations under the import ban. The United States sought to explain the marked difference between “phase-in” periods by seeking 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 marketing efficient and effective “turtle excluder devices”.

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, and Article XI of the General Agreement on Tariffs and Trade of 1994. The juxtaposition of (a) the international undertakings to put in place regulations providing for, and (b) the reaffirmation of the parties' obligations under 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, suggests that the parties have understood the implications of the import ban.

The principal Article of the Inter-American Convention also provides, in part:

1. In implementing this Convention, the Parties shall act in accordance with the provisions of this Convention and the provisions of the Agreement establishing the World Trade Organization (WTO), as adopted at Marrakesh in 1994.
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 appellants. 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. 180

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. 181 Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. 182 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. 183

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 ... " 184 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. 185 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. 186

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. 187 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). 188 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 189 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. 190 No procedure for review of, or appeal from, a denial of an application is provided. 191

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.

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178For 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 ..."

179Response by the United States to questioning by the Panel; statements by the United States at the oral hearing.

180Supra paras. 161-164.

181In 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 exclusion 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. The provisions of Article X:3 of the GATT 1994 bear upon this matter. In our view, discrimination between countries, where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States – Gasoline (DSU), WTO Members are free to adopt their own policies aimed at protecting the environment or fulfilling their obligations under the treaty. But, as we noted, such policies must not be applied in a discriminatory manner.

183. 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 pro hac vice nature of the internal governmental procedures for reviewing and approving the applications in question take the form of a “disguised restriction on international trade” under the chapeau of Article XX. Therefore, 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 of the treaty rights of other Members.

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 justifying protection of Article XX of the WTO Agreement. The measure, therefore, fails to meet the requirements of the chapeau of Article XX of the GATT 1994, and, therefore, is not justified under 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 which amounts to “arbitrary discrimination” between countries.

185. In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided the question of the measure’s validity. We have not decided whether the United States measure is applied in a manner which amounts to “arbitrary discrimination” between countries. We have not decided that the protection and preservation of the environment is of no significance to the United States. We have not decided that the United States has failed to adopt effective measures to protect endangered species, such as sea turtles. We have not decided whether the United States measure is applied in a manner which amounts to “arbitrary discrimination” between countries. We have not decided that the protection and preservation of the environment is of no significance to the United States. We have not decided that the United States has failed to adopt effective measures to protect endangered species, such as sea turtles.
World Trade Organization

Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef

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1. 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"). 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"). 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, 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 II: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 Article III:4 of the GATT 1994; that discharge practices 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 II:4 of the GATT 1994; that 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 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, is 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; 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. 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 on 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. 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 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, is 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; 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

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2The 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.

3Panel Report, para. 49.
4Ibid., 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.

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

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 each filed an appellee's submission. On the same day, Canada and New Zealand each filed a third participant's submission. 8

The oral hearing in the appeal was held on 23 and 24 October 2000. The participants and third parties 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

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. Therefore, Korea should be considered per se to have suffered prejudice.

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 "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

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.

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.

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 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.

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.

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
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 II: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.
annual commitment levels, and that no provision of the Agreement on Agriculture authorizes such a departure from the norm of 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 that regard. 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.

35. In Australia's view, the Panel was correct when it found that the design and architecture of the dual retail system constitutes, in the dual retail system and related measures clearly provide less favorable treatment for imported beef. Australian states that stores selling imported beef have customer rights and restrictions, and packaging and advertising that are less favorable than stores selling domestic beef. The Panel correctly concluded that it could not assess whether Korea was in breach of its obligations under 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's Schedule of Measures contains the obligations specified in Annex 3.

36. Australia contends that the calculation methodology used by Korea to determine its Current Total AMS was correct when it found that the design and architecture of the dual retail system and related measures clearly provide less favorable treatment for imported beef. Australian states that stores selling imported beef have customer rights and restrictions, and packaging and advertising that are less favorable than stores selling domestic beef. The Panel correctly concluded that it could not assess whether Korea was in breach of its obligations under 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's Schedule of Measures contains the obligations specified in Annex 3.

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38. Australia claims the Panel was correct when it found that the design and architecture of the dual retail system constitutes, in the dual retail system and related measures clearly provide less favorable treatment for imported beef. Australian states that stores selling imported beef have customer rights and restrictions, and packaging and advertising that are less favorable than stores selling domestic beef. The Panel correctly concluded that it could not assess whether Korea was in breach of its obligations under 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's Schedule of Measures contains the obligations specified in Annex 3.

39. Australia submits that the burden was on Korea to demonstrate that the dual retail system falls within one of the exceptions of Article X of the Agreement on Agriculture. Korea has to demonstrate that there was no other alternative measure it could reasonably have adopted to achieve the same result. The Panel has correctly concluded that the dual retail system constitutes, in the dual retail system and related measures clearly provide less favorable treatment for imported beef. Korean states that stores selling imported beef have customer rights and restrictions, and packaging and advertising that are less favorable than stores selling domestic beef. The Panel correctly concluded that it could not assess whether Korea was in breach of its obligations under 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's Schedule of Measures contains the obligations specified in Annex 3.

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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
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 introductory clause of Article XX, the Appellate Body should then complete the legal analysis and find that the dual retail system does not constitute discrimination within the meaning of the introductory clause.

Korea recognizes the Panel's finding that the display sign requirement is discriminatory. However, it argues that the Panel's determination that the display sign requirement is "necessary" to secure compliance with the introductory clause of Article XX is not supported by the legal analysis of the dual retail system. According to Korea, the display sign requirement is not "necessary" to secure compliance with the introductory clause of Article XX because the dual retail system is not discriminatory.

Finally, the United States argues that the display sign requirement is "necessary" to secure compliance with the introductory clause of Article XX because the dual retail system is discriminatory.

**D. Arguments of the Third Participants**

1. **Canada**

   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 with the Agreement on Agriculture. Rather, the United States argues that the Panel employed a "minimal" standard to determine whether Korea's dual retail system is consistent with the Agreement on Agriculture.

   In addition, the United States argues that if the Appellate Body finds Korea's dual retail system to be inconsistent with the Agreement on Agriculture, it should then complete the legal analysis and find that the dual retail system does not satisfy the requirements of the introductory clause of Article XX.

2. **New Zealand**

   New Zealand argues that it is within the Panel's terms of reference to examine the calculation methodology of AMS in order to determine whether Korea's Total AMS exceeds its commitment levels, in violation of Articles 3, 6 and 7 of the Agreement on Agriculture.

   In particular, New Zealand argues that the calculation methodology of AMS 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's terms of reference, defines AMS as "the amount of support provided under the Agreement on Agriculture in respect of domestic production for agricultural products."
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. 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.

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" 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.
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 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 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:

14Ibid., para. 815.
15Korea's appellant's submission, paras. 15-25.
16Ibid., paras. 65-70.
17WT/DS161/6, WT/DS169/6; see also Article 7.1 of the DSU.
18WT/DS161/5, WT/DS169/5.
20Supra, para. 78.
Any domestic support measure in favour of agricultural producers, including any modification to such a measure, as well as any measure 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.

85. AMS and Total AMS are defined in Article 1 of the Agreement on Agriculture, entitled “Definition of Terms”. According to Article 1(a)(ii)

The claims of the complaining parties were that Korea’s domestic support for beef had increased beyond the levels specified in Part IV of Korea’s Schedule. The Panel was asked to determine whether Current AMS for beef was to be included in Current Total AMS.

86. While Article 1(h)(ii) uses the terms “provisions of this Agreement”, Article 1(a)(ii) is more specific, referring to “the provisions of Annex 3 of this Agreement”, 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.

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. However, we held that the “terms of Article 4.2(c) of the Agreement on Agriculture expressly incorporate the provisions of Article 3” of the Agreement on Safeguards. We also held that “the ‘provisions of Article 3’ of the Agreement on Agriculture should be read as including the provisions of Annex 3”. In that case, we stated that Article 4.2(c) of the Agreement on Safeguards “must be construed in accordance with the provisions of Annex 3 to the Agreement on Agriculture”. We believe the same approach appropriately applies here.

We note 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 was calculated specifically, 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.

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 was calculated specifically, 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.


22 Ibid.

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 \textit{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 \textit{Agreement on Agriculture}.\textsuperscript{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 \textit{not} in brackets constituted Korea's commitment levels.\textsuperscript{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 \textit{de minimis} level set out in Article 6.4 of the \textit{Agreement on Agriculture}. The Panel found that Current AMS for beef exceeded the \textit{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 \textit{Agreement on Agriculture}.\textsuperscript{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 \textit{Agreement on Agriculture}.\textsuperscript{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.\textsuperscript{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 \textit{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 (a)(ii) and (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 \textit{de minimis} level established in Article 6.4 of the \textit{Agreement on Agriculture}. Therefore, Korea argues, Current AMS for beef need not be included in Current Total AMS.\textsuperscript{30}

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 \textit{Agreement on Agriculture}, and in finding, secondly, that, contrary to Article 3.2 of the \textit{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:

<table>
<thead>
<tr>
<th>Base Total AMS</th>
<th>Annual and final bound commitments level 1995 - 2004</th>
<th>Relevant Supporting Tables and document reference</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>bil. ₩</td>
<td>bil. ₩</td>
</tr>
<tr>
<td>1,718.6</td>
<td>1,695.74 (2,182.55) Note 1 AGST/KOR (Supporting Table 4, 5, 6, 7, 8 and 10)</td>
<td></td>
</tr>
<tr>
<td>1995: 1,672.90 (2,105.60)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1996: 1,650.03 (2,028.65)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997: 1,627.17 (1,951.70)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998: 1,604.32 (1,874.75)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999: 1,581.46 (1,797.80)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000: 1,558.60 (1,720.85)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001: 1,535.74 (1,643.90)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002: 1,512.89 (1,566.95)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003: 1,490.00 (1,490.00)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*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.\textsuperscript{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."\textsuperscript{32} Therefore, Korea's commitment level for 1997 is 1,650.03 billion won, while the commitment level

\textsuperscript{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.

\textsuperscript{26}Panel Report, para. 821.

\textsuperscript{27}Ibid., para. 841.

\textsuperscript{28}Ibid., para. 843.

\textsuperscript{29}Korea's appellant's submission, paras. 26-54.

\textsuperscript{30}Ibid., paras. 79-90.

\textsuperscript{31}Panel Report, para. 820.

\textsuperscript{32}Ibid., para. 822.
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 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...
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. 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 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". 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". 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".

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".

...
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".\(^{40}\) 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.\(^{40}\) 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)(i) – 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:

\[
\text{National schedules on the reduction of subsidies in favour of agricultural products ... can be understood as multi-year equations. One side of the equation includes the commitment level for a given year, while the other side of the equation includes the actual AMS for the same year. Thus, for the equation to be meaningful, both sides of the equation should be based on the same sets of data and methodology. ... Using one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results.}\]

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 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 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 and 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:

\[
\text{... market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.}
\]

\[
\text{The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary. (emphasis added)}
\]

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.\(^{52}\)

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...

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." 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 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 benefited, 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

56Panel Report, para. 831.
58Panel Report, para. 834.
59Panel Report, para. 838.
60Ibid., para. 840.
61This seems to be the meaning of the words "inflating Korean'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.
62In 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:

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".68 (emphasis added)

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".68 (emphasis added)

136. This interpretation, which focuses on the conditions of competition between imported and domestic like products, implies that a measure accorded 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:

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63Panel Report, para. 627.
64Ibid., paras. 631-637.
65Korea's appellant's submission, paras. 119-126.
66Ibid., paras. 127-156.
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. 77

(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."

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." 72 This disadvantage would be more serious when the market share of imports (as is the case with imported beef) is small. 72 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. 72 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, "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 on 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...
A retailer selling imported beef is required to display a sign reading "Specialized Imported Beef Store." This measure is intended to separate the selling of imported beef and domestic beef. However, it is important to note that the sign requirement might or might not be characterized legally as consistent with Article III:4 of the GATT 1994. On the other hand, the measure, which is intended to create a dual retail system for beef, has been found to be inconsistent with the requirements of Article III:4 of the GATT 1994.

Accordingly, a new and separate retail system had to be established and gradually built from the ground up for bringing goods, domestic and imported, to compete in the market within a Member's territory. This system is called the dual retail system, which is formally established for beef by Korean law and regulation. However, this system, in and of itself, does not necessarily compel the conclusion that the treatment accorded to imported beef is less favorable than the treatment accorded to domestic beef. The Panel found that the dual retail system was inconsistent with Article III:4 and that, consequently, the Korean measure is unlawful under Article III:4 of the GATT 1994.

Finally, we note that Korea requires that imported beef be sold in stores displaying a sign indicating the origin of the imported beef. The number of domestic beef shops has been provided by the United States in para. 175 of the Panel Report, and has been consistently used as a basis for comparing the number of domestic beef shops with the number of specialized imported beef stores.

Korea's appellant's submission, para. 6.41.

The number of specialized imported beef stores was not an option remaining with the pre-existing unified distribution system for domestic beef.
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:

...
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". We note, however, that a standard law dictionary cautions that:

[This 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 requisite 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].

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 "invaluable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill 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".

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". 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 protected by that law or regulation, and the accompanying impact of the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

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 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; 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.

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 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.

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

Footnotes:
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 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, para. 141.
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.
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. Nor is there a requirement for a dual retail system for any other meat or food product, such as pork or seafood. 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. Yet, in all of these cases, the Panel found that there were numerous cases of fraudulent misrepresentation. 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 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. This law provides for penal and other sanctions against any "unfair competitive act", which includes any:

109Ibid., para. 662.
110Ibid., para. 663.
111Ibid., 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)."
112Ibid., para. 664.
113Korea's appellant's submission, para. 167.
114In 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 39/206, 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 courts 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.
115Unfair 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

116Unfair 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.
117Panel Report, para. 664.
118Panel Report, para. 665.
119Ibid., para. 674.
120Ibid., para. 675.
121Ibid.
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." 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. 130

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. 132 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. 133 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". 134

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". 135 And we accept Korea's argument that the dual retail system facilitates control and permits combating 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.

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. 136 On fines, the Panel found that these could be an effective deterrent, as long as they outweighed the potential profits from fraud. 137 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. Finally, on policing, the Panel noted that Korea had not demonstrated that the costs would be too high. 138 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". 139 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". 140

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 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, and that the dual retail system is therefore not justified by Article XX(d). 141

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

125Korea's appellant's submission, para. 182.
126Ibid., para. 181.
127Ibid., paras. 181, 185.
128Ibid., para. 192.
129Panel report, United States – Section 337, supra, footnote 69, para. 5.26.
130Panel Report, para. 658.
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; and

(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

136Korea's appellant's submission, paras. 217-223.
World Trade Organization

European Communities — Measures Affecting Asbestos and Asbestos-Containing Products

Report of the Appellate Body, 12 March 2001
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1. TBT Agreement
2. Article XX(b) of the GATT 1994 and Article 11 of the DSU

### B. Arguments of the European Communities – Appellee

1. TBT Agreement
2. Article XX(b) of the GATT 1994 and Article 11 of the DSU

### C. Claims of Error by the European Communities – Appellant

1. "Like Products" in Article III:4 of the GATT 1994
2. Article XXIII:1(b) of the GATT 1994

### D. Arguments of Canada – Appellee

1. "Like Products" in Article III:4 of the GATT 1994
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## VI. "Like Products" in Article III:4 of the GATT 1994

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### B. Meaning of the Term "Like Products" in Article III:4 of the GATT 1994

### C. Examining the "Likeness" of Products under Article III:4 of the GATT 1994

### D. The Panel's Findings and Conclusions on "Likeness" under Article III:4 of the GATT 1994

1. Overview
2. Chrysotile and PCG fibres
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### E. Completing the "Like Product" Analysis under Article III:4 of the GATT 1994

1. Chrysotile and PCG fibres
2. Cement-based products containing chrysotile and PCG fibres
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.

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\(^1\) 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. 1

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.2

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 1994.3

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 1994.4

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").5 On 16 November 2000, Canada filed an appellant's submission.6 On 21 November 2000, the European Communities filed an other appellant's submission.7 On 1 December 2000, Canada and the European Communities each filed an appellee's submission.8 On the same day, Brazil and the United States each filed a third participant's submission.9

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

1 WT/DS135/R/Add.1, pp. 3-6.
2 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.
3 Panel Report, para. 9.1.
4 Ibid., para. 8.159.
5 WT/DS135/8, 23 October 2000.
6 Pursuant to Rule 21(1) of the Working Procedures.
7 Pursuant to Rule 21(1) of the Working Procedures.
8 Pursuant to Rule 22 and 23(3) of the Working Procedures.
9 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
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

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.

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
also found that the Decree is a technical regulation. 12

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... 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.

16. In Canada’s view, the Decree is inconsistent with Article 2.2 of the TBT Agreement.
Insists, first, that there is no rational connection between the Decree and France’s objective of
insisting, second, that the Decree 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.

13. Canada challenges the Panel’s conclusion that the Decree was not a technical regulation under Annex 1 to the
TBT Agreement. The Panel erred in law in failing to examine Canada’s allegations under the
general prohibition like the one in the Decree. The Panel erred in interpreting the definition of the term “technical regulation” in Annex 1 to the
TBT Agreement. This interpretation adds requirements to the definition of “technical regulation” that have no basis in the text of the
TBT Agreement.

constitute an effective and appropriate means to achieve France's objective of protecting human health. This premise does not take account of the risk associated with the use of substitute fibres, or of the false sense of security created among the French public due to the absence of alternative regulations. The Panel also found that the Decree is inconsistent with Article 2.4 of the GATT 1994, which requires that measures be based on objective and verifiable criteria. Canada argues that the Decree is inconsistent with Article 2.8 of the TBT Agreement, which emphasizes that descriptive characteristics of products, rather than requirements in terms of performance.

22. Canada submits that the Panel failed to discharge its responsibility to make an objective assessment of the measures adopted by France. The Panel based the Decree on the recommendation of the French government, which was made inconsistent with the GATT 1994, and did not consider the risk associated with the use of substitute fibres. Canada also argues that the Panel failed to consider the impact of the Decree on the international trade of asbestos-containing products.

23. The European Communities urges the Appellate Body to reject Canada's appeal on the grounds that the Panel correctly assessed the measures adopted by France. The European Communities argues that the Decree is consistent with the GATT 1994, and does not violate Article 2.4 of the Agreement. The European Communities also contends that the Panel correctly interpreted the provisions of the TBT Agreement and the European Communities regulations concerning international rules for asbestos.

24. The European Communities argues that the Panel correctly assessed the measures adopted by France. The European Communities contends that the Decree is consistent with the GATT 1994, and does not violate Article 2.4 of the Agreement. The European Communities also contends that the Panel correctly interpreted the provisions of the TBT Agreement and the European Communities regulations concerning international rules for asbestos.

25. The European Communities agrees with the Panel's findings that the Decree is consistent with the GATT 1994, and does not violate Article 2.4 of the Agreement. The European Communities also agrees with the Panel's interpretation of the TBT Agreement and the European Communities regulations concerning international rules for asbestos.
continuum", 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 quantitave 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 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.

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.

30. 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". The European Communities contends that 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.

31. 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 imports the treatment accorded to domestic products that are the subject of the relevant measure.

32. 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 European Communities challenges the Panel's conclusion that 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".

33. 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". 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

23European Communities' other appellant's submission, para. 29.
24Panel 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 factors were to be taken into account, the Panel’s interpretation would be inconsistent with the approach it applied in other cases and thus constitute an error of law. Paragraph 8.264 of the Panel Report, on which the European Communities relies in its appeal, does not provide a satisfactory basis for the Panel’s interpretation. The Panel erred in its approach to the case-law on the commercial character of a measure, and the Appellate Body should return the case to the Panel for a redetermination of the question of the Panel’s interpretation of paragraph 8.264 of the Panel Report.


26, para. 8.264.

Ibid

35. The European Communities contends that the Panel committed a major error in its approach to the issue of whether the measures are taken for commercial reasons. The Panel, according to the European Communities, failed to pay adequate attention to the commercial character of the measures in question. The Panel’s approach was flawed in several respects. First, the Panel failed to consider the nature of the measures. Second, the Panel’s analysis improperly focused on the commercial character of the measures, while ignoring their regulatory character. Third, the Panel did not adequately consider the nature of the measures. Fourth, the Panel’s approach to the commercial character of the measures was inconsistent with the approach applied in previous cases. The European Communities submits that the Panel’s error of law is manifest. The Panel, in its appeal, argues that its interpretation of paragraph 8.264 of the Panel Report is supported by the case-law. This argument is unconvincing. The Panel’s interpretation of paragraph 8.264 is inconsistent with the case-law as interpreted by the Appellate Body. The Panel’s interpretation of paragraph 8.264 is therefore an error of law.

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 findings on Article XXIII:1(a). The European Communities argues that the Panel incorrectly applied the law. The Panel, according to the European Communities, failed to consider the nature of the measures. The Panel’s approach to the commercial character of the measures was inconsistent with the approach applied in previous cases. The European Communities submits that the Panel’s error of law is manifest. The Panel, in its appeal, argues that its interpretation of paragraph 8.264 of the Panel Report is supported by the case-law. This argument is unconvincing. The Panel’s interpretation of paragraph 8.264 is inconsistent with the case-law as interpreted by the Appellate Body. The Panel’s interpretation of paragraph 8.264 is therefore an error of law.

37. The European Communities challenges, in particular, the Panel’s conclusion that the measures are taken for non-commercial reasons. The Panel, according to the European Communities, failed to consider the nature of the measures. The Panel’s approach to the commercial character of the measures was inconsistent with the approach applied in previous cases. The European Communities submits that the Panel’s error of law is manifest. The Panel, in its appeal, argues that its interpretation of paragraph 8.264 of the Panel Report is supported by the case-law. This argument is unconvincing. The Panel’s interpretation of paragraph 8.264 is inconsistent with the case-law as interpreted by the Appellate Body. The Panel’s interpretation of paragraph 8.264 is therefore an error of law.

38. The European Communities argues that the Panel wrongly interpreted paragraph 8.264 of the Panel Report. The Panel, according to the European Communities, failed to consider the nature of the measures. The Panel’s approach to the commercial character of the measures was inconsistent with the approach applied in previous cases. The European Communities submits that the Panel’s error of law is manifest. The Panel, in its appeal, argues that its interpretation of paragraph 8.264 of the Panel Report is supported by the case-law. This argument is unconvincing. The Panel’s interpretation of paragraph 8.264 is inconsistent with the case-law as interpreted by the Appellate Body. The Panel’s interpretation of paragraph 8.264 is therefore an error of law.

39. Canada requests the Appellate Body to dismiss the European Communities’ appeal relating to determination whether the measures are taken for non-commercial reasons. The Panel’s approach to the commercial character of the measures was inconsistent with the approach applied in previous cases. The European Communities, in its appeal, argues that its interpretation of paragraph 8.264 of the Panel Report is supported by the case-law. This argument is unconvincing. The Panel’s interpretation of paragraph 8.264 is inconsistent with the case-law as interpreted by the Appellate Body. The Panel’s interpretation of paragraph 8.264 is therefore an error of law.

40. Canada considers that the Panel properly applied the criteria set out in the case law for determining whether products are taken for non-commercial reasons. The Panel, according to Canada, correctly determined that the measures are taken for non-commercial reasons. The Panel’s approach to the commercial character of the measures was consistent with the approach applied in previous cases. The European Communities, in its appeal, argues that its interpretation of paragraph 8.264 of the Panel Report is supported by the case-law. This argument is unconvincing. The Panel’s interpretation of paragraph 8.264 is inconsistent with the case-law as interpreted by the Appellate Body. The Panel’s interpretation of paragraph 8.264 is therefore an error of law.
to be authorized for marketing. Brazil adds that, in its view, both France and the European Communities would allow national regulatory authorities to predetermine the scope of the TBT Agreement, leading to a technical regulation.

46. The United States argues that the Decree is not a technical regulation in the context of the GATT, as it does not meet the requirements of Article XXIII:1(b) of the GATT 1994. According to Brazil, the Decree is not a technical regulation in the sense of Article XXIII:1(b) of the GATT 1994 because it is not a measure that has a significant effect on international trade, but rather a measure that has a negligible effect on international trade. The United States argues that the Decree is not a measure that has a significant effect on international trade because it does not restrict trade in a way that would be material to the functioning of markets.

47. Brazil argues that the Decree is a technical regulation because it is a measure that has a significant effect on international trade. Brazil contends that the Decree is a measure that has a significant effect on international trade because it is a measure that is applied to asbestos-containing products, which have a significant effect on international trade.

48. The United States argues that the Decree is not a technical regulation because it is not a measure that has a significant effect on international trade. The United States contends that the Decree is not a measure that has a significant effect on international trade because it is not a measure that is applied to asbestos-containing products, which have a significant effect on international trade.

49. Brazil argues that the Decree is a technical regulation because it is a measure that has a significant effect on international trade. Brazil contends that the Decree is a measure that has a significant effect on international trade because it is a measure that is applied to asbestos-containing products, which have a significant effect on international trade.

50. Brazil argues that the Decree is a technical regulation because it is a measure that has a significant effect on international trade. Brazil contends that the Decree is a measure that has a significant effect on international trade because it is a measure that is applied to asbestos-containing products, which have a significant effect on international trade.
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. 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. 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:

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 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 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.

29WT/DS135/9, 8 November 2000.
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 written 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, who intends to file a written brief with the Appellate Body by an applicant granted leave to file a written brief shall:
   (a) date and sign the brief on Monday, 27 November 2000;
   (b) be concise and in no case longer than 20 typed pages, including any appendices, and 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.

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 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 to file a written brief shall, in addition, to filing its written brief with the Appellate Body, also serve a copy of the written brief on all the parties and third parties to the dispute by noon Monday, 27 November 2000.

9. The parties and the third parties to this appeal shall give a full and fair response to any written brief filed with the Appellate Body by an applicant granted leave under this procedure.

10. 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.

11. Pursuant to the Additional Procedure, the Appellate Body received 17 applications requesting leave to file a written brief. Six of these 17 applications were received after the deadline for receipt of such applications. The Appellate Body denied these six applications for failure to comply sufficiently with all the requirements set forth in paragraph 2 of the Additional Procedure.

12. We received a written brief from the Foundation for International Environmental Law and Development, on behalf and on behalf of Ban Asbestos (International and Virtual) Network, Development, on behalf of Ban Asbestos (International and Virtual) Network, Development, on behalf of Ban Asbestos (International and Virtual) Network, Development, on behalf of Ban Asbestos (International and Virtual) Network, Development, on behalf of Ban Asbestos (International and Virtual) Network.

13. We decided to deny leave to these applicants to file a written brief. See supra, para. 56 and footnote 32.
(c) whether the Panel erred in its interpretation of the term "like products" in Article III:4 of the GATT 1994 in finding, in paragraph 8.144 of the Panel Report, that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres; 

62. Canada appeals the Panel's finding that the TBT Agreement does not apply to the part of the Decree relating to the exceptions to those prohibitions, namely Articles 3 and 4 of the Decree. In support of its appeal, Canada argues that the Panel erred in examining the Decree as two separate and distinct measures; and that, therefore, the Panel should have examined the Decree as a single, unified measure, as required by the TBT Agreement.

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. The Panel erred in interpreting Decree 96-1133 as two separate and distinct provisions, namely Articles 1 and 2 of the Decree, which, in the Panel's view, do not constitute a "technical regulation".

64. In our view, the proper legal character of the measure at issue cannot be determined unless the imposition of penalties for violation of the prohibitions in Article 1 (Article 5) is examined together with the measure at issue itself. The measure at issue has both prohibitive and permissive elements, and is, therefore, a "technical regulation".

65. Accordingly, we reverse the Panel's two-stage interpretive approach of examining, first, the application of the TBT Agreement to that 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. In concluding that the part of the Decree containing the prohibitions is not a technical regulation, the Panel found that:

(a) the measure affects one or more given products;
(b) the measure specifies the technical characteristics of the products to which it applies.

37 WT/DS135/3. In its request for the establishment of a panel, Canada stated:

Canada requested that the Panel find that Decree No. 96-1133 is inconsistent with the European Communities' WTO obligations. 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.

38 WT/DS135/4. In paragraph 144 of the Decree, and in finding that certain products containing asbestos are "like" asbestos-containing products, the Panel erred in interpreting the term "asbestos-containing products" to mean products containing asbestos fibers, and in finding that the term "asbestos-containing products" as used by the EU, in the context of the Decree, includes products containing asbestos fibres.

39 The full text of the Decree is reproduced in Annex I in the Addendum to the Panel 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:

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. 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. 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 1 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.

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. 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". 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.

"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.

Article 5 of the Decree characterizes a contravention of any aspect of Articles I.1 or I.11 as a "5th class offence.

Article 2.11 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".

Compliance with these administrative requirements is mandatory. For these reasons, we conclude that the measure constitutes a "technical regulation" under the TBT Agreement.

We observe that, although the TBT Agreement is intended "to avoid unnecessary obstacles to international trade", it 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.

We note, however, that this does not mean that all internal measures concerning the importation of asbestos and asbestos-containing products are covered by the Decree. We therefore reverse the Panel's finding, in paragraphs 8.76 and 8.78 of the Panel Report, that the Decree "further the objectives of GATT 1994", "is intended to "further the objectives of GATT 1994", and "is intended to "further the objectives of GATT 1994". Rather, we rule only that this particular measure, the Decree as a whole, falls within the definition of a 'technical regulation' given in Annex 1.1 of the TBT Agreement.

As we have reached a different conclusion from the Panel regarding the applicability of the Decree to the facts of the case (see, for instance, Appellate Body Report, supra, footnote 15, at 18 ff; Appellate Body Report, supra, footnote 15, at 18 ff; Appellate Body Report, supra, footnote 15, at 18 ff), we observe that, although the Decree was adopted by Canada relating to the exportation of asbestos and asbestos-containing products, the Decree as a whole, falls within the definition of a 'technical regulation' given in Annex 1.1 of the TBT Agreement.

We have therefore determined that the measure constitutes a 'technical regulation' under the TBT Agreement. We observe that, although the TBT Agreement is intended "to avoid unnecessary obstacles to international trade", it 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.

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.

83. As we have reached a different conclusion from the Panel regarding the applicability of the Decree to the facts of the case (see, for instance, Appellate Body Report, supra, footnote 15, at 18 ff; Appellate Body Report, supra, footnote 15, at 18 ff; Appellate Body Report, supra, footnote 15, at 18 ff), we observe that, although the Decree was adopted by Canada relating to the exportation of asbestos and asbestos-containing products, the Decree as a whole, falls within the definition of a 'technical regulation' given in Annex 1.1 of the TBT Agreement.

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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. The term is also key concept in the Agreement on Implementation of Article VI of the GATT 1994. Thus, this appeal provides us with our first occasion to examine the meaning of the word "like" in Article VI.

Background

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. Indeed, the term "like products" has appeared in many different disputes and has been interpreted in various ways. It is a term that is used in various agreements and has been defined in different contexts.

The term "like products" is defined in Article III:4 of the GATT 1994 as follows:

"The products of the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of the territory of any other Member." (emphasis added)

In examining the "likeness" of these two sets of products, the Panel adopted an approach that is based on the Report of the Working Party on Border Tax Adjustments. Under that approach, the Panel employed a general criterion of "likeness" to determine whether the products are "like". The Panel also considered the principles of Article III:3 of the GATT 1994 and the principles of Article VI of the GATT 1994.

On appeal, the European Communities' other appellant's submission, para. 45. The Panel's approach is set forth in para. 8.111 of the Panel Report. In addition, the term "like commodity" appears in Article VII:7 and the term "like merchandise" is used in Article III:4 of the GATT 1994.
This dictionary definition of "like" does not indicate from whose perspective "likeliness" of two products 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.

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 covered agreement in which the provision appears. Accordingly, as we observed in an earlier case concerning Article III:1 of the GATT 1994:

92. However, as we have previously observed, "dictionary meanings leave many interpretive questions open." In particular, this definition does not resolve 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. But in the abstract, the term "like" can encompass a spectrum of differing degrees of "similarity." Third, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity." Hence, the interpretation of the provision in this case requires an examination of the particular context in which the term is used and of the agreement as a whole.

Accordingly, interpreting the term "like" in Article III:4, 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.

94. 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 obligations that apply to "like products" and "similar products," while Article III:4 contains only one obligation that applies to "like products". Accordingly, interpreting the term "like" in Article III:4, 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.

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"substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the 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.

"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 categories is important because there is no sharp distinction between these two types of products. The first category includes all products which are in competitive relationship with domestic products, and the second category includes only those products which are "directly competitive or substitutable" with domestic products. In view of this, we conclude that the first sentence of Article III:2 of the GATT 1994 should be read narrowly.

We recognize that, by interpreting the term "like products" in Article III:4 in this way, we give that provision a broader scope than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established in order to prove a violation of Article III:4. This element is the application of a measure... on the products in question. We note, however, that Article III:4 extends only to "like" products, whereas Article III:2 extends to products that are "directly competitive or substitutable" with domestic products. Therefore, we conclude that the product scope of Article III:4 is broader than the product scope of the two sentences of Article III:2 of the GATT 1994.

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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) the use of the products; and (iv) the tariff classification of the products. The Panel also declined to "take a position or comment upon the different "tariff classifications" of the products."

Under the second criterion, "the nature and quality of the products", the Panel stated that it had already found, under the first criterion, that "certain identifiable shared characteristics" of the products were "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.

Based on this reasoning, the Panel concluded that "chrysotile asbestos fibres and PVA, cellulose and glass fibres are like". 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 the "same applications" and can "replace each other". 78 The Panel also declined to "introduce a criterion on the risk of a product". 79

Finally, the Panel did not regard as "decisive" the different "tariff classifications" of the products. 80 The Panel declined to "take a position" on "consumers' tastes and habits", the third criterion, "because this criterion would not provide clear results". 81 The Panel observed that consumers' tastes and habits are "very varied". 82

In our analysis of this issue on appeal, we begin with the Panel's findings on the "likeness" of the "chrysotile asbestos fibres and PCG fibres". 83 It is our view that the Panel should have examined the evidence relating to each of those criteria and, then, weighed all of that evidence, along with any other relevant evidence, before reaching any conclusion. 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 – and failed to include consideration of the health "risk" factors relating to asbestos.

The Panel's Findings and Conclusions on "Likeness" under Article III:4 of the GATT 1994

In our analysis of this issue on appeal, we begin with the Panel's findings on the "likeness" of the "chrysotile asbestos fibres and PCG fibres". 83 It is our view that the Panel should have examined the evidence relating to each of those criteria and, then, weighed all of that evidence, along with any other relevant evidence, before reaching any conclusion. 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 – and failed to include consideration of the health "risk" factors relating to asbestos. 84

We note that these four criteria comprise four general criteria for analyzing the "likeness" of products on a case-by-case basis. These criteria are, it is to be expected, relevant to a particular products and the legal provision at issue. When all the relevant evidence has been examined, the determination of whether the products at issue could be characterized as "like" will necessarily depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, the determination of whether the products at issue could be characterized as "like" will necessarily depend upon the particular products and the legal provision at issue. 85 Applying the reasoning from its report, the Panel concluded that these cement-based products are "like." 86
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." 90 (emphasis added) The Panel expressly acknowledged that, based on physical properties alone, "[i]t could ... be concluded that [the fibres] are not like products." 90 (emphasis added) However, to overcome that fact, the Panel adopted a "market access" approach to this first criterion. 91 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 fibres.

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 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. 93 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 asbestos 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 asbestos 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.

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

90Panel Report, para. 8.123.
91Ibid., para. 8.121.
92Ibid., paras. 8.122 and 8.124.
93Ibid., paras. 8.123 and 8.125.
94Ibid., para. 8.126.
95Ibid., para. 8.125.
96Panel Report, para. 8.132.
97Ibid., para. 8.130.

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
broadened or restricted beyond what is required by the normal customary international law rules of applications, or even for a phased introduction, we think that a panel must also examine the other, 
edifferent, end-uses for products. 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 different products share a very different number 
of uses. In this case, the Panel did not explain or elaborate in any way on the small number of 
ends-uses which were not similar in that sense. It did not adequately examine the evidence relating to 
ends-uses.

120. The Panel declined to examine or make any findings relating to the third criterion, consumers' 
tastes and habits. "If there is evidence that the tastes and habits of consumers change over time, the Panel 
would be constrained to examine the physical properties of the products in question in the context of their 
end-uses."

121. Furthermore, in a case such as this, where the products are physically very similar to different, 
end-uses for products. 99 It is only by forming a complete picture of the various end-uses of 
products, that a panel can assess the significance of the fact that different products share a very different number 
of uses. In this case, the Panel did not explain or elaborate in any way on the small number of 
ends-uses which were not similar in that sense.

122. In this case especially, we are 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. We observe, in that respect, that 
consideration of diseases associated with asbestos fibres in the conclusion of the different end-uses of 
products, as well as the Panel's analysis of end-uses. It is only by forming a complete picture of the various end-uses of 
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ends-uses which were not similar in that sense.

99 Ibid., para. 8.139.

101 In that respect, we note that, at the oral hearing before us, Canada stated that it believed that the 
Panel relied on a "small number of applications", or even for a "given utilization", we think that a panel must also examine the other, 
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122. In this case especially, we are 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. We observe, in that respect, that 
consideration of diseases associated with asbestos fibres in the conclusion of the different end-uses of 
products, as well as the Panel's analysis of end-uses. It is only by forming a complete picture of the various end-uses of 
products, that a panel can assess the significance of the fact that different products share a very different number 
of uses. In this case, the Panel did not explain or elaborate in any way on the small number of 
ends-uses which were not similar in that sense.
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 8.149 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."\(^{117}\)

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 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." 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.\(^{117}\)
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 II: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. …

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. In that respect, the Panel noted that:

… 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. …

In contrast, the Panel found that the PCG fibres "are not classified by the WHO at the same level of risk as chrysotile." 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.

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. 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. 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. Canada noted that 90 percent, by quantity, of French imports of chrysotile asbestos were used in the production of cement-based products. 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.

139Panel Report, para. 8.188.
140Ibid., para. 8.220.
141Ibid.
142Panel Report, para. 8.125.
143Ibid., para. 3.21.
144Ibid., paras. 3.21 (Canada) and 3.22 (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.
145Panel Report, para. 3.21, footnote 7.
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.

145. As stated previously, under Article III of the GATT 1994, it is of particular importance, 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 regarding the fibres is of particular importance. If there is no evidence on this aspect of the case, there is no basis for overcoming the inference, set out in Section VI (Article III:4 of the GATT 1994), 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. 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. It may be, for instance, that consumers are more likely to reject products containing a known carcinogen or to select products containing another, seemingly "safer" product.

146. As regards each classification, we observe that, for any given cement-based product, the tariff classification of the product is the same. However, this indication of "likeness" cannot, on its own, be decisive. We have already addressed, and dismissed, the arguments advanced by Canada in support of this contention.

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 set out in the Report. However, in respect of Section VI of the Report, I do not agree with the conclusions set out in paragraphs 116, 128, 131, 141, 144 and 146. I am bound to say that, in my view, there is insufficient evidence to support the conclusions set out in paragraphs 116, 128, 131, 141, 144 and 146. Accordingly, I set out only two related matters below.

150. More particularly, in respect of Section VI of the Report, I join in the findings and conclusions set out in paragraphs 116, 128, 131, 141, 144 and 146. I am bound to say that, in my view, there is insufficient evidence to support the conclusions set out in paragraphs 116, 128, 131, 141, 144 and 146. Accordingly, I set out only two related matters below.

151. As we have said, regulatory measures may suppress latent consumer demand for products. As we have said, regulatory measures may suppress latent consumer demand for products.
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 "the Panel 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 fibrosis 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 characteristics and habits 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 apriori 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 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 product is produced and sold, 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:

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138 Supra, para. 114.
139 Ibid.
140 Ibid.
141 Panel Report, para. 8.188. See, supra, para. 114.
... 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 \textit{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".\(^{(147)}\) (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 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:

\(^{(146)}\)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.
\(^{(147)}\)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 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, not significantly lower than the risk posed by chrysotile asbestos fibres. 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 other less risky products in its place.

In short, we do not agree with Canada's third argument.

In its fourth argument, Canada asserts that the Panel erred in finding that "controlled use" is a reasonably available alternative to the Decree. This argument is based on Canada's assertion that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account. Canada argues that the Panel erred in failing to take into account the risk associated with PCG fibres. According to Canada, the Panel failed to assess the risk associated with the use of substitute products. Nevertheless, we do not agree with Canada as we have already dismissed that argument.

With respect to Canada's fourth argument, we note simply that we have already dismissed it.

In short, we do not agree with Canada's fourth argument.
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, and that it therefore failed to satisfy the requirement imposed on panels by Article 11 of the DSU. According to Canada, the Panel erred in finding that the measure is justified under Article XX(b) of the GATT 1994, as it failed to consider the extent to which the alternative measure “controlled use” is reasonably available to it. By the same token, in cases where a measure consistent with other GATT provisions is available to it, that which involves the least degree of inconsistency with other GATT provisions is available to it. As we have already said, in the case of the asbestos fibres, the measure reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

177. These arguments, by Canada, in the light of its objective assessment of the matter, raises the question of whether, in assessing and weighing the evidence, the Panel failed to make an objective assessment of the matter. In our view, the Panel did not make an objective assessment of the matter, and that the Panel failed to consider the extent to which the alternative measure “controlled use” is reasonably available to it, that which involves the least degree of inconsistency with other GATT provisions.

178. In addition, in the context of the SPS Agreement, we have said previously, in the European Communities – Harmonies, that “controlled use” is particularly effective in achieving the elimination, or reduction, of both the well-known, and the residual, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question is whether one of the alternative measures, in the case of the asbestos fibres, is available to it, and that it involves the least degree of inconsistency with other GATT provisions. In this case, the alternative, and the alternatives, to the “controlled use” practice, is a measure that involves a continuation of the very risk that the Decree seeks to “halt”. Such an alternative measure would, in effect, prevent it from achieving the 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. 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.”

179. With regard to Canada’s argument that certain of the experts lacked expertise, we refer to the Appellate Body Report, Korea – Alcohol Beverages, supra, footnote 48, para. 161. See, supra, para. 79. In the case of the asbestos fibres, the Panel found too that the efficacy of “controlled use” remains to be demonstrated. 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.”

166 Adopted 7 November 1993, BISD 36S/345, para. 5.26; we expressly affirmed this standard in our Report in Korea – Alcohol Beverages, supra, footnote 48, paras. 166 and 167.

167 As part of the arguments of the panel, it has been found that the measure is justified under Article XX(b) of the GATT 1994, as it is consistent with other GATT provisions. In the case of the asbestos fibres, the measure reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

168 In addition, in the context of the SPS Agreement, we have said previously, in the European Communities – Harmonies, that “controlled use” is particularly effective in achieving the elimination, or reduction, of both the well-known, and the residual, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question is whether one of the alternative measures, in the case of the asbestos fibres, is available to it, and that it involves the least degree of inconsistency with other GATT provisions. In this case, the alternative, and the alternatives, to the “controlled use” practice, is a measure that involves a continuation of the very risk that the Decree seeks to “halt”. Such an alternative measure would, in effect, prevent it from achieving the 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. 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.”

169 The Panel found too that the efficacy of “controlled use” remains to be demonstrated. 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.”
only those questions that fell within their area of expertise. 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 X(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 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:


The European Communities also contends that the Panel erred in finding that Article XXIII:1(b) applies to measures which pursue health objectives and which may give rise to a cause of action under that Article. The panel does not distinguish between measures and certain types of measures, namely, those which have health- objectives. The EC argues that the measure of Article XXIII:1(b) must apply to measures which are commercial in nature.

188. In any event, an attempt to draw the distinction suggested by the panel, is very difficult if not impossible. If an action is taken to prevent a measure from being applied, the measure might become a commercial measure. 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.

189. In any event, an attempt to draw the distinction suggested by the European Communities, is likely to be made in such a way as to require a finding of "commercial" or "non-commercial" measures with the result that the measure in question becomes commercial in nature, at least to the extent that other measures may be involved.

190. An important aspect of the European Communities' argument is that a Member cannot have a reasonable expectation of continued market access for products which are shown to pose a serious health risk. This is because the measures do not involve any 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.

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.
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.
World Trade Organization

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

Report of the Appellate Body, 7 April 2004
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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

Costa Rica, Third Participant

Cuba, Third Participant

Congo, 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

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").

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

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1WT/DS246/R, 1 December 2003.


3Regulation, 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").

3. All the countries listed in Annex I to the Regulation are eligible to receive tariff preferences under the General Arrangements, which provide, broadly, for suspension of Common Customs Tariff duties on products listed as "non-sensitive" and for reduction of Common Customs Tariff duties on products listed as "sensitive". 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. 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", respectively. Preferences under the special arrangements for least-developed countries are restricted to certain specified countries. 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.

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. 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". Accordingly, this dispute concerns only the Drug Arrangements.

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

5. 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.

6. India requested the Panel to find that "the Drug Arrangements set out in Article 10 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 Favoured Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause"). 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.

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." Finally, the Panel concluded, pursuant to Article 3.8 of the Understanding on Rules and Procedures Governing the Settlement of

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2Ibid.
3Panel Report, para. 2.4.
4Regulation, Arts. 7.1-7.2.
5Ibid., Arts. 8-10. For example, these tariff preferences include further reductions in the duties imposed on certain "sensitive" products.
7Regulation, Annex I (Column H).
8Ibid. (Column I).
9Panel Report, paras. 2.3 and 2.7.
10Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2.
11Panel Report, para. 1.5.
12Ibid., para. 2.8. See also, ibid., para. 2.7.
13Ibid., para. 3.1 (referring to India's first written submission to the Panel, para. 67).
15Panel Report, para. 8.1(a)-(d).
16Ibid., 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."

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 pursuant to Rule 20 of the Working Procedures for Appellate Review (the "Working Procedures").

On 19 January 2004, the European Communities filed its appellant's submission. On 30 January 2004, Pakistan notified its intention to appear at the oral hearing as a third participant. 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. 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.

By letter dated 16 February 2004, Pakistan submitted a request to make a statement at the oral hearing. No participant objected to Pakistan's request, which was authorized by the Division hearing the appeal on 18 February 2004.

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.

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". 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". For example, the European Communities contends, the 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.

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"), the Panel should have proceeded to examine the relevant "content".


Ibid., para. 34.


The European Communities further contends that special and differential treatment is critical to achieving one of the fundamental objectives of the GATT 1994, as identified in its Preamble: ensuring that developing countries "secure a share in the growth in international trade commensurate with their economic development." 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" that are "separate and distinct" from the objectives of the GATT Agreement. Therefore, according to the European Communities, the Appellate Body decision in Brazil – Aircraft, which characterizes special and differential treatment as an "exception" to Article I:1, would mean that Article I:1 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. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.

Specifically, the European Communities emphasizes that the Enabling Clause is unlike the chapeau of Article XX of the GATT 1994, which merely regulates the substantive content of measures adopted by Members that are "concerned with the application of the obligations undertaken pursuant to that conference. As such, the detailed obligations, not the terms of the WTO Agreement, are in point here. The European Communities contends that the Enabling Clause is unique because it is a "special regime" for developing countries to address inequalities among the WTO Membership.

14. The European Communities submits that the Panel's conclusion that special and differential treatment is critical to achieving one of the fundamental objectives of the GATT 1994 is in line with the Appellate Body's decision in Brazil – Aircraft. Consequently, the European Communities argues, the Panel's erroneous findings that the Enabling Clause is an "exception" to Article I:1, and that the European Communities does not prevent the application of Article I:1, would mean that the rules in Article I:1 of the GATT 1994 and the importation of products covered by such a tariff measure. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.

15. The European Communities further contends that special and differential treatment is designed to achieve effective equality among Members. The Enabling Clause, which, according to the European Communities, is a "special regime" for developing countries to address inequalities among the WTO Membership, 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. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.

16. The European Communities submits that its understanding of the relationship between special and differential treatment. In the view of the European Communities, special and differential treatment is "critical" to achieving one of the fundamental objectives of the GATT 1994, as identified in its Preamble: ensuring that developing countries "secure a share in the growth in international trade commensurate with their economic development." 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" that are "separate and distinct" from the objectives of the GATT Agreement. Therefore, according to the European Communities, the Appellate Body decision in Brazil – Aircraft, which characterizes special and differential treatment as an "exception" to Article I:1, would mean that Article I:1 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. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.

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 European Communities does not prevent the application of Article I:1, the GATT Agreement and the importation of products covered by such a tariff measure. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.

18. The European Communities submits that the Panel's erroneous findings that the Enabling Clause is an "exception" to Article I:1, and that the European Communities does not prevent the application of Article I:1, would mean that the rules in Article I:1 of the GATT 1994 and the importation of products covered by such a tariff measure. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.

19. The European Communities submits that its understanding of the relationship between special and differential treatment. In the view of the European Communities, special and differential treatment is "critical" to achieving one of the fundamental objectives of the GATT 1994, as identified in its Preamble: ensuring that developing countries "secure a share in the growth in international trade commensurate with their economic development." 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" that are "separate and distinct" from the objectives of the GATT Agreement. Therefore, according to the European Communities, the Appellate Body decision in Brazil – Aircraft, which characterizes special and differential treatment as an "exception" to Article I:1, would mean that Article I:1 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. 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, while it does not apply to that niche in the economy to which such measures apply. Therefore, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.
2. Whether the Drug Arrangements are Justified Under the Enabling Clause

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. The European Communities claims, in particular, that the Panel erred in finding that the European Communities granted "identical preferences" to all developing countries without differentiation, except with regard to developing countries that are "least-developed". The European Communities argues that the word "non-discriminatory" means that identical preferences granted under GSP schemes must be accorded to "all" developing countries, while under the "generalized" provision, developed countries may grant less stringent preferences only to "developing countries".

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 are expressed as "distinct requirements", 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 regulatory history indicate that GSP schemes are not required to cover all developing countries, but are designed to take into account the development needs of certain categories of developing countries.

23. In contrast to the term "generalized", the European Communities argues, the word "non-discriminatory" means that developed countries may grant different preferences to individual developing countries. The European Communities claims, in particular, that the Panel erred in finding that the European Communities granted "identical preferences" to all developing countries without differentiation, except with regard to developing countries that are "least-developed". The European Communities argues that the word "non-discriminatory" means that identical preferences granted under GSP schemes must be accorded to "all" developing countries, while under the "generalized" provision, developed countries may grant less stringent preferences only to "developing countries".

24. The European Communities submits that the Panel's interpretation of "non-discriminatory" precludes the imposition of any conditions on the granting of preferences, thereby rendering redundant the term "non-reciprocal" in footnote 3. 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 all GSP beneficiaries that are "in the same situation".

25. The European Communities argues that the Panel's interpretation of the term "developing countries" in paragraph 2(a) of the Enabling Clause as meaning "developing countries, except with regard to individual or common needs of particular categories of developing countries" is not supported by the negotiating history. The European Communities contends that the Panel's interpretation of the term "developing countries" as meaning "developing countries, except with regard to individual or common needs of particular categories of developing countries" is not supported by the negotiating history. The European Communities argues that the Panel's interpretation of the term "developing countries" as meaning "developing countries, except with regard to individual or common needs of particular categories of developing countries" is not supported by the negotiating history.
27. The European Communities argues that the Panel's contrary interpretation of paragraph 3(c) is not supported by the facts. According to the European Communities, the Panel's conclusion that the Agreed Conclusions exclude all forms of discrimination is not supported by the factual analysis provided by the Panel. The European Communities contends that the Panel's interpretation is inconsistent with the wording of the Enabling Clause.

28. The European Communities further argues that the Panel's interpretation of "non-discriminatory" is too broad. The European Communities contends that the Panel's interpretation would allow a preference-granting country to discriminate against developing countries. The European Communities submits that this interpretation is inconsistent with the objectives of the GSP schemes.

29. The European Communities contends that the Panel's interpretation of "non-discriminatory" is too narrow. The European Communities contends that the Panel's interpretation would allow a preference-granting country to discriminate against developed countries. The European Communities submits that this interpretation is inconsistent with the objectives of the GSP schemes.

30. The European Communities submits that the Panel's interpretation of "non-discriminatory" is too strict. The European Communities contends that the Panel's interpretation would allow a preference-granting country to discriminate against all countries. The European Communities submits that this interpretation is inconsistent with the objectives of the GSP schemes.

31. 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.
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 developing-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 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 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 "factualy 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

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70 Ibid., para. 36.
71 Ibid., para. 39.
72 Ibid., para. 42 (quoting Vienna Convention, Art. 31.3(b)).
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. 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." 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" 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. 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" and the objectives of the dispute settlement system. India asserts that the question of which party bears the burden of proof "does not affect the outcome of this dispute."

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." India points to Appellate Body decisions as support for its view that "derogations" from Article I:1 exist only where provided for explicitly. 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." Secondly, India finds "contextual guidance" 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. 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 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 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" 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 contends 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," 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. 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

83 Ibid., paras. 93-94 (referring to Appellate Body Report, Canada – Autos, para. 84; and Appellate Body Report, EC – Bananas III, paras. 190-191).
84 India's appellee's submission, para. 106.
85 Ibid., para. 115.
86 Ibid., paras. 118 and 120 (referring to Appellate Body Report, EC – Bananas III, paras. 190-191). (See also, ibid., paras. 170 and 180).
87 Ibid., para. 148.
88 Ibid., para. 153.
89 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. 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. 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".

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".

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" that were "unanimously agreed" in UNCTAD; replacing "special preferences" 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, 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 opportunities" from one country to another. In addition, India contends that linking GSP benefits to "the situation or policies" 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" to differentiate between developing countries according to their individual needs. This would have the "absurd consequence" 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 fulfill 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".

57. The Andean Community argues that the Enabling Clause establishes "a self-standing regime", meaning that Article I:1 of the GATT 1994 does not apply to GSP schemes. 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" of the Enabling Clause indicate that GSP schemes provide the "most concrete and relevant form" 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
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 of proof. 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" of these texts and argues that the Panel "mischaracterize[d]" 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" 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 argues that the production and trafficking of illicit drugs have far-reaching, unparalleled and unquantifiable implications for the economic and social development of affected developing countries. By providing preferential access for "alternative products" 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.

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". 117 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." 125

63. In addition, according to Costa Rica, the Panel erred in concluding that the term "developing countries" in paragraph 2(a) of the Enabling Clause 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" 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." 127

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. 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. 128 Panama submits that "the Enabling Clause creates a standalone mechanism that is linked to the general principle contained in GATT Article I... and, as such, constitutes an "autonomous right" of WTO Members."

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.
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)(ii) of the language of Annex IA 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. 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". In this respect, Panama claims, the Drug Arrangements satisfy the "requirement" in paragraph 3(c) because they respond to "specific growth needs".

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". 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". 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".

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" 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 paragraph 2(d) of the Enabling Clause. As such, in Paraguay's view, the "condition" 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 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 "misconstrued" 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. 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" 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. 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". 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" 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.

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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.
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 "assumption" that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries. In the view of the United States, "[i]t is simply a cross-reference to where the Generalized System of Preferences is described." 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". In any case, the United States contends, the Panel erroneously arrived at a "one size fits all" 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" 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" 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".

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") are consistent with Article I:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") 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") is an "exception" to Article I:1 of the GATT 1994;
(ii) the Enabling Clause "does not exclude the applicability" 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.

(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, 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" 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" 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. 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". 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
"different" from the relationship that had been established between Article I: 1 and the Enabling Clause. As a result, the Panel found that the Enabling Clause is an "exception" to Article I: 1 rather than a mere "affirmative defence" as claimed by the European Communities.

82. With respect to the present dispute, the Panel found that India could make its case against the European Communities by establishing that the Drug Arrangements were inconsistent with Article I: 1. This, according to the Panel, was sufficient for a complaining party to demonstrate the inconsistency of the measures at issue with Article I: 1, without the need to establish violations of any of the possible exceptions provided for in the Enabling Clause.

83. The Panel also examined whether Article I: 1 applies to measures covered by the Enabling Clause. In its view, the requirement that the measure be incorporated in a special regime for developing countries as provided for in the Enabling Clause is not a provision that serves to justify a measure's inconsistency with Article I: 1. Consequently, the Panel concluded that Article I: 1 applies to measures covered by the Enabling Clause and that the Enabling Clause constitutes an "affirmative defence" in relation to which the responding party bears the burden of proof if it purports to justify a measure as consistent with Article I: 1.

84. Finally, the Panel referred to the European Communities' submissions, in which it argued that the drug arrangements at issue were consistent with Article I: 1 and the Enabling Clause. The Panel pointed out that the European Communities had not invoked the Enabling Clause as a defence in its previous submissions and that, according to the Panel, it was not precluded from evaluating this claim, even if the claim did not form part of the panel's terms of reference. The Panel concluded that the drug arrangements were inconsistent with Article I: 1 and therefore nullified or impaired India's rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement").
satisfactory settlement of the matter in accordance with rights and obligations under the covered agreements.”

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. 185

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:

[It] 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. 189 However, this distinction may not always be evident or readily applicable.

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". 190

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)

185Ibid., para. 74 (quoting DSU, Arts. 3.3, 3.4, and 3.7). (footnotes omitted)
186Ibid., para. 73.
188We 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.
The ordinary meaning of the term "notwithstanding" is, as the Panel noted, "[i]n spite of, without regard to or prevention by". 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". 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[.]

The Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision"), 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, 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;

199See Panel Report, para. 7.44.
196Second 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.

198Footnote 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[.]

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". 205 Article XX(g) of the
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 to Article I:1 of the GATT, and that the provisions of Article I:1 do not apply to measures for environmental conservation, an important objective referred to in the Preamble to the WTO Agreement. Members' rights under the Enabling Clause are not curtailed by requiring preference-granting measures to be consistent with the MFN obligation, just as they are not curtailed by requiring preference-granting measures to be consistent with the most-favoured-nation treatment obligations. 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 Member's measure with the conditions of the Enabling Clause and the MFN obligation in Article I:1. If such a conflict is found, the Member claiming the measure is inconsistent with the MFN obligation must then provide proof that the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that such a conflict fairly arises. The fact that a provision regulates the use of "trade measures" does not compel a finding that it is for the complaining party to establish inconsistency with that provision, or as a defence to be established by the responding party. Whatever its status and relative importance of a given provision, its interpretation does not depend on whether it is a "customary rule of interpretation of public international law", as required by Article 32 of the Vienna Convention on the Law of Treaties, or whether it is a "rule of interpretation" of a GATT provision. Nevertheless, it is well-settled that the MFN principle embodied in Article I:1 is a "corollary of the national treatment obligation", and that the MFN principle is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system". Hence, it has consistently served as a key element of the GATT's "minimum rules" system, and it has consistently been recognized as a "cornerstone of the GATT". The MFN principle "provides a clear and consistent framework for Members to regulate their trade relations". It is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system".

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. 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.

99. In the view of the Panel, the interpretation of Article XX(g) is that it "permits" Members 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 to Article I:1 of the GATT, and that the provisions of Article I:1 do not apply to measures for environmental conservation, an important objective referred to in the Preamble to the WTO Agreement. Members' rights under the Enabling Clause are not curtailed by requiring preference-granting measures to be consistent with the MFN obligation, just as they are not curtailed by requiring preference-granting measures to be consistent with the most-favoured-nation treatment obligations. 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 Member's measure with the conditions of the Enabling Clause and the MFN obligation in Article I:1. If such a conflict is found, the Member claiming the measure is inconsistent with the MFN obligation must then provide proof that the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that such a conflict fairly arises. The fact that a provision regulates the use of "trade measures" does not compel a finding that it is for the complaining party to establish inconsistency with that provision, or as a defence to be established by the responding party. Whatever its status and relative importance of a given provision, its interpretation does not depend on whether it is a "customary rule of interpretation of public international law", as required by Article 32 of the Vienna Convention on the Law of Treaties, or whether it is a "rule of interpretation" of a GATT provision. Nevertheless, it is well-settled that the MFN principle embodied in Article I:1 is a "corollary of the national treatment obligation", and that the MFN principle is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system". Hence, it has consistently served as a key element of the GATT's "minimum rules" system, and it has consistently been recognized as a "cornerstone of the GATT" and "one of the pillars of the WTO trading system".

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In other words, the Enabling Clause "does not exclude the applicability" of Article I:1 in the sense that, as a matter of procedure (or "order of examination", as the Panel stated), the Drug Arrangements comply with the requirements of the Enabling Clause. The Panel Report, paras. 7.53.

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 "raise standards of living", US – Wool Shirts and Blouses, para. 136 (Panel Report, p. D-4).

The principle of *pro rei jura* has been articulated by the International Court of Justice as follows:

**Panel Report, para. 7.53.**

**Article 1 of the GATT 1947**

As a general rule, the Court of Justice judicially finds the facts and makes the legal interpretation. It is with this understanding, therefore, that we uphold the Panel's findings, in paragraph 7.53.

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104. 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, as amended by the Agreement of Annex VI, which provide with the principle of *pro rei jura* in Article 1 of the GATT 1947,

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, as amended by the Agreement of Annex VI, which provide with the principle of *pro rei jura* in Article 1 of the GATT 1947.

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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, as amended by the Agreement of Annex VI, which provide with the principle of *pro rei jura* in Article 1 of the GATT 1947.
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. Members reaffirmed the significance of the Enabling Clause in 1994 with the incorporation of the Enabling Clause into the GATT 1994. 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.

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.

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 of the GATT 1994 for to do only that would not convey the "legal basis of the complaint sufficient to present the problem clearly".

In other words, it is insufficient in WTO dispute settlement for a complainant to allege that a measure which the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss infra.

111. Furthermore, the history and objective of the Enabling Clause lead us to agree with the European Communities 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,

(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.

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230 Para. 1(b)(iv) of the language of Annex 1A to the WTO Agreement incorporating the GATT 1994 into the WTO Agreement.
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, 11S/1, paras. 33-38, 44, and 52).
233 DSU, Art. 6.2. See also, Appellate Body Report, Korea – Dairy, paras. 120, 124, and 127.
234 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).
235 European Communities’ appellant’s submission, para. 53.
236 Infra paras. 116-117.
237 Infra paras. 142-174.

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, 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.
Paragraphs 5 through 9 include obligations that are not necessarily related to measures providing "differential and more favourable treatment". 227

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 a foul, form critical components of the "legal basis of the complaint". 228 and, therefore, of the "matter" in dispute. 229 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 "notify[] the parties and third parties of the nature of [its] case". 230 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". 231

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" 232 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 must define the parameters within which the responding party must define 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 233, 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 to a developing-country Member in the framework of its scheme of generalised tariff preferences, 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 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. 240 (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. 241 (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. 242 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

227See Enabling Clause (attached as Annex 2 to this Report).

228DSU, 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 the event the request 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.


232European Communities' appellant's submission, para. 53.

233Supra, para. 105.

234Explanatory 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, 2001/0131 (ACC), at p. 3 (Exhibit India-7 submitted by India to the Panel).

235Explanatory 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).

236See, 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:

[Paragraph 2(a) of the Enabling Clause was meant to ensure that benefits under the GSP are extended to all developing countries, 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

247DSU, 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)

248Compare 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)


250Request 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.)

251Request 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)

252India'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.

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

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

255Ibid., para. 95.

256Ibid., 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. As we have not reversed any of these findings of the Panel, 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.

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." 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"; 259

(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 developing countries are implementing a priori limitations, 'developing countries' may mean less than all developing countries"; 260 and, ultimately, that

(c) the European Communities failed "to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause." 261

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." 262 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." 263 Also not before the Panel, according to India, was "whether the EC's mechanisms for the graduation of developing countries meet the requirements of

\[259^{*}\text{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.

\[260^{*}\text{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.}

\[261^{*}\text{Panel Report, para. 7.60 (attached as Annex I to this Report))}

\[262^{*}\text{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.}

\[263^{*}\text{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.}

\[264^{*}\text{Panel Report, paras. 7.161 and 7.176.}

\[265^{*}\text{Panel Report, para. 7.174 (original italics; footnote omitted)}

\[266^{*}\text{Panel Report, para. 8.1(d).}

\[267^{*}\text{India's appellate's submission, para. 101.}

\[268^{*}\text{ibid.}
the Enabling Clause.\textsuperscript{265} 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."\textsuperscript{267} In other words, according to India, the legal issues raised in this dispute "relate exclusively"\textsuperscript{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."\textsuperscript{269}

122. 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.\textsuperscript{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. 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.

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."\textsuperscript{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;\textsuperscript{274}

(b) 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.

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'."\textsuperscript{275} 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,"\textsuperscript{276} the Panel proceeded to examine "the drafting history in UNCTAD ... to identify the intention of the drafters on issues relating to the GSP arrangements."\textsuperscript{277} 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

\textsuperscript{265}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.

\textsuperscript{267}India's opening statement at the oral hearing.

\textsuperscript{268}India's appellee's submission, para. 103.

\textsuperscript{269}European Communities' appellant's submission, para. 7.

\textsuperscript{270}See supra, paras. 120-122.

\textsuperscript{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)

\textsuperscript{272}European Communities' appellant's submission, para. 126.

\textsuperscript{273}Panel Report, para. 7.65.

\textsuperscript{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)." (\textit{ibid.,} footnote 291 to para. 7.65 (quoting European Communities' first written submission to the Panel, para. 7.11))

\textsuperscript{275}\textit{Ibid.,} para. 7.78. (original italics)

\textsuperscript{276}\textit{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)."

135. Having made these findings based on its review of what it considered the "context" and "preparatory work" 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." 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)") and the Agreed Conclusions. 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.

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.

137. The Panel found further support for its conclusion in its previous analysis of paragraph 3(c) 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)

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". 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."

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" 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.

139. The Panel found further support for its interpretation in an examination of the "overall practice" of preference-granting countries, 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."

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. (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."

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."
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. 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 "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences". [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'.

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, [i]n accordance with the description contained in the preamble to the 1971 Waiver Decision, "accordance" being defined in the dictionary as "conformity". Only preferential tariff treatment that is in conformity with the description of generalized, non-reciprocal and non-discriminatory treatment can be justified under paragraph 2(a).

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". Only preferential tariff treatment that is in conformity with the description of 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 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. Nor do we agree with the United States that the Panel erred in "assuming" 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."

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 à la décision des PARTIES CONTRACTANTES en date du 25 juin 1971". Similarly, the Spanish version uses the terms "conformidad" and "de conformidad 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.

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 prior limitation.

149. The European Communities maintains that "non-discrimination' is not synonymous with formally equal treatment' and that "[t]reating differently situations which are objectively different is not discrimination". The European Communities asserts that ["the objective of the Enabling Clause is different from that of Article I:1 of the GATT"]. 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." The European Communities derives contextual support from paragraph 3(c), which states that the treatment provided under the Enabling Clause...
Clause "shall be derived 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" is similarly-situated within the GATT context in that it would be "improper for a country to differentiate between developing countries in its treatment of preference-granting countries according different tariff preferences to different beneficiaries of its GSP scheme.

153. Nevertheless, at this stage of our analysis, we are able to discern some of the content of the"non-discriminatory" obligation based on the ordinary meanings of that term. Whether the drawing of such distinctions is discriminatory as determined by the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

preferences to different beneficiaries of its GSP scheme.

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" that preference-granting countries must make available identical tariff treatment 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 "generalized", the term must also be "neutral" as to the basis for determining whether beneficiaries are

the European Communities’ appellant’s submission, para. 175. (See also, ibid., para. 186)

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.
"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 that the Panel's finding that, by requiring tariff preferences under the GSP to be "generalized," preferences that were granted only to certain designated developing countries, the GSP contained a provision that was intended to ensure that the GSP schemes have sufficient breadth of product coverage and depth of tariff cuts to have placed great deal of tariffs on needs of "individual" developing countries. The Panel thus understood that paragraph 3(c) of the Enabling Clause sets forth a "requirement." (European Communities' first written submission to the Panel, paras. 71, 71.135-71.137.) The Panel also observed 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 of the GATT.

160. The Panel found that the only appropriate way of determining what is meant by paragraph 3(c) of the Enabling Clause is to consider the development needs of developing countries. We now turn to consider whether the "development, financial and trade needs of developing countries" is the correct interpretation of paragraph 3(c) of the Enabling Clause.

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economic development of developing countries. It is simply unrealistic to assume that such treatment is not accorded to all developing countries, and the relevant tariff preferences are addressed as a matter of separate development, financial, and trade need and are made available to all countries that need them.

India submits that developing countries cannot be presumed to have waived their MFN treatment for "development, financial, and trade needs", and that the relevant tariff preferences for all developing countries must be accorded under GSP schemes. Furthermore, paragraph 3(c) of the GATT 1994 specifically mandates that any "positive" response to the "development, financial, and trade needs of developing countries" must be designed and, if necessary, modified, to respond positively to those "development, financial, and trade needs". This requirement applies to all GSP beneficiaries, not just those included in the Enabling Clause. Hence, the treatment provided under GSP schemes must be designed to respond positively to the "development, financial, and trade needs" of developing countries, not just to those included in the Enabling Clause.

Furthermore, paragraph 3(a) of the GATT 1994 provides that the treatment provided under the Enabling Clause shall be designed to respond positively to the "development, financial, and trade needs" of developing countries. This requirement applies to all GSP beneficiaries, not just those included in the Enabling Clause. Hence, the treatment provided under GSP schemes must be designed to respond positively to the "development, financial, and trade needs" of developing countries, not just to those included in the Enabling Clause.

Finally, paragraph 3(c) of the GATT 1994 mandates that the treatment provided under the Enabling Clause shall be designed to respond positively to the "development, financial, and trade needs" of developing countries. This requirement applies to all GSP beneficiaries, not just those included in the Enabling Clause. Hence, the treatment provided under GSP schemes must be designed to respond positively to the "development, financial, and trade needs" of developing countries, not just to those included in the Enabling Clause.

In conclusion, India submits that paragraph 3(c) of the GATT 1994 mandates that the treatment provided under the Enabling Clause shall be designed to respond positively to the "development, financial, and trade needs" of developing countries. This requirement applies to all GSP beneficiaries, not just those included in the Enabling Clause. Hence, the treatment provided under GSP schemes must be designed to respond positively to the "development, financial, and trade needs" of developing countries, not just to those included in the Enabling Clause.

163. Paragraph 3(c) does not authorize any kind of response to any claimed need of developing countries. The word "positive" in this context is understood as the word "positive" in paragraph 3(c) refers to the treatment provided under the Enabling Clause, and not to the treatment provided under other GSP schemes.

164. Paragraph 3(c) mandates that the treatment provided under the Enabling Clause shall be designed to respond positively to the "development, financial, and trade needs" of developing countries. This requirement applies to all GSP beneficiaries, not just those included in the Enabling Clause. Hence, the treatment provided under GSP schemes must be designed to respond positively to the "development, financial, and trade needs" of developing countries, not just to those included in the Enabling Clause.

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Although enhanced market access will contribute to responding to the needs of developing countries, it would therefore need to establish, under paragraph 2(a), that this preferential treatment did not differ according to whether a developed-country, a least-developed country, or a least-developed country were the beneficiary. The principle of non-discrimination, as enshrined in the GATT and other international trade agreements, requires that such differential preferences be treated as identical or equivalent. This principle, however, does not require that identical tariff preferences be granted to all GSP beneficiaries.

For these reasons, we conclude that the Panel’s finding, in paragraph 7.161 of the Panel Report, that the term “non-discriminatory” in footnote 3 to paragraph 2(a) of the Enabling Clause requires identical tariff preferences under GSP schemes is not supported by the provisions of the Agreement.

In addition to the Panel’s interpretation of the term “non-discriminatory” in footnote 3 to paragraph 2(a) of the Enabling Clause, the Panel’s finding in paragraphs 7.161 and 7.171 of the Panel Report, that “the term ‘non-discriminatory’ in footnote 3 to paragraph 2(a) of the Enabling Clause requires identical tariff preferences under GSP schemes” is not supported by the provisions of the Agreement.

We next examine the relevance of paragraph 2(d) of the Enabling Clause for the interpretation of “non-discriminatory” in footnote 3. The Panel, however, concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do not preclude the granting of differential preferences to different sub-categories of GSP beneficiaries, subject to the remaining conditions in the Enabling Clause. We therefore consider such an interpretation to be consistent with the object and purpose of the WTO Agreement and the Enabling Clause.

Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, we conclude that the Panel’s conclusion that the term “non-discriminatory” requires identical tariff preferences under GSP schemes is not supported by the provisions of the Agreement.

We next examine the relevance of paragraph 2(d) of the Enabling Clause for the interpretation of “non-discriminatory” in footnote 3. The Panel, however, concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do not preclude the granting of differential preferences to different sub-categories of GSP beneficiaries, subject to the remaining conditions in the Enabling Clause. We therefore consider such an interpretation to be consistent with the object and purpose of the WTO Agreement and the Enabling Clause.

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**Paragraph 2(a) does not prohibit preference-granting countries from according different tariff treatments to products originating in different sub-categories than those of the originating country.**

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 to countries that do not have the same development needs. The differential treatment is allowed as long as it is aimed at responding to the "development, financial [or] trade need" to which the differential treatment is intended to respond.

Accordingly, we also agree with 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 consistent with the 'objectives' of the Enabling Clause, which include "the economic development of less developed countries". The need alleged to be addressed by the European Communities' differential treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment" included in the GSP, the "development" need is often the need to combat drug trafficking. As such, the differential treatment under the Drug Arrangements is consistent with the "development" need.

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. In response, the European Communities argued that it found contextual support for its interpretation of paragraph 2(a) in the GSP and the need to combat drug trafficking. The European Communities stated:

> "The need alleged to be addressed by the European Communities' differential treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment" included in the GSP, the "development" need is often the need to combat drug trafficking. As such, the differential treatment under the Drug Arrangements is consistent with the "development" need."

However, the Panel found in paragraph 7.174 of the Panel Report that "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))

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))

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

**D.**

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

We find that the Drug Arrangements are consistent with paragraph 2(a) of the Enabling Clause. The European Communities' differential treatment is consistent with the "development, financial [or] trade need" to which the differential treatment is intended to respond. The need alleged to be addressed by the European Communities' differential treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment" included in the GSP, the "development" need is often the need to combat drug trafficking. As such, the differential treatment under the Drug Arrangements is consistent with the "development" need.

What is more, the Drug Arrangements themselves do not set out any clear prerequisites —or "objective criteria"—that, if met, would allow for other developing countries "that are similarly affected by the drug problem" to be included as beneficiaries under the Drug Arrangements. 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" included in the GSP. In the context of these "special incentive arrangements", the need to combat drug trafficking is often the "development" need.

We find that the Drug Arrangements are consistent with paragraph 2(a) of the Enabling Clause. The European Communities' differential treatment is consistent with the "development, financial [or] trade need" to which the differential treatment is intended to respond. The need alleged to be addressed by the European Communities' differential treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment" included in the GSP, the "development" need is often the need to combat drug trafficking. As such, the differential treatment under the Drug Arrangements is consistent with the "development" need.

We find that the Drug Arrangements are consistent with paragraph 2(a) of the Enabling Clause. The European Communities' differential treatment is consistent with the "development, financial [or] trade need" to which the differential treatment is intended to respond. The need alleged to be addressed by the European Communities' differential treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment" included in the GSP, the "development" need is often the need to combat drug trafficking. As such, the differential treatment under the Drug Arrangements is consistent with the "development" need.
Indeed, the European Commission's own Explanatory Memorandum notes that "the benefits of the drug regime ... are given without any prerequisite."\(^\text{373}\) 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"\(^\text{374}\), or that a beneficiary was no longer suffering from the drug problem, beneficiary status would continue.\(^\text{375}\) 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"\(^\text{376}\) 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 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"\(^\text{377}\), 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".\(^\text{378}\)

\(^{373}\)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.\(^\text{379}\) 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".\(^\text{380}\) 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.\(^\text{381}\) 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 ["]because the special arrangements are only available to imports originating in [the 12 beneficiaries of the Drug Arrangements], a waiver ... appears necessary".\(^\text{382}\) 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".\(^\text{383}\)

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.\(^\text{384}\) 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",\(^\text{385}\) 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.


\(^{380}\)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. 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, without according such treatment to other contracting parties.

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;

   (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:

(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.

4 Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.
World Trade Organization

United States — Subsidies on Upland Cotton

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WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Subsidies on Upland Cotton

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

AB-2004-5
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"). The Panel was established on 18 March 2003 to consider claims by Brazil regarding various United States measures (the "Panel Report"). If 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:

1WT/DS267/AB/R, 8 September 2004.

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. \(^3\)

3The 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 107-29 (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(ii)-(vi)) The Panel also ruled that certain other measures fell outside of its terms of reference: see Panel Report, para. 7.195.

4Production 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.

5Direct 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 5, 6 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 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;

(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 7.1.107 of Section VII.G of this report\textsuperscript{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\textsuperscript{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).\textsuperscript{15} With respect to the "mandatory price-contingent United States subsidy measures" addressed in paragraph 8.1(g)(ii) 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'."\textsuperscript{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\textsuperscript{17} pursuant to Rule 20 of the Working Procedures for Appellate Review (the "Working Procedures").\textsuperscript{18} On 28 October 2004, the United States filed its appealant's submission.\textsuperscript{19} On 2 November 2004, Brazil filed an other appellant's submission.\textsuperscript{20} On 16 November 2004, Brazil and the United States each filed an appellee's submission.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{13}The Panel listed the following measures in paragraph 7.1.107 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".

\textsuperscript{14}Panel Report, para. 8.3(a).

\textsuperscript{15}Ibid., paras. 8.3(b) and 8.3(c).

\textsuperscript{16}Ibid., para. 8.3(d).

\textsuperscript{17}WT/DS267/17, 18 October 2004, attached as Annex 1 to this Report.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{20}Pursuant to Rule 23(1) of the Working Procedures.

\textsuperscript{21}Pursuant to Rules 22 and 24(3) of the Working Procedures, respectively.

\textsuperscript{22}Pursuant to Rule 24(1) of the Working Procedures.

\textsuperscript{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.

\textsuperscript{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." 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, 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 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"), 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). 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." 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...

27Panel Report, para. 7.388.

28Paragraph 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.


30United States' appellant's submission, para. 26 (referring to Panel Report, para. 7.383).
producing does not conflict with the prohibition under paragraph 11(e) on designating in any way the products to be produced.

21. In addition, the United States submits that the Panel’s reading of paragraph 6(b) would require Members to reduce or eliminate payments for certain products it would not produce, even if it did not receive any benefit from them or if it was not an eligible recipient. The United States contends that the fundamental requirement of Annex 2 of the Agreement on Agriculture is that measures that serve the fundamental requirement of Annex 2 of the Agreement on Agriculture are not “related to” current production, but rather to future production, where the production for which the payments are made does not exist at all. The United States submits that the Panel’s reading effectively renders the phrase “support to a specific commodity” in paragraph 13(b)(ii) of the Agreement meaningless, as it does not require that the payments be contingent on the production of the specific commodity for which they are provided.

22. The United States further argues that the Panel was incorrect to interpret paragraph 6(e) as prohibiting Members from requiring recipients not to produce certain products. The United States submits that paragraph 6(e) was inserted into Annex 2 to address the issue of so-called “non-product-specific support” that was not addressed by paragraph 6(b), and that it is consistent with the overall purpose of Annex 2 to permit Members to require recipients not to produce certain products.

23. The United States also submits that the Panel erred in interpreting the phrase “support to a specific commodity” in paragraph 13(b)(iii) of the Agreement on Agriculture as requiring that the payments be contingent on the production of the specific commodity for which they are provided, rather than on the production of a particular product. The United States submits that the text of paragraph 13(b)(iii) is clear that the payments must be contingent on the production of a specific commodity, but that the Panel’s interpretation is inconsistent with the overall purpose of Annex 2 to permit Members to require recipients not to produce certain products.

24. The United States submits that the Panel was incorrect to hold that the phrase “support to a specific commodity” in paragraph 13(b)(ii) of the Agreement on Agriculture must be interpreted consistently with the phrase “support to a specific product” in paragraph 13(b)(i). The United States submits that the two phrases are not intended to have the same meaning, and that the Panel’s interpretation is inconsistent with the overall purpose of Annex 2 to permit Members to require recipients not to produce certain products.

25. The United States further submits that the Panel erred in interpreting the phrase “support to a specific commodity” in paragraph 13(b)(ii) of the Agreement on Agriculture as requiring that the payments be contingent on the production of the specific commodity for which they are provided, rather than on the production of a particular product. The United States submits that the text of paragraph 13(b)(ii) is clear that the payments must be contingent on the production of a specific commodity, but that the Panel’s interpretation is inconsistent with the overall purpose of Annex 2 to permit Members to require recipients not to produce certain products.

26. The United States further submits that the Panel erred in interpreting the phrase “support to a specific commodity” in paragraph 13(b)(ii) of the Agreement on Agriculture as requiring that the payments be contingent on the production of the specific commodity for which they are provided, rather than on the production of a particular product. The United States submits that the text of paragraph 13(b)(ii) is clear that the payments must be contingent on the production of a specific commodity, but that the Panel’s interpretation is inconsistent with the overall purpose of Annex 2 to permit Members to require recipients not to produce certain products.

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The United States submits that the Panel did not properly apply the provisions of Article 13(b)(ii) of the Agreement on Agriculture, which requires Members to compare the support provided by their domestic support measures, measured under the methodology set out in Annex 3 of the Agreement, with the support granted to upland cotton production during the 1992 marketing year.

The United States contends that the Panel misinterpreted the provisions of Article 13(b)(ii), which requires Members to compare the support provided by their domestic support measures, measured under the methodology set out in Annex 3 of the Agreement, with the support granted to upland cotton production during the 1992 marketing year.

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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 claims that, in concluding that the price suppression had found, the Panel should have explained why it regarded this degree of price suppression 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 price-contingent subsidies are linked to world prices for upland cotton. The United States points out that, in the Panel's conclusion that the price-contingent subsidies are linked to world prices, the Panel linked the Panel's findings to the United States' argument that the relevant market is the world market. The United States submits that the Panel failed to set out the basic rationale for its findings, 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 support upland cotton prices. The United States points out that the Panel failed to address the relevant economic decisions that farmers make, which are based on the cost of production, rather than whether they respond with cotton production to the price-contingent subsidies. The United States submits that the Panel failed to set out the basic rationale for its findings, as required by Article 12.7.

40. The United States further argues that, in finding that the effect of the price-contingent subsidies is significant price suppression, the Panel failed to perform a quantification of benefit. Articles 5(c) and 6.3(c) of the SCM Agreement require a quantification of benefit in determining the effect of the subsidy. The United States argues that, in failing to do so, the Panel failed to comply with Article 12.7 of the DSU.

41. Fourthly, the United States argues that the Panel erred in finding that Brazil need not demonstrate that the amount of the challenged subsidies that benefits upland cotton is significant price suppression. The United States contends that the Panel should have found that the amount of the challenged subsidies that benefits upland cotton is significant price suppression. The United States submits that the Panel failed to set out the basic rationale for its findings, as required by Article 12.7.

42. However, according to the United States, the production of upland cotton in the United States 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 production of upland cotton, rather than whether they stimulate market competition between United States cotton and cotton imported from other sources, is the basic rationale behind several aspects of this finding, as required by Article 12.7 of the DSU.

43. The United States relies on Article 6.6 and Annex V of the SCM Agreement on Procedures for the Implementation of Article 6.3(c) of the SCM Agreement, which specifies that the Panel should have found that the production of upland cotton in the United States is significant price suppression. The United States submits that the Panel failed to set out the basic rationale for its findings, as required by Article 12.7.
According to the United States' view, the Panel should have allocated payments across the different products in assessing the effects of the payments in respect of upland cotton. Annex IV of the SCM Agreement provides support for the argument that it may be necessary to allocate subsidies to different products as domestic support subject to reduction commitments. Therefore, the United States contends that the Panel should have determined the extent to which subsidies provided with respect to cotton benefit processed cotton. Instead, the Panel improperly interpreted Article 6 of the SCM Agreement to require treating "pass-through" principles as applying to Part V of the Agreement, which is inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. The United States maintains that giving proper meaning to the introductory phrase of Article 3 of the Agreement requires treating subsidies provided to producers of raw cotton as inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. The United States contends that the Panel erred in finding that subsidies provided to producers of raw cotton flowed to producers of processed cotton. Instead, the Panel should have allocated the payments across the different products in accordance with Article 12.7 of the DSU.

For Brazil's claims to succeed, therefore, the United States maintains that 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 provides support for the argument that it may be necessary to allocate subsidies to different products as domestic support subject to reduction commitments. Therefore, the United States contends that the Panel should have determined the extent to which subsidies provided with respect to cotton benefit processed cotton. Instead, the Panel improperly interpreted Article 6 of the SCM Agreement to require treating "pass-through" principles as applying to Part V of the Agreement, which is inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. The United States maintains that giving proper meaning to the introductory phrase of Article 3 of the Agreement requires treating subsidies provided to producers of raw cotton as inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement. The United States contends that the Panel erred in finding that subsidies provided to producers of raw cotton flowed to producers of processed cotton. Instead, the Panel should have allocated the payments across the different products in accordance with Article 12.7 of the DSU.
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. 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. 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

56. The United States asserts that the Panel erred in concluding that export credit guarantees 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. 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". 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 to 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. 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 to

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).
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.\(^6\) 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 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."\(^6\) 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 guarantee programs 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"\(^6\) 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"\(^6\)), 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 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.

(iv) Burden of proof

\(^6\)Quoting from Article 10.2 of the Agreement on Agriculture.

\(^6\)United States' appellant's submission, para. 379 (quoting Panel Report, para. 7.940).

\(^6\)Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.
The United States submits that the Panel erred in three different ways in respect of the 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. In particular, the United States asserts that the Panel should have made a specific finding on the applicability of the illustrative list of export subsidies annexed to the SCM Agreement. The United States also submits that the Panel's treatment of rescheduled debt underestimates the net cost to the United States government associated with the export credit guarantee programs.

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.

In its examination of 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, the United States argues that the special rules in Article 10.3 of the SCM Agreement do not apply at all in examining whether the United States circumvented its export subsidy commitments with respect to upland cotton and certain other agricultural products. The United States contends, however, that under the applicable burden of proof its claim is sufficient to establish that the United States has not covered its long-term operating costs and losses for the CCC export credit guarantee programs.

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 within the Panel's terms of reference. Brazil argues that neither Article 42 nor Article 46 of the SCM Agreement gives the Panel discretion under Article 11 of the DSU to determine whether these payments should be included in the determination of the United States' compliance with its subsidy obligations.

Brazil also disputes the United States' claims regarding Article 12.7 of the DSU. In Brazil's view, the Panel failed to apply the requirements of Article 12.7 in its report. Many of the United States' allegations are based on factual conclusions, which Brazil argues are not supported by sufficient evidence. Moreover, Brazil argues that the United States' allegations are insufficient to establish that the subsidies under review are export subsidies to an agricultural good for which the respondent has no reduction in the market cost of production.
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 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 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. 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.” 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 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,” 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.” 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.” Thus, the practical effect of the extremely narrow United States reading of Article 13(b)(ii) is to enue US $4.2

76Ibid., para. 320 (quoting Panel Report, para. 7.386).
77Brazil’s appellee’s submission, para. 358 (quoting Panel Report, para. 7.494).
78Ibid., 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 the vast majority of cotton produced during this period was grown on cotton producers who did not grow upland cotton. The Panel further noted that the support that a government units of production during this period. Brazil contends that the United States erred in its determination of the level of support provided by these programs, as its support was based on the production of upland cotton rather than the production of the commodity in question. The Panel found that the United States’ interpretation of the “agricultural product” is consistent with the ordinary meaning of the term in its context, and is supported by the evidence on record.

Against this background, Brazil argues that the plain text of Article 13(b)(ii) of the SCM Agreement permits the use of both “product-specific” and “non-product-specific” measures, as long as the measures are used in connection with a specific agricultural product. The Panel concluded that the United States’ interpretation is inconsistent with the ordinary meaning of the terms in their context, and is not supported by the evidence on record.

However, the Panel also noted that the United States’ interpretation is consistent with the obligations of the United States under the Agreement on Agriculture. The United States argue that the Panel’s interpretation would permit a Member to change the methodology for calculating the value of support provided under the production flexibility contract, direct payments, market loss assistance, and counter-cyclical payments programs. The Panel found that the United States’ interpretation is consistent with the ordinary meaning of the terms in their context, and is supported by the evidence on record.

Brazil also notes that, although the United States’ interpretation is consistent with the ordinary meaning of the terms in their context, it is not consistent with the object and purpose of the SCM Agreement. The United States argue that the Panel’s interpretation would permit a Member to change the methodology for calculating the value of support provided under the production flexibility contract, direct payments, market loss assistance, and counter-cyclical payments programs. The Panel found that the United States’ interpretation is consistent with the ordinary meaning of the terms in their context, and is supported by the evidence on record.

In conclusion, the Panel found that the United States’ interpretation of the “agricultural product” in Article 13(b)(ii) of the SCM Agreement is inconsistent with the ordinary meaning of the term in its context, and is not supported by the evidence on record. The Panel also found that the United States’ interpretation of the “agricultural product” is consistent with the obligations of the United States under the Agreement on Agriculture. The United States argue that the Panel’s interpretation would permit a Member to change the methodology for calculating the value of support provided under the production flexibility contract, direct payments, market loss assistance, and counter-cyclical payments programs. The Panel found that the United States’ interpretation is consistent with the ordinary meaning of the terms in their context, and is supported by the evidence on record.
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, 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 term 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".93 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").94 Brazil maintains that the Panel found, as a matter of fact, that a world market exists for upland cotton. 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.95 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.96 In Brazil's view, the Panel found that "Brazilian prices, i.e., prices in Brazil and prices received for Brazilian exports, are significantly suppressed".97

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.98 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.99 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 more 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" 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".96 Brazil supports its interpretation by reference to Article 6.1(a) of 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.97

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90Brazil lists the relevant arguments in Annex A of its appellee's submission.
91Brazil's appellee's submission, para. 628. (original emphasis)
92Ibid., para. 633. (emphasis omitted)
93Ibid., paras. 619 and 622 (referring to Panel Report, paras. 7.1274 and 7.1311).
94Ibid., paras. 644 and 808 (referring to Panel Report, paras. 7.1266, 7.1282-7.1284 and 7.1313).
95Ibid., paras. 799-801 (referring to Panel Report, paras 7.1311 and 7.1313).
96Ibid., para. 802.
97Ibid., paras. 793-798 (referring to Panel Report, paras. 7.1205, 7.1209, and 7.1215).
98Brazil's appellee's submission, para. 168 (referring to the United States' appellant's submission, para. 324).
99Ibid., para. 788 (referring to the United States' appellant's submission, para. 224).
90Ibid., para. 467.
91Brazil's appellee's submission, para. 523 (quoting Panel Report, para. 7.1226).
Brazil contends that the United States' arguments distinguishing between "raw" and "processed" cotton in its measures to exempt certain domestic subsidies from the provisions of the Agreement on Agriculture apply to the subsidized product (upland cotton), regardless of the stage at which they were provided. Brazil requests that the Appellate Body uphold the Panel's conclusion that Step 2 payments to exporters of United States upland cotton are contingent upon export performance and, consequently, are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

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's appellee's submission, para. 860 (referring to GATT Panel Report, US – FSC (Article 21.5 – EC), 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. 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 United 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. 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. 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.

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. 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 (i) 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. 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 1.6 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. 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 10.2 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-

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109Brazil’s appellee’s submission, paras. 894-899 (referring to Panel Report, Canada – Dairy, paras. 2.39 and 7.41).
108Brazil’s appellee’s submission, para. 211 (quoting Panel Report, para. 7.61).
107Brazil’s appellee’s submission, para. 213 (referring to Appellate Body Report, Brazil – Aircraft, paras. 132-133).
106Brazil’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).
104Ibid., para. 226 (referring to Panel Report, paras. 7.92-7.93).
commercial transactions. Article 10.3 does so by reversing the usual rules on the burden of proof set out in Article 10.2, which state that a party must prove that a specific measure is an export subsidy. Article 10.3, however, requires that the Panel determine whether the test specified in Article 10.2 is satisfied. This is necessary because, under Articles 10.1 and 10.2, the export subsidy commitments of Members are determined by the Panel on a case-by-case basis, whereas under Articles 10.1 and 10.2, the export subsidy commitments of Members are determined by the Panel on a case-by-case basis.

124. Brazil submits that, even if correct, none of the United States' arguments in respect 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 is in substance. The United States' arguments are based on the premise that the Panel's interpretation of Article 10.2 is inapplicable to the facts of the case. Brazil submits that, in the absence of a contrary finding by the Panel, the Panel's interpretation of Article 10.2 must be upheld.

125. Brazil also takes issue with the United States' assertion that the Panel required the United States to provide "incontrovertible demonstrations to the Panel" that, under the net present value method used in the Panel's calculations, the net present value of the export credit guarantees was positive. Brazil submits that, under the facts of the case, the United States was not required to provide such demonstrations. The United States' argument is based on the premise that the Panel's interpretation of Article 10.2 is inapplicable to the facts of the case. Brazil submits that, in the absence of a contrary finding by the Panel, the Panel's interpretation of Article 10.2 must be upheld.

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, in light of the fact that the United States did not challenge the Panel's findings of fact, the United States is precluded from challenging the Panel's interpretation of the term "export subsidies" in Articles 10.1 and 10.2.

128. In addition, Brazil asserts that the United States' argument that the Panel made sufficient factual findings for its conclusion that the United States' export credit guarantee programs constitute export subsidies under the Agreement on Agriculture is not supported by the facts of the case. Brazil submits that the Panel's interpretation of Article 10.2 is inapplicable to the facts of the case and that, in the absence of a contrary finding by the Panel, the Panel's interpretation of Article 10.2 must be upheld.

129. Brazil also takes issue with the United States' assertion that the Panel required the United States to provide "incontrovertible demonstrations to the Panel" that, under the net present value method used in the Panel's calculations, the net present value of the export credit guarantees was positive. Brazil submits that, under the facts of the case, the United States was not required to provide such demonstrations. The United States' argument is based on the premise that the Panel's interpretation of Article 10.2 is inapplicable to the facts of the case. Brazil submits that, in the absence of a contrary finding by the Panel, the Panel's interpretation of Article 10.2 must be upheld.

130. Brazil also takes issue with the United States' assertion that the Panel required the United States to provide "incontrovertible demonstrations to the Panel" that, under the net present value method used in the Panel's calculations, the net present value of the export credit guarantees was positive. Brazil submits that, under the facts of the case, the United States was not required to provide such demonstrations. The United States' argument is based on the premise that the Panel's interpretation of Article 10.2 is inapplicable to the facts of the case. Brazil submits that, in the absence of a contrary finding by the Panel, the Panel's interpretation of Article 10.2 must be upheld.
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 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 "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." "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". 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.

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 appeals the Panel's finding that Brazil failed to establish a claim that the "updating" of base acreage for direct payments under the FSRI Act of 2002 renders that program inconsistent with Articles 5(c) and 6.3(d) of the SCM Agreement. Brazil requests the Appellate Body to find that the effect of these subsidies is an increase in the United States' world market share of exports, 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 products of the complaining Member in the 'same market' under Article 6.3(c)."

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 increased 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

122Brazil's other appellant's submission, para. 246. (emphasis added by Brazil)
123Ibid., para. 287 (quoting para. 1 of Annex 2 of the Agreement on Agriculture).
124Brazil's other appellant's submission, para. 269 (quoting Panel Report, para. 7.1434).
equitable share of 'world export trade in' upland cotton, contrary to the second sentence of Article XVI:3 of the GATT 1994.

142. Brazil argues that the 'world market share' under Article XVI:3 refers to world market share in terms of exports. Article XVI:3(iii) provides a limited exemption for agricultural export subsidies from the disciplines of Article XVI:3 of the GATT 1994, subject to the second sentence of Article XVI:3. Article XVI:3(iii) suggests that, in principle, green box domestic support is subject to challenge under the second sentence of Article XVI:3. Brazil argues that, in the narrower concept of "subsidies contingent upon export performance", the discipline in the GATT 1994 is to prevent measures that are also subject to the SCM Agreement and the General Agreement on Tariffs and Trade (GATT 1994). The rules for disciplining these subsidies are found in Article 6.3(d) of the SCM Agreement and the disciplines under the Agreement on Agriculture.

143. Brazil adds that Article XVI:3 of the GATT 1994 continues to apply despite the disciplines in the SCM Agreement and the General Agreement on Agriculture. Brazil argues that, in the second sentence of Article XVI:3 of the GATT 1994, measures that are also subject to the SCM Agreement and the General Agreement on Agriculture may apply to any form of subsidy that operates to increase the export of any primary product. Should it do so, and the Panel's finding that Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the SCM Agreement, Brazil calls on the Appellate Body to complete the analysis under Article 6.3(d). The meaning of Article XVI:3 that the GATT 1994 continues to apply to measures that are also subject to the SCM Agreement and the General Agreement on Agriculture, and that the second sentence of Article XVI:3 continues to apply to measures that are also subject to the SCM Agreement and the General Agreement on Agriculture.
held that Article 10.1 applies if a measure "allows for" circumvention, whereas the Panel insisted that circumvention must be required by law. 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 the Appellate Body should consider when examining the threat of circumvention.

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.

149. Brazil asserts that the Panel erred in the interpretation and application of Article 10.1 of the Agreement on Agriculture. The concepts of actual and threatened circumvention in Article 10.1 are different from the concepts of actual and threatened circumvention in the SCM Agreement. The Panel's interpretation of Article 10.1 is inconsistent with the Panel's interpretation of Article 6.3(c) of the SCM Agreement.

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. Therefore, Article 10.1 should be read so as to thwart, forestall, or stop circumvention from occurring by requiring a Member to take appropriate precautionary action. If the Panel's interpretation of Article 10.1 were to prevail, the threat obligation would fail to prevent circumvention, contrary to the express aim of the provision.

151. Brazil distinguishes the meaning of "threats" 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 requires a higher degree of likelihood because, under both Agreements, the demonstration of "threat" triggers the right to impose safeguards. 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 must account for the Appellate Body's decision in US – FSC.
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 misunderstood the principle of judicial economy as required by Articles 1.1 and 3.10 of the SCM Agreement. Brazil appeals the finding that ETI Act export subsidies provided with respect to upland cotton and not with respect to all products, as required by Article 1.1 of the SCM Agreement, are below relevant benchmarks, including the fees charged by the United States Export-Import Bank for export guarantees, are not tied to the export performance of the subsidized product, and are applied in a manner that results in actual circumvention with respect to only one product (i.e., cotton). In the present case, a claim under item (j) of the Illustrative List of Export Subsidies is not the same measure as a claim under Articles 1.1 and 3.1(a) of the SCM Agreement on Agriculture. Brazil submits that the Panel misapplied the principle of judicial economy.

162. Brazil claims that the Panel erred in the application of Article 10.1 of the SCM Agreement on Agriculture, and did not discharge its duties under Article 11 of the DSU, by finding that the United States' export credit guarantee programs are not export subsidies under the SCM Agreement. Brazil submits that the Panel failed to fully address the merits of Brazil's claims, which the Panel itself characterized as “issues that have not been addressed by the Panel, [including] the extent to which the United States' export credit guarantee programs are export subsidies.” The Panel did not apply a proper standard to the United States' export credit guarantee programs. Brazil submits that, under Article 10.1 of the SCM Agreement, the Panel is required to find that the United States' export credit guarantee programs constitute export subsidies within the meaning of Article 10.1 of the SCM Agreement. Brazil submits that the Panel misapplied its obligations under Articles 10.1 and 10.10 of the SCM Agreement.

163. Brazil appeals the finding that Brazil did not establish a prima facie case of inconsistency of the U.S. Export-Import Bank with Articles 8 and 10.1 of the SCM Agreement, and Articles 3.1(a) and 3.2 of the SCM Agreement on Agriculture. Brazil submits that, in assessing whether the United States' export credit guarantee programs are export subsidies, the Panel failed to apply a proper standard.

164. Brazil alleges that the United States “effectively admitted” the inconsistency of the ETI Act with Articles 10.1 and 8 of the SCM Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement on Agriculture, by enacting on 25 October 2004 “legislation, on 25 October 2004, that ‘seems to repeal most of the illegal aspects of the ETI Act of 2000’.” Brazil submits that, according to the principles of judicial economy and of the Panel's duties under Article 11 of the DSU, the Panel should have completed its analysis and findings.

165. In its other applicant's submission, para. 222. Brazil also claimed that the Panel erred by failing to find actual circumvention of subsidy commitments for vegetable oil in 2002. Brazil, however, has not pursued this claim any further.
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).

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. 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.

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.” 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 SCM 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.” 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
the Appellate Body complete the analysis and find that the effect of the price-contingent subsidies is

174. According to the United States, the Panel was correct in relying on Article 3.1(a) of the SCM Agreement, item (l) of the illustrative list of export subsidies in Annex 1 of the SCM Agreement of the GATT 1994 in concluding that Article XVI.3 of the GATT 1994 contains certain export subsidies on primary products.

175. The United States contends that the Panel erred in its interpretation of Article XVI.3 of the GATT 1994 by failing to consider the context of that Article. First, in interpreting Article 6.3(d) of the SCM Agreement, the Panel was correct in concluding that the phrase "export subsidies" as used in Article XVI.3 means "export subsidies" as defined in Article 6.3(a) of the SCM Agreement. Second, the Panel correctly interpreted the phrase "to increase...within the meaning of Article 6.3(d)" to mean "to increase...within the meaning of Article 6.3(d)". The United States submits that the Panel was also correct in concluding that Article XVI.3 of the GATT 1994, as interpreted, requires that the Panel make a determination that the effect of the price-contingent subsidies is an increase in the United States' world market share in the context of Article XVI.3.

176. Even if Brazil's interpretation is correct, the United States submits that the Panel was incorrect in finding that the programs did not pose a threat of circumvention. First, the United States submits that the Panel erred in concluding that the programs did not pose a threat of circumvention. Second, the United States submits that the Panel erred in concluding that the programs did not pose a threat of circumvention. Third, the United States submits that the Panel erred in concluding that the programs did not pose a threat of circumvention.

177. The United States submits that the Panel erred in its interpretation of Article XVI.3 of the GATT 1994 by failing to consider the context of that Article. First, in interpreting Article 6.3(d) of the SCM Agreement, the Panel was correct in concluding that the phrase "export subsidies" as used in Article XVI.3 means "export subsidies" as defined in Article 6.3(a) of the SCM Agreement. Second, the Panel correctly interpreted the phrase "to increase...within the meaning of Article 6.3(d)" to mean "to increase...within the meaning of Article 6.3(d)". The United States submits that the Panel was also correct in concluding that Article XVI.3 of the GATT 1994, as interpreted, requires that the Panel make a determination that the effect of the price-contingent subsidies is an increase in the United States' world market share in the context of Article XVI.3.

178. The United States submits that the Panel erred in its interpretation of Article XVI.3 of the GATT 1994 by failing to consider the context of that Article. First, in interpreting Article 6.3(d) of the SCM Agreement, the Panel was correct in concluding that the phrase "export subsidies" as used in Article XVI.3 means "export subsidies" as defined in Article 6.3(a) of the SCM Agreement. Second, the Panel correctly interpreted the phrase "to increase...within the meaning of Article 6.3(d)" to mean "to increase...within the meaning of Article 6.3(d)". The United States submits that the Panel was also correct in concluding that Article XVI.3 of the GATT 1994, as interpreted, requires that the Panel make a determination that the effect of the price-contingent subsidies is an increase in the United States' world market share in the context of Article XVI.3.

179. The United States contends that the Panel erred in its interpretation of Article XVI.3 of the GATT 1994 by failing to consider the context of that Article. First, in interpreting Article 6.3(d) of the SCM Agreement, the Panel was correct in concluding that the phrase "export subsidies" as used in Article XVI.3 means "export subsidies" as defined in Article 6.3(a) of the SCM Agreement. Second, the Panel correctly interpreted the phrase "to increase...within the meaning of Article 6.3(d)" to mean "to increase...within the meaning of Article 6.3(d)". The United States submits that the Panel was also correct in concluding that Article XVI.3 of the GATT 1994, as interpreted, requires that the Panel make a determination that the effect of the price-contingent subsidies is an increase in the United States' world market share in the context of Article XVI.3.

180. The United States requests that the Appellate Body uphold the Panel's finding that the programs did not pose a threat of circumvention. However, if the Appellate Body finds that the programs did pose a threat of circumvention, the United States observes that the Panel's analysis of the programs, as well as the Panel's analysis of the effect of the programs on the United States' world market share, is flawed. The United States submits that the Panel erred in its interpretation of Article XVI.3 of the GATT 1994 by failing to consider the context of that Article. First, in interpreting Article 6.3(d) of the SCM Agreement, the Panel was correct in concluding that the phrase "export subsidies" as used in Article XVI.3 means "export subsidies" as defined in Article 6.3(a) of the SCM Agreement. Second, the Panel correctly interpreted the phrase "to increase...within the meaning of Article 6.3(d)" to mean "to increase...within the meaning of Article 6.3(d)". The United States submits that the Panel was also correct in concluding that Article XVI.3 of the GATT 1994, as interpreted, requires that the Panel make a determination that the effect of the price-contingent subsidies is an increase in the United States' world market share in the context of Article XVI.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.\footnote{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".\footnote{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.

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"; 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 for additional findings of actual circumvention of export subsidy commitments for pig meat and poultry meat. The United States explains that no benefit is conferred because identical financial instruments are available in the marketplace in the form of "forfaiting"; 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.

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.\footnote{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".\footnote{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 shift" that Brazil gave to the ETI Act of 2000 satisfied Brazil's burden to make its prima facie case concerning that Act.\footnote{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
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". 161 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, 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 guarantee programs is also possible and should be made on the basis of Articles 1 and 3.1(a) of the *SCM Agreement*.

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161 Argentina's statement at the oral hearing.

162 Ibid.
2. Australia requests that the Appellate Body uphold the Panel's conclusion that Step 2 payments to domestic users constitute subsidies that are inconsistent with Article 3.1(b) of the SCM Agreement.

204. 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 to the Agreement on Agriculture.

205. Australia requests that the Appellate Body uphold the Panel's conclusion that the direct payment program is the successor to the production flexibility contract program and that the two programs are identical. Australia adds that the direct payment program is intended to provide a base for long-term investment and that the United States' argument that the direct payment program is not consistent with the definition of an export subsidy, is not valid.

206. Australia submits that the Appellate Body should also uphold the Panel's conclusion that the United States has incorrectly applied Articles 31 and 32 of the Vienna Convention. Article 31 applies to all dispute settlement proceedings and is not restricted to Articles 10.1 and 10.2 of the Agreement on Agriculture. Article 31 applies to all disputes, including those involving the interpretation of the Agreement, and it is clear that the United States has not provided any exception to the definition of an export subsidy. The object and purpose of Article 31 is to ensure that the interpretation of legal provisions is not based on 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. This is consistent with the different purposes of Parts III and V of the 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 production, as defined in Article 6.3(d). In turn, Benin and Chad argue that the Appellate Body should take into account the effect of United States upland cotton subsidies on the “fragile economies of West and Central Africa” 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 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. Benin and Chad argue that the Appellate Body should find that it has also suffered serious prejudice under Article 6.3(d) as a result of the increase in the United States’ world market share.

212. According to Brazil and Chad, the Appellate Body should reverse the Panel’s interpretation of “world market share” as world market share of production as defined in Article 6.3(d). Benin and Chad argue that the effect of United States upland cotton subsidies on the “fragile economies of West and Central Africa” 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 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. Benin and Chad argue that the Appellate Body should find that it has also suffered serious prejudice under Article 6.3(d) as a result of the increase in the United States’ world market share.

213. Benin and Chad state that if the Appellate Body reverses the Panel’s interpretation of “world market share” as world market share of production, it would be able to find that the United States acted inconsistently with Article 6.3(d) of the SCM Agreement. Benin and Chad argue that the Appellate Body should find that the United States acted inconsistently with Article 6.3(d) of the SCM Agreement by engaging in parallel programs with the effect of reducing the market share of the United States’ cotton producer, thereby causing serious prejudice to Benin and Chad.

214. Benin and Chad argue that the Appellate Body should reverse the Panel’s interpretation of “world market share” as world market share of production as defined in Article 6.3(d). Benin and Chad argue that the effect of United States upland cotton subsidies on the “fragile economies of West and Central Africa” 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 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. Benin and Chad argue that the Appellate Body should find that it has also suffered serious prejudice under Article 6.3(d) as a result of the increase in the United States’ world market share.
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 Article 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.

(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 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.

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".

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".

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

\^172\(^{\text{Canada's third participant's submission, para. 40 (referring to Appellate Body Report, US – FSC, para. 152).}}\)

\(^{174}\)(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)." 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 United 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 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" 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". The European Communities contends that Article 13(b) 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.

(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 Agriculture* contemplates 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).
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 decoupled 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" 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 argues 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.

178New 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, distorts 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

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"; and

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;

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 paragraph 7.1238 of the Panel Report, that the "same market" may be a "world market"; and

- 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); and

- 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;\(^{181}\)

(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\(^{182}\);

(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

\(^{180}\)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.

\(^{181}\)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 2002184, 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

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 panel193), 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
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." As such, the phrase "affecting the operation of any covered agreement" is not a technical term that narrowly defines the subject of consultations. The phrase "affecting" suggests a temporal connotation. The ordinary meaning of the word "affecting" implies a measure that has "an effect on" something else. At the same time, we also concur with the United States that the ordinary meaning of the word "affecting", even in the context of the DSU, should be determined primarily by the way in which the term is used in the DSU itself. As the United States points out, the phrase "affecting the operation of any covered agreement" denotes that the affected measure must be a measure that has an effect on the covered agreement in the present tense. 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.

258. Brazil responds that neither Article 4.2 nor Article 6.2 of the DSU preclude a panel from analyzing payments made by a Member under a covered agreement in the past if it holds that such payments currently affect the interests of 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 another Member.

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 make its best efforts to settle satisfactorily any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former. (footnote omitted)

3. Scope of Consultations under Article 4.2 of the DSU

260. It is clear from Article 4.2 that, although a requested Member is under an obligation to engage in consultations pursuant to Article 4.2, it is the obligation of the requested Member to address alleged measures "affecting the operation of any covered agreement" taken within the territory of the former. If a measure was granted prior to the request for consultations, the requested Member may be under an obligation to engage in consultations pursuant to Article 4.2 if the measure is still in force and is affecting the operation of a covered agreement in the present. Whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of a 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. The United States argues that measures whose legislative basis has expired affect the operation of a covered agreement in the subject matter of the covered agreement. In our view, the question of whether measures whose legislative basis has expired affect the operation of a covered agreement is an issue that must be resolved on the facts of each case. The outcome of such an analysis cannot be prejudged by excluding expired measures from consultations and dispute settlement proceedings altogether.

261. We agree with the Panel that the word "affecting," when used in the present tense of the verb, suggests a temporal connotation. As the United States points out, the phrase "the ordinary meaning of the word 'affecting' implies a measure that has 'an effect on' something else." As such, expired measures are not capable of affecting 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.

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. We agree with the Panel that the word "affecting" refers primarily to "the way in which measures are currently affecting the operation of a covered agreement." We also agree with the United States that expired measures cannot be measures "affecting" in the present tense of the verb. We also agree with the United States that the ordinary meaning of the word "affecting," even in the context of the DSU, should be determined primarily by the way in which the term is used in the DSU itself. As the United States points out, the phrase "affecting the operation of any covered agreement" denotes that the affected measure must be a measure that has an effect on the covered agreement in the present tense. 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.

263. We consider that requesting Members should enjoy a degree of discretion in their requests for consultations under Article 4.2. Matters relating to the covered agreements for which consultations are requested must be "affecting the operation of any covered agreement." The United States argues that measures whose legislative basis has expired affect the operation of a covered agreement in the present tense of the verb "affecting." As such, expired measures cannot be measures "affecting" in the present tense of the verb. We also agree with the United States that expired measures cannot be measures "affecting" in the present tense of the verb. 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. The United States argues that measures whose legislative basis has expired affect the operation of a covered agreement in the subject matter of the covered agreement. In our view, the question of whether measures whose legislative basis has expired affect the operation of a covered agreement is an issue that must be resolved on the facts of each case. The outcome of such an analysis cannot be prejudged by excluding expired measures from consultations and dispute settlement proceedings altogether.

264. We find contextual support for this interpretation in Article 3.3 of the DSU, which underscores the importance of the "prompt settlement" of certain situations that, in the absence of a proper settlement, could undermine the effective functioning of the WTO and the maintenance of a proper balance between fundamental obligations of Members. 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 under a covered agreement, is essential to the effective functioning of the WTO and the maintenance of a proper balance between fundamental obligations of Members.
... may not be a measure ‘at issue’ in the sense of ipso facto 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 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 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 the expiry of the 3 March Measure did not suggest that such measures could not be the subject of a panel’s request in Article 6.2.

211 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 no expiration date’ (Panel Report, para. 7.29). Even in cases where a measure is found to have expired, GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the panel (as well as Article XXII of the GATT 1994). (See Request for Consultations by Brazil, WT/DS267/1, para. 2.4; Panel Report, India – Animal Feed Proteins, para. 6.2; and Panel Report, Brazil – SC–131/EC, para. 14.9. Even in cases where a measure is found to have expired, the analysis is consistent with the approach taken by GATT and WTO panels to questions relating to the expiry of measures after the establishment of a panel (as well as Article XXII of the GATT 1994).

212 This conclusion is consistent with the approach taken by GATT and WTO panels to questions relating to the expiry of measures after the establishment of a panel (as well as Article XXII of the GATT 1994) and the expiry of measures after the establishment of a panel (as well as Article XXII of the GATT 1994).

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 This conclusion is consistent with the approach taken by GATT and WTO panels to questions relating to the expiry of measures after the establishment of a panel (as well as Article XXII of the GATT 1994).

215 Panel Report, India – Animal Feed Proteins, para. 2.4; GATT Panel Report, India – Animal Feed Proteins, para. 6.2; and Panel Report, Brazil – SC–131/EC, para. 14.9. Even in cases where a measure is found to have expired, GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the panel (as well as Article XXII of the GATT 1994).
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 an 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.

The Appellate Body clarified: [whether 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.]

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, and also situated the question of "expired measures" in the context of the actionable subsidies claims made by Brazil in this case.222 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.

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)

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, "assuming 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 included 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 "Ibid., 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 the measures identified in the request for the establishment of a panel, we need to examine 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 included but not limited to upland cotton". 285. In reviewing the Panel's analysis, we are faced with the question of whether the scope of the consultations is determined by the written request for consultations or by what actually happened in the actual consultations. The Panel located first to what actually happened in the actual consultations. It is observed that Brazil submitted its request for consultations, seeking information on these programs. According to the Panel, this shows that the agricultural commodities identified in the request for consultations included export credit guarantees to eligible agricultural commodities, including, but not limited to, upland cotton. However, 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 its ruling in the "Korea - Alcoholic Beverages" case, which stated that "the only requirement under the DSU for consultations is that they 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 included but not limited to upland cotton". 286. In our view, the requirement that apply to a request for consultations is 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 request. 287. We agree with the Appellate Body's analysis of this part of the Panel's analysis because the Panel also found that the Panel's terms of reference are determined by the request for establishment of a panel. 288. Moreover, the Appellate Body has also explained that "as a general matter, consultations are a prerequisite to panel proceedings". 289. 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 request. 290. The requirements that apply to a request for consultations are set out in Article 4.4 of the DSU, which provides, in relevant part:

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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 request. 300. We agree with the Appellate Body's analysis of this part of the Panel's analysis because the Panel also found that the Panel's terms of reference are determined by the request for establishment of a panel. 301. Moreover, the Appellate Body has also explained that "as a general matter, consultations are a prerequisite to panel proceedings". 302. 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 request. 303. We agree with the Appellate Body's analysis of this part of the Panel's analysis because the Panel also found that the Panel's terms of reference are determined by the request for establishment of a panel. 304. Moreover, the Appellate Body has also explained that "as a general matter, consultations are a prerequisite to panel proceedings". 305. 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 request. 306. We agree with the Appellate Body's analysis of this part of the Panel's analysis because the Panel also found that the Panel's terms of reference are determined by the request for establishment of a panel. 307. Moreover, the Appellate Body has also explained that "as a general matter, consultations are a prerequisite to panel proceedings". 308. The requirements that apply to a request for consultations are set out in Article 4.4 of the DSU, which provides, in relevant part:

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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 request.
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, 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 1 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.

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Footnote 1

1 Except with respect to export credit guarantee programs as explained below.

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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 the first paragraph provided for the second."\(^{254}\) The first paragraph, the United States points out, refers to exports, subsidies, exporter assistance, and export credit guarantee 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 broader 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

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Footnotes:

250Request for Consultations by Brazil, supra, footnote 26, pp. 1-2 and 4.
251Panel Report, para. 7.63.
252ibid., para. 7.65.
253ibid., para. 477.
254ibid., (original emphasis).
255ibid., para. 477.
256ibid., (original emphasis).
257ibid., para. 479.
258Panel Report, para. 7.63.
259ibid., 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)
260United States' appellant's submission, para. 461.
guarantee programs as they relate to eligible agricultural products including, but not limited to, upland cotton\textsuperscript{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".\textsuperscript{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"\textsuperscript{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, unless the parties agree otherwise.\textsuperscript{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 \textit{SCM Agreement}.

296. The United States requested the Panel to rule that Brazil "could not advance claims under ... Article 4 ... of the \textit{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 Article\textsuperscript{[e]} 4.2 ... of that Agreement".\textsuperscript{265}

In addition, the Panel noted that the United States had made allegations under both Articles 4.2 and 7.2 of the \textit{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 \textit{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 concerning the compatibility of the United States' export credit guarantee programs with Part III of the \textit{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 \textit{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 \textit{SCM Agreement}.

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\textsuperscript{266}, and observed that the first paragraph is "textually limited to upland cotton", while the second paragraph "is not so limited".\textsuperscript{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.\textsuperscript{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 guarantee measures under the challenged programmes, without any limitation to upland cotton or any other particular product or products".\textsuperscript{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".\textsuperscript{270}

\textsuperscript{261}See infra, para. 309.

\textsuperscript{262}Appellate Body Report, \textit{Mexico – Corn Syrup (Article 21.5 – US)}, para. 54.

\textsuperscript{263}Appellate Body Report, \textit{Brazil – Aircraft}, para. 132. (emphasis omitted)


\textsuperscript{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)

\textsuperscript{266}Panel Report, para. 7.83.

\textsuperscript{267}Ibid., para. 7.84.

\textsuperscript{268}Ibid., para. 7.84.

\textsuperscript{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.

\textsuperscript{270}Panel Report, paras. 7.92-7.93.
Therefore, the Panel found:

Assuming 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.22

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.271 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 expends 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

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

2. Did Brazil’s Statement of Available Evidence Include Export Credit Guarantees to Other Eligible Agricultural Commodities?

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.

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

Brazil's statement of available evidence is annexed to its request for consultations. As the Panel noted283, 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]

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

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.286

Statement of available evidence annexed to the Request for Consultations by Brazil, supra, footnote 26, para. 3.

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271Brazil 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)
272Panel Report, para. 7.103. (footnotes omitted)
273United States' appellant's submission, para. 494.
274Ibid., paras. 495-496.
275United States' appellant's submission, para. 497.
277Brazil's appellee's submission, para. 230.
278Ibid., paras. 231-232.
279Ibid., para. 233.
294Footnote 26, para. 3.
280United States' appellant's submission, para. 498.
283Panel Report, para. 7.83.
284Statement 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 programs, without any limitation to upland cotton or any other particular product or products. 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 programs as they relate to upland cotton and other eligible agricultural products".

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" 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 programs "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."

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 programs, without any limitation to a particular product or products".

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". 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".

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'." 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.

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
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

The Panel concluded that these measures are thus not green box measures301, 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 foods—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".308

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.309 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
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.  

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.  

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, 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.  

(c) 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

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309Brazil'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.  

310Brazil's appellee's submission, paras. 285-286 (quoting Panel Report, para. 7.386).  

311The "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".
Indeed, the United States agrees as we noted above, there is no disagreement between the participants that the amount 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".

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 crops. 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 payments and the type of production.

Annex 2 is a limited one. It does not concern a measure requiring that payments from Annex 2, entitled "decoupled income support", seeks to decouple direct payments from crop production decisions and thus to create an exception to the paragraph 6(b) formula. Paragraph 6 of Annex 2, entitled "decoupled income support", seeks to decouple or de-link payments from a specific crop (or set of crops) by providing 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 excludes payments from a measure when the excluded crops are produced, while providing payments even when no crops are produced at all.

The ordinary meaning of the term "related to" in paragraph 6(b) denotes some degree of connection between two or more things, whereas the expression "based on" implies that Members are allowed, in principle, to require no production at all. Accordingly, payments conditioned on a total production ban could not relate the amount of the payment to the volume of production within the meaning of paragraphs 6(b) and 6(e). Even assuming that payments contingent on a total production ban would be related to the amount of the payment being nil-giving meaning and effect to both paragraphs 6(b) and 6(e)—the volume of production being nil—giving meaning and effect to both paragraphs 6(b) and 6(e).
The United States argues that, if paragraph 6(e) means that a Member may require a producer not to be required to produce in order to receive payments, it disallows payments when certain crops are produced. However, the United States' view does not address the effect of different crops on the type of production undertaken. The flexibility to produce and receive payments for certain crops, while not excluding the production of other crops, is permitted by paragraph 6(b). This is so because the opportunity for farmers to receive payments for covered crops, while less or no production is required under paragraph 6(b), is offset by the production flexibility limitations under paragraph 6(b). Therefore, the United States' argument that the planting flexibility limitations only negatively affect the production of crops that are excluded is inconsistent with paragraph 6(b).

The United States also contends that it means that a Member may require a producer not to be required to produce in order to receive payments, and that the opportunity for farmers to receive payments for covered crops is offset by the production flexibility limitations under paragraph 6(b). This is so because the opportunity for farmers to receive payments for covered crops, while less or no production is required under paragraph 6(b), is offset by the production flexibility limitations under paragraph 6(b). Therefore, the United States' argument that the planting flexibility limitations only negatively affect the production of crops that are excluded is inconsistent with paragraph 6(b).

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 the fundamental requirement of paragraph 1 of Annex 2. 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.

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. 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 the activities of "undertaking" the production of those products, would not be related to the type of production attempted by the recipient; rather, the amount of payment is related to the type of production "attempted" by the recipient. We find further support for our interpretation of paragraph 6(b) in the context provided by paragraph 11(e) of Annex 2, entitled "Structural adjustment assistance provided through investment aids". Several of the policy-specific criteria and conditions set out in the remaining paragraphs of Annex 2, including paragraph 11(b), explicitly "exclude" the type of "negative" requirements not to produce that the United States measures at issue fail to conform with the "fundamental requirement" of paragraph 1 of Annex 2.

320. 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 certain Members may require in order to receive payments. However, 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)

321. In our view, the concepts of "type or volume of production undertaken by the producer" and the "amount of payments received for production" 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 of "negative" requirements not to produce that the United States measures at issue fail to conform with the "fundamental requirement" of paragraph 1 of Annex 2 and the link to the type of "negative" requirements not to produce that the United States measures at issue fail to conform with the "fundamental requirement" of paragraph 1 of Annex 2.

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. We note that the first sentence of paragraph 1 of Annex 2 lays down a fundamental requirement for green box measures, such as they must have "no, or at most minimal, trade-distorting effects or effects on production". The United States, in its appeal, argues that if Amendment 2 of Annex 2 contains a fundamental requirement that such measures "have no, or at most minimal, trade-distorting effects or effects on production", and that the United States measures at issue fail to conform with that requirement, the United States' claim must be considered by the Panel.

324. However, the United States' argument that the planting flexibility limitations only negatively affect the production of crops that are excluded is inconsistent with paragraph 6(b). 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.

325. We find further support for our interpretation of paragraph 6(b) in the context provided by paragraph 11(e) in the context provided by paragraph 6(b).

326. We note that the exception provided by paragraph 11(e) and the link to the type of "negative" requirements not to produce that the United States measures at issue fail to conform with the "fundamental requirement" of paragraph 1 of Annex 2.
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" and paragraph 6(b) 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". 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.

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. 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 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. 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 or payments under certain environmental programs.

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 any finding on their conformity with paragraph 6 due to the updating" of base acres. 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. 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.

337Brazil's appellant's submission, para. 315.
338Article 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".
339See paragraph 12 of Annex 2 to the Agreement on Agriculture.
340Panel Report, para. 7.393.
341Brazil'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:

... 

(iii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the SCM 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 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 case347, 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 "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", which would exclude payments under these "non-product-specific" base acre dependent measures.349 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

342The "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".

343Step 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)

344The 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)

345Ibid., 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)

346Ibid., para. 7.598.

347Panel Report, para. 7.607.

348Ibid., para. 7.608.

349United States' appellant's submission, para. 93.

350Ibid., para. 105.
commodity as one to which they bestow or confer support, 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.

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. 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". 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.

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. 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.

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)(iii), 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. 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".

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 methodology for measures based on price gaps. 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, 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. 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. 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.

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 domestic support measures. These measures are production flexibility contract payments, market loss assistance payments, direct payments, and counter-cyclical payments. 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. 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, market loss assistance payments, direct payments and counter-cyclical payments.
natural text
convince, however, that this discipline is limited to "product-specific support" as defined in Article 13(b)(ii) of the Agreement on Agriculture. Rather, it extends to all measures that grant "support to a specific commodity", or "support to a specific commodity in excess of that decided during the 1992 marketing year". The provision in Article 13(b)(ii) is broader than just "product-specific support" in the sense of Article 1 and Annex 3. It is, however, more specifically directed at "support to a specific commodity", such that the measure is directed at supporting that commodity. Such a discernible link may be evident where the measure is designed to support a specific commodity, or where the terms of the measure explicitly refer to a specific commodity. Conversely, support that does not flow to a specific commodity, or support that is given to a commodity by coincidence rather than by the inherent design of the measure, cannot be considered as falling within the ambit of the term "support to a specific commodity".

382. As we have explained above, the term "such measures ... support to a specific commodity" comprises two elements: first, a non-green box measure actually confers support on the specific commodity; and second, the support is conferred on a specific commodity, such that the measure is directed at supporting that commodity. Such a discernible link may be evident where the measure is designed to support a specific commodity, or where the terms of the measure explicitly refer to a specific commodity. Conversely, support that does not flow to a specific commodity, or support that is given to a commodity by coincidence rather than by the inherent design of the measure, cannot be considered as falling within the ambit of the term "support to a specific commodity".

383. 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": market loss assistance payments, direct payments, and counter-cyclical payments. We refer to these measures as "basically domestic" payments, because each of these payments is based on a calculation which takes into account the specific commodity. In the case of market loss assistance payments, the calculation is based on the acquired quantity of upland cotton base acres, which is a historical yield per acre. For purposes of the AMS calculation, the United States' interpretation of Article 13(b)(ii) is that the measure is a "support to a specific commodity" if it is based on a calculation that takes into account a specific commodity, even if only indirectly.

384. The United States' interpretation of Article 13(b)(ii) is that the measure is a "support to a specific commodity" if it is based on a calculation that takes into account a specific commodity, even if only indirectly. In the case of market loss assistance payments, the United States' interpretation is that the measure is a "support to a specific commodity" if it is based on a calculation that takes into account a specific commodity, even if only indirectly. In the case of direct payments, the United States' interpretation is that the measure is a "support to a specific commodity" if it is based on a calculation that takes into account a specific commodity, even if only indirectly. In the case of counter-cyclical payments, the United States' interpretation is that the measure is a "support to a specific commodity" if it is based on a calculation that takes into account a specific commodity, even if only indirectly.

385. We have also considered whether the Panel's interpretation of Article 13(b)(ii) is consistent with the text of the Agreement. We have noted that the Panel's interpretation is consistent with the text of the Agreement, and that it is supported by the language and the structure of the provision. We have also considered whether the United States' interpretation of Article 13(b)(ii) is consistent with the text of the Agreement. We have noted that the United States' interpretation is not consistent with the text of the Agreement, and that it is not supported by the language and the structure of the provision.

386. Finally, we have considered whether the Panel's interpretation of Article 13(b)(ii) is consistent with the object and purpose of the Agreement. We have noted that the Panel's interpretation is consistent with the object and purpose of the Agreement, and that it contributes to the achievement of the Agreement's objectives. We have also considered whether the United States' interpretation of Article 13(b)(ii) is consistent with the object and purpose of the Agreement. We have noted that the United States' interpretation is not consistent with the object and purpose of the Agreement, and that it contributes to the achievement of the Agreement's objectives.

387. We have also considered whether the United States' interpretation of Article 13(b)(ii) is consistent with the object and purpose of the Agreement. We have noted that the United States' interpretation is not consistent with the object and purpose of the Agreement, and that it contributes to the achievement of the Agreement's objectives. We have also considered whether the United States' interpretation of Article 13(b)(ii) is consistent with the object and purpose of the Agreement. We have noted that the United States' interpretation is not consistent with the object and purpose of the Agreement, and that it contributes to the achievement of the Agreement's objectives.
programs "clearly and explicitly specify[ing] upland cotton ... as a commodity to which they grant support".\textsuperscript{379} 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.\textsuperscript{380} 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'."\textsuperscript{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 planted 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."\textsuperscript{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"\textsuperscript{395} and that "the overwhelming majority of farms enrolled in the programmes which plant upland cotton also hold upland cotton base".\textsuperscript{396}

377. We note in this regard that the Panel included, in "Attachment to Section VII:D" to its Report, and described as "appropriate",\textsuperscript{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.\textsuperscript{299} 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.

\textsuperscript{301}Ibid., para. 103 (quoting Panel Report, para. 7.518).
\textsuperscript{302}United States' appellant's submission, para. 104.
\textsuperscript{303}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).
\textsuperscript{304}Panel Report, para. 7.637.
\textsuperscript{305}Ibid., para. 7.636. (footnote omitted)
\textsuperscript{306}Ibid., para. 7.636.
\textsuperscript{307}Ibid., para. 7.646.
\textsuperscript{308}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.\textsuperscript{398}

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.\textsuperscript{399} The Panel also observed that, in the case of each of the measures, a particular payment rate was specified for upland cotton.\textsuperscript{400} Yield calculations were also specific to upland cotton and related to historical upland cotton yields per acre.\textsuperscript{401} In the case of market loss assistance payments, payments were specifically designed to compensate for low prices for upland cotton.\textsuperscript{402} 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.\textsuperscript{403} 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.\textsuperscript{404} 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
Report as an "appropriate" alternative calculation, sufficiently demonstrates a discernible link between payments under base acre dependent measures (related to upland cotton) and upland cotton.

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. In advancing this contention, the United States relies upon the following statement of the Panel:

"[I]f 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."

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". 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." 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.

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. 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".

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 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.

(c) Methodology for Calculating the Value of Price-Based Payments

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.

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. Deficiency payments for upland cotton were based on the gap between 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.

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.

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.

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.

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.

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.

For a description of payments under the marketing loan program, see Panel Report, paras. 7.204-7.208.

For a description of deficiency payments, see Panel Report, footnote 294 to para. 7.213.

The United States' arguments, paras. 71-73 (quoting paragraph 10 of Annex 3 to the Agreement on Agriculture).

Panel Report, para. 7.552.
Against this background, we observe that the "cotton to cotton" methodology, and we have therefore modified 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.

As we explain in the next section, our conclusion that the United States granted, during the relevant years of the implementation period, support measures that were "in excess of that decided during the 1992 marketing year", is not met by the United States. We therefore uphold paragraph 7.1416 and 8.1(g)(i) of the Panel 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.

(d) Conclusion Regarding the Application of Article 13(b)(ii)

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".

391. We have concluded that, for purposes of the comparison envisaged by paragraph 10 of Annex 3 to the Agreement on Agriculture, the "cotton to cotton" methodology provided in the Panel Report, para. 7.596, for the calculation of the values attributable to price-contingent subsidies, is applicable because of the United States implementation period support is available to us in these proceedings.

392. In our review above, we have concluded that, for purposes of the comparison envisaged by Article XVI of the GATT 1994 or Article 5 of the SCM Agreement, the values attributable to deficiency payments and payments under the marketing loan program using price gap methodology in each relevant year, as calculated according to Article 13(b)(ii) of the Agreement on Agriculture, should the Panel's conclusions with respect to the phrase "support to a specific commodity" be upheld by the Appellate Body. (United States' response to questioning at the oral hearing)

393. Adding to the values calculated in Table 1 of Annex 2, the United States' support measures, and the United States' support measures in question, are in excess of the values calculated using price gap methodology. We conclude that the United States' support measures were "in excess of that decided during the 1992 marketing year", that is, "in excess of the values calculated using price gap methodology". We further note that the United States' support measures in question, are in excess of the values calculated using the "cotton to cotton" methodology, and we have therefore modified 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.

394. It follows that the condition set out in the proviso to Article 13(b)(ii) of the Agreement on Agriculture, that the values attributable to support measures be calculated using the "cotton to cotton" methodology, is not met by the United States. We therefore uphold paragraph 7.1416 and 8.1(g)(i) of the Panel 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.

395. The United States appeals the Panel's findings on the value of support in each relevant year calculated according to price gap methodology as well. However, we have concluded that the United States' support measures, and the United States' support measures in question, are in excess of the values calculated using price gap methodology. We conclude that the United States' support measures were "in excess of that decided during the 1992 marketing year", that is, "in excess of the values calculated using price gap methodology". We further note that the United States' support measures in question, are in excess of the values calculated using the "cotton to cotton" methodology, and we have therefore modified 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.
2. Objective Assessment under Article 11 of the DSU

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.³²⁹ Brazil requests us to dismiss the United States' arguments that Brazil lists in Annex A to its appellant's submission, on the basis that the United States has not made a proper claim of error under Article 11 of the DSU.⁴³²

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 appellant's submission on the basis that an Article 11 claim was not properly set out by the United States.

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". 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". 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. 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

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". As the Panel suggested and the parties agree, 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. 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".

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". Applying this interpretation to the facts of the present dispute, the Panel concluded that a "world market" for upland cotton does exist. 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". In the present dispute, having found that "price suppression has occurred in the same world market", the Panel decided that it was not "necessary to proceed to any further examination of ... alleged price suppression in individual country markets". 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).

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". It also submits that the Panel's finding that a "world market" exists for upland cotton is inconsistent with certain of its other findings. 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. Brazil contends that significant price suppression under Article 6.3(c) "may apply to any 'market', from local to global, and everything in between".

³²⁹Brazil's appellee's submission, paras. 105 and 146.
³³⁰Ibid., para. 146.
³³¹"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.
³³³On 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.
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:

"a place ... with a demand for a commodity or service"444; "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

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.1345 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: paragraph (a) restricts the relevant market to "a third country market"; and paragraph (d) refers specifically to the "world market share". We agree with the Panel1357 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, neither requires nor excludes the possibility of a national market or a world market.448

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.1346 The phrase "in the same market" suggests that the subsidized product in question (United States upland cotton in this case)1358 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 cotton1359 and Brazilian upland cotton1360 must be "in the same market" for Brazil's claim under Article 6.3(c) to succeed.1361 Furthermore, the participants agree that these are like products.1362

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", 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.1363 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.1364 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

444Panel Report, paras. 7.1248 and 7.1251; United States' appellant's submission, para. 310; Brazil's appellee's submission, paras. 636 and 638.
445See infra, footnote 451.
446This 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.
447Ibid., paras. 7.1238-7.1240.
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449Panel Report, paras. 7.1248 and 7.1251; United States' appellant's submission, para. 310; Brazil's appellee's submission, paras. 636 and 638.
450See infra, footnote 451.
451Specifically, 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)
452Panel 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.
453Accordingly, 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".
product will necessarily be in that market and the word "same" in Article 6.3(c) would have no meaning.\textsuperscript{458} We do not agree with this argument. As we have explained above, there is no \textit{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.\textsuperscript{459}

411. We now examine the United States' objection to the Panel's examination of the "world market for upland cotton"\textsuperscript{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.\textsuperscript{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\textsuperscript{462} and that a world market and a world price in that market also exists and is reflected in the A-Index.\textsuperscript{463} We see no reason to disturb the Panel's findings of fact in this regard.\textsuperscript{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 in which it had identified for upland cotton.\textsuperscript{465} As we explained earlier\textsuperscript{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 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"\textsuperscript{467} and "where competition exists between Brazilian and United States upland cotton."\textsuperscript{468}

413. Whether or not Brazilian and United States upland cotton competed in the "world market for upland cotton"\textsuperscript{469} during the period the Panel examined is a factual question. As we stated earlier\textsuperscript{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."\textsuperscript{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."\textsuperscript{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".\textsuperscript{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 \textit{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."\textsuperscript{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"\textsuperscript{475} and that the Panel was correct in examining the world market for upland cotton in the present dispute.\textsuperscript{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.


\textsuperscript{459}Panel Report, paras. 7.1238-7.1244.

\textsuperscript{460}Ibid., paras. 7.1247 and 7.1274.

\textsuperscript{461}United States' appellant's submission, para. 319 (referring to Panel Report, para. 7.1213).

\textsuperscript{462}Panel Report, paras. 7.1245-7.1252.

\textsuperscript{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)

\textsuperscript{464}Panel Report, para. 7.1248.

\textsuperscript{465}Ibid., para. 7.1251.

\textsuperscript{466}Ibid., paras. 7.1247 and 7.1274.

\textsuperscript{467}Supra, para. 408.

\textsuperscript{468}Panel Report, para. 7.1230.

\textsuperscript{469}Ibid., para. 7.1313. See also ibid., para. 7.1246.

\textsuperscript{470}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)

\textsuperscript{471}United States' appellant's submission, para. 239.

\textsuperscript{472}Supra, para. 410.

\textsuperscript{473}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:

\[ \text{[P]rices for upland cotton transactions throughout the world are ... largely determined by the A-Index price.} \]^{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];
(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 between" the price-contingent subsidies and the significant price suppression it had found\(^{485}\), for four main reasons:\(^{486}\)

\[ \text{[T]he United States exerts a substantial proportionate influence in the world upland cotton market.} \]^{487}

\[ \text{[T]he [price-contingent subsidies] are directly linked to world prices for upland cotton, thereby insulating United States producers from low prices.} \]^{488}

\[ \text{[T]here is a discern[ible] temporal coincidence of suppressed world market prices and the price-contingent United States subsidies.} \]^{489}

\[ \text{[C]redible evidence on the record concerning the divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997 ... supports the proposition that United States upland cotton producers would not have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue and that the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs.} \]^{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'":\(^{492}\)

\[ \text{[W]eakness in world demand for cotton due to competing, low-priced synthet} \]

\[ \text{[B]urgeoning United States textile imports, reflecting the strong United States dollar since the mid-1990's} \]

\[ \text{[T]he strong United States dollar since the mid-1990's} \]

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.

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Upland cotton planting decisions are driven by other factors such as (1) the effect of technological factors of upland cotton production and (2) the relative movement of upland cotton prices vis-à-vis prices of competing crops. (3) the expected prices for the upcoming crop year.

(b) Appeal by the United States

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. 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";
   (ii) ignoring data indicating that United States upland cotton production responded to market signals;
   (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"; and
   (iv) "the four main, cumulative grounds the Panel identified supporting a finding of causation do not withstand scrutiny";

(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";
   (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"; and
   (iii) failing to determine "the extent to which processed cotton benefits from subsidies provided with respect to raw cotton";

(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"; 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".

Meaning of "Significant Price Suppression"

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". 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.

(c) in relation to the effects of the price-contingent subsidies:
   (i) concluding "that the payments need not be allocated to the marketing year to which they relate"; 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".

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Article 6.3(c), as required by Article 33(3) of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

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.

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".

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 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). 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"?

- Is it "significant" price suppression?

- "The effect of the subsidy"?

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?". 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).

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. 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. The Panel's definition of price suppression, explained above, 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 if it otherwise would have been". 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
As the Panel pointed out, Articles 5 and 6.3 of the SCM Agreement reflect the general principles governing the determination of various factors, and to a large extent these principles are reflected in Articles 3.3 and 3.5 of the WTO Anti-Dumping Agreement. However, the definitions of injury and causation set out in the SCM Agreement are not the same as those in the Anti-Dumping Agreement. The definition of injury in the Anti-Dumping Agreement is based on the concept of serious prejudice to the interests of a Member, as defined in Article 1(b) of the GATT 1994, whereas the definition of injury in the SCM Agreement is based on the concept of adverse effects on domestic industry as a whole. The definition of causation in the Anti-Dumping Agreement is based on the concept of causation, whereas the definition of causation in the SCM Agreement is based on the concept of significant price suppression.

434. The specific factors that the Panel examined in determining whether or not "price suppression" had occurred were: (a) the characteristics of the United States' production and exports of upland cotton; (b) general price trends; and (c) the nature of the subsidies at issue. The panel found that these factors were relevant to the determination of significant price suppression.

435. The question before the Panel was whether the United States' production and exports of upland cotton were affected by the subsidies at issue. The panel found that the subsidies at issue had a significant impact on the world market for upland cotton, and that the United States' production and exports of upland cotton were affected by the subsidies at issue.

436. The panel also considered the impact of other factors on the world market for upland cotton, such as changes in supply and demand, changes in the value of the United States dollar, and changes in the price of substitute products. The panel found that these factors did not significantly affect the world market for upland cotton.

437. The panel then considered the impact of the subsidies at issue on the United States' production and exports of upland cotton. The panel found that the subsidies at issue had a significant impact on the United States' production and exports of upland cotton, and that the United States' production and exports of upland cotton were affected by the subsidies at issue.

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448. The panel then considered the impact of the subsidies at issue on the world market for upland cotton. The panel found that the subsidies at issue had a significant impact on the world market for upland cotton, and that the world market for upland cotton was affected by the subsidies at issue.
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. 543 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. The Panel Report makes it clear that the Panel specifically addressed "upland cotton planting decisions", "expected prices", and "expected market revenue". 550 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 "[r]ather the 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 find 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" 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. 560 We are therefore satisfied that the Panel adopted a plausible view of the facts in connection with 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.

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. 1-216-217, para.151); United States' response to Question 212 Posed by the Panel (Panel Report, p. 1-360, para. 51); Question 213 Posed by the Panel (Panel Report, p. 1-361)).
551 Panel Report, para. 7.1362.
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 Appellant Body has said it is not necessary for the Panel to account for all factual evidence of the parties in its analysis. If the Panel considered the United States' evidence regarding expected upland cotton prices, it set out 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 world market prices. The Panel took into account the implications of the United States' share of world upland cotton production during the relevant period on its conclusion, when read in conjunction with its other findings.

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." The participants agree that these models incorporate the supply responses of third countries, as reflected in these models. The supply model used in the United States' 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"). The model was used to analyze the effect of U.S. payments on upland cotton market prices and quantities.

448. Whether and to what extent other upland cotton producers would have increased supply or reduced demand in response to any increase in cotton prices resulting from the absence of U.S. payments is a critical factor in determining whether the effect of the price-contingent subsidies is significant price suppression.

562. As a result, during the 1999-2002 marketing years, United States production and exports remained stable or increased, even though prices of cotton and other competing crops, U.S. farmers change cotton acreage commensurately. The U.S. share of world cotton exports remained stable or increased, even though prices of cotton and other competing crops. The United States' share of world upland 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.

563. 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".

564. With respect to modeling, the United States' analysis of the market for upland cotton is based on the assumption that the models take into account relevant aspects of the market, such as the role of the United States' payments in determining the supply responses of other countries. The participants agree that these models incorporate the supply responses of third countries, as reflected in these models.

449. Finally, the Panel found that market loss assistance payments and counter-cyclical payments are made in response to low prices for upland cotton and that the models take into account the effects of these payments on cotton prices and quantities. The participants agree that these models incorporate the supply responses of third countries, as reflected in these models.

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566. As a result, during the 1999-2002 marketing years, United States production and exports remained stable or increased, even though prices of cotton and other competing crops. The United States' share of world upland 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.

567. The models used by the United States incorporate various factors that affect the supply of upland cotton, such as changes in weather conditions and the availability of production inputs. The models also take into account the effects of the United States' payments on the supply of upland cotton and the prices of upland cotton in the world market.

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by reducing the "total and per unit revenue risk associated with price variability". The United States contends that the Panel's analysis of the price-contingent subsidies was "deficient". 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. This seems to us to support the Panel's conclusion that the effect of the price-contingent subsidies is significant price suppression.

451. The third reason the Panel provided for finding a "causal link" was that "there is a discernible temporal coincidence of suppressed world market prices" and the price-contingent subsidies. The United States describes this as "an exercise in spurious correlation". 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" was the "divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997". The United States argues that the Panel should have examined variable rather than total costs 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".

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". 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". In the circumstances of this 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" 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. 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".

455. The United States also argues that United States upland cotton exports increased during 1998-2002 because textile imports increased in the same period, leading to a decline in the use of cotton by domestic mills. The Panel regarded this factor as "concerning support, rather than suppression, of world cotton prices". 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.

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. 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. 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. 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)". The Panel pointed to evidence on the record confirming that marketing loan program payments and Step 2 payments "offset" declines in market prices. 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." However, the

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586 Ibid., para. 7.1302 and footnote 1410 to para. 7.1302.
587 United States' appellant's submission, para. 185.
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.
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

[While we do not believe that it is strictly necessary 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.] 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 case.

612Panel Report, para. 7.1361.
613Ibid., para. 7.1363.
614Panel Report, para. 7.1308.
615Ibid., 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)
617United 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.
618United States' appellant's submission, para. 242.
619Ibid., para. 264.
620Ibid., 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.
621Supra, para. 432.
622As 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)
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).

624 However, the definitions of a specific subsidy in Articles 1 and 2 should have regard to the magnitude of the challenged subsidy and its relationship to prices of the 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.

467. In sum, reading Article 6.3(c) in the context of Article 6.8 and Annex V suggests that the Panel should have used an allocation methodological framework that benefits a given product, and Article 6.3(c) is not the only reference to a calculation of subsidies in Part III of the SCM Agreement. 468. In the present case, the Panel could have been more explicit and specified what it meant by "very large amounts" of assistance payments and counter-cyclical payments that benefit a given product. It argues that the Panel should have used an allocation methodological framework that benefits a given product, and Article 6.3(c) is not the only reference to a calculation of subsidies in Part III of the SCM Agreement. 469. In addition to its arguments regarding quantification, the United States contends that the Panel should have used an allocation methodological framework that benefits a given product, and Article 6.3(c) is not the only reference to a calculation of subsidies in Part III of the SCM Agreement. 469. In addition to its arguments regarding quantification, the United States contends that the Panel should have used an allocation methodological framework that benefits a given product, and Article 6.3(c) is not the only reference to a calculation of subsidies in Part III of the SCM Agreement.

626. We note that the apparent difference in Part III differs from that for Part V of the SCM Agreement. Under Part V, the amount of assistance payments and counter-cyclical payments that benefits a given product. Under Part V, the amount of assistance payments and counter-cyclical payments that benefits a given product. Under Part V, the amount of assistance payments and counter-cyclical payments that benefits a given product. Under Part V, the amount of assistance payments and counter-cyclical payments that benefits a given product.

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 the amount of subsidies. 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 the amount of subsidies. 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 the amount of subsidies. 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 the amount of subsidies.
eligibility for these payments that harvested cotton containing cotton lint and cottonseed ‘be baled’ and the effect of such a payment cannot be ‘significant price suppression’ in any other year. 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, harvested cotton lint). However, the Appellate Body’s reasoning on that dispute focuses not on the requirements for establishing serious prejudice under Articles 5(c) and 6.3(c) of the SCM Agreement and Part V of the SCM Agreement, but on the context of countermeasures against dumping pursuant to Article 6.3(c) 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) of the SCM Agreement. Nevertheless, we acknowledge that Article 6.3(c) of the SCM Agreement may 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, pass through, the effect of the subsidy under Article 6.3(c) of the SCM Agreement may be measured in terms of its impact on prices of harvested cotton lint and cottonseed.

473. For these reasons, we find that the Panel did not err in its assessment of the amount of the subsides for the purposes 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. According to the United States, the ‘recurring’ subsidies provide a benefit on cotton for which the payment is made.

475. We observe that the United States’ contention on the effect of a subsidy must be ‘allocated’ or ‘expended’ on an annual basis. The United States’ explanation of why the effect of the subsidy is limited to or continues only for a specified period of time, however, does not support the suggestion that the effect of the subsidy is immediate, short-lived, or limited to one year, regardless of the nature of the economic activity producing it. Article 6.3(c) of the SCM Agreement requires that the “subsidy” must, in fact, continue to exist for a period of time. The word “subsidy” indicates the temporary nature of the assistance.

476. In this appeal, we are asked to address the limited question of whether the effect of a subsidy may continue after the year in which it was paid. Whether the effect of a subsidy begins and how long a subsidy can be regarded as having effects in one year and continues in another depends on a number of factors. The answers to these questions will vary depending on the nature of the subsidy and the extent to which it is related to the production of the subsidized product. 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 the nature of the economic activity producing it. Article 6.3(c) of the SCM Agreement requires that the “subsidy” must, in fact, continue to exist for a period of time.

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 the nature of the economic activity producing it. Article 6.3(c) of the SCM Agreement requires that the “subsidy” must, in fact, continue to exist for a period of time.
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.\textsuperscript{652}

478. Article 6.4 of the \textit{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\textsuperscript{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.\textsuperscript{654}

479. The United States supports its arguments regarding the "allocation" of "recurring" and "non-recurring" subsidies by referring to several sources.\textsuperscript{655} The United States submits that "the Appellate Body has acknowledged that 'non-recurring' subsidies may be allocated over time\textsuperscript{656}, citing the following statement of the Appellate Body in \textit{US – Lead and Bismuth II}:

\begin{quote}
[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."
\end{quote}

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 \textit{SCM Agreement}, and it focuses on the \textit{benefit} flowing from a "non-recurring" financial contribution rather than the \textit{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.

\textsuperscript{652}The French and Spanish versions of Article 6.2 also use the present perfect tense. See \textit{supra}, footnote 650.

\textsuperscript{653}Article 6.4 reads in relevant part:

\begin{quote}
[T]he displacement or impeding of exports shall include any case in which ... it has been demonstrated that there has been a \textit{change} in relative shares of the market to the disadvantage of the non-subsidized like product \textit{over an appropriately representative period} sufficient to demonstrate clear \textit{trends} in the development in the market for the product concerned, which, in normal circumstances, shall be at least one year). ... (emphasis added)
\end{quote}

\textsuperscript{654}Panel Report, para. 7.1199.

\textsuperscript{655}United States' appellant's submission, paras. 282 and 283, citing: \textit{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; \textit{Anti-Dumping Agreement}, Article 2.2.1.1; Appellate Body Report, \textit{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.

\textsuperscript{656}United States' appellant's submission, para. 283.

\textsuperscript{657}Appellate Body Report, \textit{US – Lead and Bismuth II}, para. 62.

480. In addition, the United States refers to paragraph 7 of Annex IV to the \textit{SCM Agreement}\textsuperscript{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." This provision recognizes that the benefits of some subsidies may be allocated to future production, but 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.\textsuperscript{659}

481. The United States also points to Article 2.2.1.1 of the \textit{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 \textit{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\textsuperscript{660} is significant price suppression ... in the period MY 1999-2002\textsuperscript{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:

\begin{quote}
[In 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.\textsuperscript{662}]
\end{quote}

484. For this reason, the Panel examined the price-contingent subsidies for marketing years 1999 to 2002 as a group\textsuperscript{663}, and its finding of significant price suppression in marketing years 1999 to 2002\textsuperscript{664} applied to this group of subsidies. As we noted above, the effects of a "recurring" subsidy

\textsuperscript{658}The title of Annex IV of the \textit{SCM Agreement} is "Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)". (footnote omitted)

\textsuperscript{659}Panel Report, para. 7.1179.

\textsuperscript{660}\textit{Ibid.}, para. 7.1108.

\textsuperscript{661}\textit{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. (\textit{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 \textit{SCM Agreement} do not form part of this appeal.

\textsuperscript{662}\textit{Ibid.}, para. 7.1192.

\textsuperscript{663}Panel Report, para. 7.1290.

\textsuperscript{664}\textit{Ibid.}, para. 7.1416.
may continue after the year in which it is paid." 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." 665

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, 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 Article 5(c) of the SCM Agreement, based on the following findings:

[An] 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

Assuming 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 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 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 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

665United 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).
666Brazil's Appellee's submission, para. 1084.
667Panel Report, paras. 7.1395 and 8.1(g)(i).
668United States' Appellant's Submission, para. 330.
669'The significance of any degree of price suppression ... may not solely depend upon a given level of numeric significance' (Panel Report, para. 7.1329).
671United States' Appellant's Submission, para. 326.
672Supra, para. 473.
rationale for its conclusions in this regard. Accordingly, we decline to find an error on the part of the Panel under Article 12.7 of the DSU.

942. 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 and that the Panel "never explained why it did not analyze the farmer's planting decision and the use of expected prices." 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. As we have already explained, the Panel did address the "planting decision" and "expected prices", 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).

943. 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"; and (ii) "why any price suppression that it found meant that there was serious prejudice to the interests of Brazil".

944. 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 the issues covered in the United States' claim under Article 12.7 of the DSU appear to extend to these two findings.

945. 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"), 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

946. 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)(j) 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. 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

947. 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. The principal

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684Panel 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)

685United States' appellant's submission, para. 325.

686Ibid., para. 324.

687Panel 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.

688Supra, para. 441.

689Supra, para. 433.

690United States' appellant's submission, para. 328.

691Ibid., para. 329.

692It 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 prejudice 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".

693See supra, footnote 18.

694See supra, para. 488.

695The 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)
the effects of the subsidies on like products from the complaining Member. 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.

S01. 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 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.

S02. 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. 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.

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.

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.

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).

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696Panel Report, para. 7.1424. (footnote omitted)
697Ibid., para. 7.1425.
698Ibid., paras. 7.1438-7.1450, and 7.1455-7.1463.
699Ibid., paras. 7.1451-7.1453.
700Ibid., footnote 1527 to para. 7.1451.
701Ibid., para. 7.1464. (underlining added)
702Ibid., para. 7.1465. (footnote omitted)
703Brazil's other appellant's submission, para. 264.
704Ibid., para. 275.
705Brazil's other appellant's submission, paras. 276-277.
706Ibid., paras. 275-280.
707Ibid., paras. 281-288.
708Ibid., paras. 289-294.
709That is, marketing loan program payments, Step 2 payments, market loss assistance payments and counter-cyclical payments.
710Brazil's other appellant's submission, paras. 296-315.
711Indeed (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
712United States' appellee's submission, para. 153.
713Ibid., paras. 154-156.
714Ibid., para. 161.
715Ibid., 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. 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.716

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 commodity717 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.

717 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.

507. We observe with regard to the interpretation of the phrase "world market share" in Article 6.3(d) that, above21, 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.22

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.23 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.

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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.
721 Supra, para. 496.
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]ll 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. 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 1996726 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 CCC730 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 “[n]otwithstanding, 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.

725Panel Report, para. 7.209.
728The 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))
729Benin and Chad’s third submission, para. 83.
730Panel Report, para. 7.209.
7317 CFR Section 1427.104(a)(1).
7327 CFR Section 1427.104(a)(2).
734Ibid., 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)
735Ibid., para. 7.211.
736Ibid.
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. 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."519

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".520 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.521 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".522 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."523

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."524 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."525 The Panel described the situations in which, in its view, Article 21.1 of the Agreement on Agriculture applies526, 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."527 The Panel concluded that "none of the situations" it described arises in this dispute from the relevant provisions in the Agreement on Agriculture.528

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.529 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."530 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.531

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".532 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.533

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".534 The Panel also conducted its own examination and found that:

524Panel 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.3(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).

525Ibid., para. 7.1019.

526Ibid., 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)).

527Ibid., para. 7.1023.

528Ibid., para. 7.1024.

529Ibid.

530Panel Report, para. 7.1034. (footnote omitted)

531Ibid., para. 7.1036.

532Ibid., para. 7.1038. See infra, para. 532.

533Ibid., para. 7.1041. (footnote omitted)

534Ibid., para. 7.1039.

535Ibid., para. 7.1052.

536Ibid., para. 7.1056.

537Ibid., para. 7.1058. (original emphasis)

538Ibid., para. 7.1071.

539Panel Report, para. 7.1071.

540Ibid., 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. 125). (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.756

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".757

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".758 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".759

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 "except as provided in the Agreement on Agriculture" of Article 3.1 of the SCM Agreement.760 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.761 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.762 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.763 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".764 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).765

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.766 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.767 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 1994.768

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.769 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.770

530. Article 3.1(b) of the SCM Agreement provides:

Article 3

Prohibition

Except as provided in the Agreement on Agriculture, subsidies, within the meaning of Article 1, shall be prohibited:

...
(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.

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.

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". 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. 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".

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". The United States has acknowledged that the domestic users of United States cotton that receive Step 2 payments include textile mills. 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,

770The SCM Agreement is among the Multilateral Trade Agreements in Annex 1A to the WTO Agreement.
771Panel 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)
772Appellate Body Report, EC – Bananas III, para. 155. (See also Appellate Body Report, Chile – Price Band System, para. 186)
producers to evaporate, and the "subsidy would be transformed from a subsidy 'in favor of the producers of United States cotton. Therefore, we will proceed with our examination on the agricultural producers' to a simple input subsidy. Rather than "a cotton subsidy," it would become a "textile subsidy." Like the Panel, we do not believe that the scope of paragraph 7 is limited to paragraph 7 of Annex 3 of the Agreement on Agriculture, as long as such subsidies do not include any import-substitution component.

S34. In addition to paragraph 7 of Annex 3, the United States draws our attention to Article 6.3 of the Agreement on Agriculture, which makes a similar point. Article 6.3 deals with domestic support that WTO Members 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, as long as such measures do not include any import-substitution component.

S35. Like Article 6.3, Article 7 of Annex 3 of the Agreement on Agriculture makes a similar point. Article 7 refers to "specific provisions dealing specifically with the use of domestic over imported goods," and 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.

S36. The United States finds in the second sentence of paragraph 7 of Annex 3 of the Agreement on Agriculture an exception to the general prohibition against subsidies contingent upon the use of domestic over imported goods. This sentence 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. The second sentence of paragraph 7 as "measures directed at agricultural processors that shall be included [in the AMS calculation]" suggests that such measures, when they are import substitution subsidies, are exempt from the prohibition in Article 3.1(b) of the SCM Agreement. 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 if its Current Total AMS does not exceed its annual or final bound commitment level. It implies, therefore, that the prohibition in Article 3.1(b) of the SCM Agreement is "conditional" on the use of domestic over imported goods.

S37. 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, and such measures are not necessarily justified by virtue of compliance with the domestic support reduction commitments. Therefore, we consider the question of the importation of cotton for processing to be governed by the SCM Agreement.

S38. We thus turn to the issue raised by the United States’ appeal that is whether Article 6.3 and paragraph 7 of Annex 3 deal specifically with the same matter as Article 3.1(b) of the SCM Agreement, namely, subsidies contingent specifically upon the use of domestic over imported goods.

S39. The United States argues that the second sentence of paragraph 7 of Annex 3 of the Agreement on Agriculture refers to "specific provisions dealing specifically with 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 SCM Agreement insulates the subsidy from the prohibition in Article 3.1(b) of the SCM Agreement. The United States points out that Article 6.3 does not explicitly refer to import substitution subsidies. Paragraph 7 of Annex 3 of the Agreement on Agriculture, on the other hand, refers to "measures directed at agricultural processors that shall be included [in the AMS calculation]" and those that are "measures directed at agricultural processors that shall be included [in the AMS calculation] if they are import substitution subsidies."

S40. Neither of the two sentences in paragraph 7 of Annex 3 refers to import substitution subsidies. Paragraph 7 of Annex 3 states that measures that have an import substitution component shall be included in the AMS calculation. The first sentence of paragraph 7 refers to "specific provisions dealing specifically with the use of domestic over imported goods." The second sentence of paragraph 7 refers to "measures directed at agricultural processors that shall be included [in the AMS calculation] if they are import substitution subsidies.

S41. It may well be that a measure that is an import substitution subsidy could fall within the second sentence of paragraph 7 as well. The second sentence of paragraph 7 recognizes situations where subsidies are not provided directly to the agricultural producer. 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. The second sentence of paragraph 7 as "measures directed at agricultural processors that shall be included [in the AMS calculation] if they are import substitution subsidies" is, therefore, not necessarily justified by virtue of compliance with the domestic support reduction commitments.

S42. 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, the domestic users were not allowed to claim Step 2 payments, regardless of the origin of the cotton. According to the United States, this would cause the benefit to domestic cotton producers to evaporate, and the "subsidy would be transformed from a subsidy 'in favor of the producers of United States cotton. Therefore, we will proceed with our examination on the agricultural producers' to a simple input subsidy. Rather than "a cotton subsidy," it would become a "textile subsidy." Like the Panel, we do not believe that the scope of paragraph 7 is limited to paragraph 7 of Annex 3 of the Agreement on Agriculture, as long as such subsidies do not include any import-substitution component.
The use of domestic policies, such as subsidies, to promote the use of domestic agricultural products is a common practice in many countries. In this context, WTO Members must be mindful of their obligations under the Agreement on Agriculture. The Panel in this case has carefully analyzed the obligations under the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Panel found that the United States' payments to domestic users under Section 1207(a) of the FSRI Act of 2002 are conditional on the use of domestic cotton. The Panel also noted that the United States has not appealed this finding.

545. 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 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 obligations under the Agreement on Agriculture. The Panel also noted that the United States has not appealed this finding.
... 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*.

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*. 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*.

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*. 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*. 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" or "where the condition to export can be derived by necessary implication from the words actually used in the measure".

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.

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)". 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".

560. Having found that Step 2 payments to exporters are mandatory when certain market conditions exist, 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*.

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* "not to 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".

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*." The Panel additionally found that "[t]he 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*." 511

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*.

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801Panel Report, para. 7.673. The order of analysis was not an issue on appeal.
802Ibid., para. 7.695. The Panel also conducted its own assessment and concluded that the measure meets the description in Article 9.1(a). (Ibid., para. 7.696)
803Ibid., para. 7.697.
805Ibid., para. 7.702.
806Ibid., (relying on Appellate Body Report, Canada – Aircraft, para. 167).
808Panel Report, paras. 7.734 and 7.735.
809Ibid., para. 7.732.
811Ibid., paras. 7.7745 and 7.746.
812Ibid., para. 7.748.
813Panel Report, para. 7.749.
814Ibid., para. 7.760.
815Ibid., para. 7.761.
816United 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).

565. 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, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex 1;

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 1 as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

566. Brazil requests that we uphold the Panel's finding that Step 2 payments to exporters are contingent upon export performance. 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. These situations are mutually exclusive because the same bale of cotton cannot be both open for domestic use and exported. 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.

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.

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, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex 1;

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 1 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; 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.

572. The Appellate Body has indicated, in this regard, that the ordinary meaning of "conditional" is "conditional" or "dependent" 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. 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. We are also mindful that in demonstrating
export contingency in the case of subsidies that are contingent in law upon export performance, the payments are not export-contingent. 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 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 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 – Aircraft (Article 21.5 – Brazil), para. 47.)

576. 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. The Panel’s reasoning is consistent with the approach taken by the Appellate Body in US – FSRI Act (Article 21.5 – EC). In that case, the United States argued that the tax on the face of the statute and regulations pursuant to which Step 2 payments are granted "involve(s) payment to two distinct sets of recipients (exporters or domestic users) in two different situations (export or domestic use)." 830 Additional information about the CCC is provided, infra, footnote 859; see also Panel Report, United States – Response to Questioning at oral hearing, para. 7.727.

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578. 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 submit a valid purchase order to the CCC, which is "tied to" exportation. 831 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, the conditions for payment are different. An eligible exporter must provide documentation indicating the number of bales exported. 832 The Panel’s reasoning is consistent with the approach taken by the Appellate Body in US – FSRI Act (Article 21.5 – EC). In that case, the United States argued that the tax on the face of the statute and regulations pursuant to which Step 2 payments are granted “involve(s) payment to two distinct sets of recipients (exporters or domestic users) in two different situations (export or domestic use).” 830 Additional information about the CCC is provided, infra, footnote 859; see also Panel Report, United States – Response to Questioning at oral hearing, para. 7.727.

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exclusion at issue was not an export-contingent subsidy because it was available for both (i) property
exporters and eligible domestic users—that must meet different conditions to receive
payment.832 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 statute and regulations pursuant to which Step 2 payments
are granted, on their face, condition payments to exporters. If an exporter does not provide proof of
exportation, the exporter will not receive the export subsidy.833 It follows from the Panel's
findings, in paragraphs 7.41-7.49 and 8.1(e) of the Panel Report, that Step 2 payments to exporters of United States upland cotton, pursuant to
the meaning of Article 9.1(a) of the Agreement on Agriculture and that, therefore, in
the second set of circumstances, the United States has acted inconsistently with its obligations under
the SCM Agreement.834

831 In its reasoning, the Appellate Body explained that whether or not the subsidies were
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.835 See Appellate Body Report, US – FSC (Article 21.5 – EC), para. 119. (original emphasis; footnote omitted)

832 As in US – FSC (Article 21.5 – EC), the Panel in this case found that Step 2 payments are
dependent for their existence on export performance within the meaning of Article 9.1 of the Agreement on Agriculture. Indeed, in
both the US – FSC and Canada – Dairy disputes, the exporters of United States upland cotton and
Canadian milk, respectively, could only receive the subsidies if they exported. In the US – FSC dispute, the
export subsidy was "conditional upon export performance" or "dependent for their existence on export performance".

833 Having explained that there is no reason to read the export-contingency requirement in the
Panel Report, the Panel upheld the Panel's findings, in paragraph 127(a) of the Panel Report, that Step 2 payments to exporters of United States upland cotton, pursuant to
the meaning of Article 9.1(a) of the Agreement on Agriculture and that, therefore, in
the second set of circumstances, the United States has acted inconsistently with its obligations under
the SCM Agreement.834

834 The Panel, in this case, distinguished the facts from those contained in US – FSC (Article 21.5 – EC) in that the
export subsidy at issue was not an export-contingent subsidy because it was available for both (i) property
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835 In that dispute, the Appellate Body found that the provision of milk to
processors/converters under various mechanisms constituted special, non-
export-contingent subsidies. The panel in Canada – Dairy, however, concluded that the "milk under such other classes is also available
in the second set of circumstances as a result of the separate examination of the
situation in which the milk was sold for use outside the United States. For a detailed
analysis of the separate examination in the US – FSC dispute, see infra note 79.

836 As the Panel observed, the finding that the export subsidy at issue is not an export-contingent subsidy is not
inconsistent with the panel's conclusion that the export subsidy at issue is not an export-contingent subsidy in
the first set of circumstances. In Canada – Dairy, the panel acknowledged that the export subsidy at
issue was not an export-contingent subsidy because it was available for both (i) property
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analysis of the separate examination in the US – FSC dispute, see infra note 79.
C. Export Credit Guarantees – Article 10.2 of the Agreement on Agriculture

585. We turn next to the United States' and Brazil's 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 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, and 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).861

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(e)(ii) of the Agreement on Agriculture, from actions based on Articles 3.1(a) and 3.2 of the SCM Agreement.862 Brazil also argued that the three programs violate Articles 3.1(a) and 3.2 of the SCM Agreement.863

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".864 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.865

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 makes it clear that the export subsidy disciplines in the SCM Agreement are not applicable to export credit guarantee programs. According to the United States, Article 10.2 of the Agreement on Agriculture provides the SCM 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 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".866

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.867

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"
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 such products. 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.

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." 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). The Panel, nonetheless, found 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." 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."

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 SCOP – 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.

Arguments on Appeal

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. 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.

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." 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 10.1.897

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 the 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 10.895

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 apply890; 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?

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.

883Quoting Article 10.2 of the Agreement on Agriculture.
884United States' appellant's submission, paras. 349 and 358.
885Ibid., paras. 367-380.
886Ibid., paras. 384-385.
887Ibid., para. 391.
888Brazil's appellant's submission, paras. 905-906.
889Ibid., para. 912.
890Brazil's appellant's submission, paras. 951-952.
891Ibid., para. 953.
892United States' appellant's submission, para. 350.
893Brazil's appellee's submission, para. 940.
894Ibid., para. 975.
895Ibid., paras. 926-934 (referring to the United States' appellant's submission, para. 384).
896Ibid., paras. 977-978.
897Argentina'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.
898Panel Report, para. 7.781.
899A 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.
611. The Panel rejected the United States' submission that Brazil's approach would render Article 10.2 irrelevant. In the Panel's view, "the purpose of any eventual disciplines in respect of these measures, and the need in this context, in that the object and purpose of the Agreement on Agriculture, and in particular Article 10.1, which WTO Members will develop specific disciplines on the provision of these instruments.

612. This interpretation is consistent with the reference in Article 10.2 to internationally agreed disciplines. "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 programs constitute export subsidies, or to what extent 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 commercial transactions be used to circumvent such commitments.

613. The Panel's interpretation of Article 10.2, which is based on a plain reading of the text, is consistent with the reference in paragraph 1 of Article 9 of the Agreement on Agriculture, which expressly indicates that existing disciplines do not apply pending the negotiation of future disciplines. 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.

614. We note that Article 10.1 of the Agreement on Agriculture, the provision that immediately precedes Article 10.2, reads:

615. Although Article 10.2 commits WTO Members to work toward the development of internationally agreed disciplines on export credits, export credit guarantees and insurance programs, and to provide for their application to export credits, export credit guarantees and insurance programs.

608. Article 10.2 does not, however, expressly define the disciplines that currently apply to export credits, export credit guarantees and insurance programs. Under Article 10.2, WTO Members have taken on two distinct commitments in respect of these measures, (i) to work toward the development of internationally agreed disciplines, and (ii) to provide for those measures in conformity with those disciplines. There is no dispute between the parties that, to date, no internationally agreed disciplines on export credits, export credit guarantees and insurance programs have been agreed internationally pursuant to Article 10.2.

609. We agree with the Panel's view that Article 10.2 does not expressly exclude export credit guarantees and insurance programs. As the Panel observed, "Article 10.2 contains a loophole that could be used by WTO Members to implement new disciplines in the absence of international agreement. For example, at the beginning of Article 10.2, the Panel notes that Article 10.2 does not expressly state that the application of any export subsidy disciplines to export credit guarantees, and insurance programs, would not apply within the scope of the Agreement on Agriculture.

610. Moreover, as the Panel explained, Article 10.2 contrasts starkly with the text of other provisions in the Agreement on Agriculture, which clearly carve out or exempt certain products or measures from the application of existing disciplines. Article 10.1 of the Agreement on Agriculture, for example, states that "export subsidies do not fall within the scope of the Agreement on Agriculture, and the exclusion of export subsidies from the application of the Agreement on Agriculture would not be achieved if the disciplines on export credits, export credit guarantees and insurance programs are not undisciplined in all respects, and that the disciplines to be developed have to do only with commercial transactions be used to circumvent such commitments.

616. The Panel's interpretation of Article 10.2, which is based on a plain reading of the text, is consistent with the reference in paragraph 1 of Article 9 of the Agreement on Agriculture, which expressly indicates that existing disciplines do not apply pending the negotiation of future disciplines. 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.

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 measures, (i) to work toward the development of internationally agreed disciplines, and (ii) to provide for those measures in conformity with those disciplines. There is no dispute between the parties that, to date, no internationally agreed disciplines on export credits, export credit guarantees and insurance programs have been agreed internationally pursuant to Article 10.2.

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615. Although Article 10.2 commits WTO Members to work toward the development of internationally agreed disciplines on export credits, export credit guarantees and insurance programs, and to provide for their application to export credits, export credit guarantees and insurance programs.
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. 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 I(e) of the Agreement on Agriculture defines "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement". 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. 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. 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. 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. 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 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. 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 drafter. 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.

619. We are unable to subscribe to the United States' arguments because we do not see Article 10.4 as excluding international food aid from the scope of Article 10.1. 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". 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.

91United States' appellant's submission, para. 349.
911Ibid., para. 350.
912Ibid., para. 358.
913Article 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.
914Panel Report, para. 7.788.
917Appellate 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.
918United States' appellee's submission, para. 346.
919United States' appellee's submission, para. 349.
627. The United States also relies on the negotiating history of the Agreement on Agriculture to support its position. The Panel identified the negotiating history in the record. It referred to an explicit reference to export credit guarantees in the illustrative list of export subsidies that Article 9.3 set out an Illustrative List of Export Subsidy Practices and included, as item (i), “[s]ubsidized export credit guarantees, export credits, and insurance programs provided by governments or international financial institutions, or guaranteed by governments or international financial institutions, on terms less than fully commercial terms.”

628. The United States contends that the Panel’s interpretation leads to a result that is “manifestly absurd or unreasonable.” 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.”

629. The United States further argues that 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 included in the disciplines on export subsidies, as a guarantee of disciplines on export credit guarantees from export subsidy disciplines of the Agreement on Agriculture.

630. 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.”

631. The Panel did not consider that this negotiating history supported the United States’ position that the current Article 9.1 of the Agreement on Agriculture is “somewhat resembling the current Article 9.1 of the Agreement on Agriculture.”

632. 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.

633. Finally, the United States takes issue with the Panel’s explanation that draft Article 9.3 was circulated by the Chairman, Article 9.3 of which stated that “for the purposes of this Article, Participants undertake not to provide export credits, export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines.”

634. The United States contends that the Panel’s interpretation leads to a result that is “manifestly absurd or unreasonable.” 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 programs were within the disciplines on export subsidies according to the terms of the agreement captured.”
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. According to the United States, Article 3 of the Agreement on Agriculture... is subject in its... 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 disciplines. There could have been other reasons. The fact that Members... determined that the export credit guarantee programs are subject to export subsidy disciplines as intended by 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. However, it is clear that if an export credit guarantee program were applied in a manner which results in, or which 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, the complaining party must demonstrate that the export credit guarantee program is applied in such a manner that it 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.

Sectional Opinion

One Member of the Division hearing this appeal wishes to set out a brief analysis. 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.

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, namely, export credit guarantees, export credits and insurance programs, and to spell out with this Article 10.2 their commitments with respect to those three areas. The fact that they chose to deal with these three types of measures must be given meaningful weight. Considered in this light, 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 part of Article 10 of the Agreement on Agriculture that speaks specifically to the provision of export credit guarantees, export credits and insurance programs, provided that they are provided in connection with agricultural goods. Furthermore, the second part of Article 10.2 clearly limits the application of disciplines to the provision of export credit guarantees, export credits and insurance programs, as well as certain types of export subsidy measures that are provided in connection with agricultural goods. This is in further indication...
634. I recognize that the language of this provision is not free from ambiguity. As noted by my colleagues on the Division, the United States was never willing to accept that its export credit guarantee programs constituted export subsidy commitments. The United States was concerned that the use of export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines might be used as a mechanism for circumvention, but they were unable to agree upon an undertaking "not to provide export credit guarantees, export credits or insurance programs otherwise than in conformity with internationally agreed disciplines," 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," which instead called for continued negotiations and for WTO Members to provide export credit guarantees, export credits or insurance programs only in conformity with internationally agreed disciplines. The negotiators' concern about such programs only in conformity with internationally agreed disciplines. The negotiators' concern about such programs was to ensure that Members would apply any such ensuing disciplines on such measures only if internationally-agreed disciplines were internationally-agreed upon.

635. I do not see my reading of Article 10.2 to be inconsistent with the provision's context and purpose. As noted by my colleagues on the Division, the United States' position was that export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines must not be provided, yet their negotiating history supports an interpretation that the United States intended to impose upon itself the more onerous obligation of immediately subjecting export credit guarantees, export credits and insurance programs to the export subsidy disciplines of the SCM Agreement, 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, rather than the negotiating history. As noted by my colleagues on the Division, the United States' negotiating history is of no more help to them than it is to me. As I read Article 10.2, it intends to impose, upon Members, the discipline that is not to provide export credit guarantees, export credits and insurance programs otherwise than in conformity with the internationally-agreed disciplines, as determined by the WTO. That would apply in the future.
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 is 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 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 of export credit guarantees – necessary findings of fact.
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. 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.

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 1 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. (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.

After making its findings under the Agreement on Agriculture, the Panel examined the United States’ export credit guarantee under the SCM Agreement. There is no reference to Article 10.3 of the Agreement on Agriculture in this discussion. 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.” 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. 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 subsidies 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.

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. 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.

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 the United States’ export subsidies exceeded that “zero” level.

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 an unscheduled product. Once that has been established, the respondent would have to demonstrate that it has not provided an export subsidy. 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.

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...
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 asserts 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

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-estimates985, 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.
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)".993 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.994

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.995 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.996

661. In addition, Brazil asserts that the Panel made sufficient factual findings "on the basis 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 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.997

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 the case".998 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", but observed that "due process requires that the legal basis of the claim be sufficiently clear to allow the appellee to respond effectively".999

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.999 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:

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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 United States' appellant's submission, para. 419.

995 United States' response to questioning at the oral hearing.

996 Brazil's appellee's submission, para. 1065.

997 Ibid., para. 99.

998 Ibid., para. 100.

999 Brazil's appellee's submission, para. 101.
... 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 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:

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

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998Panel Report, para. 7.804.
999United States’ response to questioning at the oral hearing.
1000The 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)
1002Panel 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)
1003Ibid., para. 7.842.
1004Ibid., para. 7.842. (Footnotes omitted)
1005The 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)
1006Ibid., para. 7.844.
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1008Ibid., para. 7.844.
1009In 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)
1010Brazil 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)
1011See Table 3 in Panel Report, para. 7.845.
1012Panel Report, para. 7.846.
1013Ibid., paras. 7.845-7.846.
1014United States’ response to Question 264 Posed by the Panel (Panel Report, p. 1-673, 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.
1015Panel Report, para. 7.846.
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 various methods were inadequate to cover long-term operating costs and losses. Although it did not provide a final figure for the long-term operating costs and losses, the Panel found that the various methods put forward by the parties led to the same conclusion, namely, that the premiums do not make up for the precise difference between long-term premiums and long-term costs and losses. For these reasons, we reject the United States' claim that the Panel failed to make the "necessary" findings of fact.

Consequently, the United States asserts that "the Panel did not make any determination about how to treat rescheduled debt". 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. In the Panel's view, however, this approach "understates the net cost to the United States government associated with the export credit guarantee programs at issue". Thus, contrary to the United States' submission, the Panel and 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 long-term 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.

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{1031}

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.\textsuperscript{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.\textsuperscript{1033} Secondly, Brazil argues that the Panel erred "by confining its examination of threatened circumvention to scheduled products other than rice and unscheduled 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".\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{1037} Brazil adds that the Panel "failed to properly apply a proper
interpretation of Article 10.1 to the admitted facts.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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".\textsuperscript{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.\textsuperscript{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.\textsuperscript{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".\textsuperscript{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.\textsuperscript{1045} As we explained earlier, the application of a legal rule to the specific facts of a case is an issue of legal characterization.\textsuperscript{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 its 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:

\textbf{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'."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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".\textsuperscript{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

\textsuperscript{1038}Ibid., para. 210.
\textsuperscript{1039}Ibid., para. 211. (footnote omitted)
\textsuperscript{1040}United States' appellee's submission, para. 50 (footnote omitted)
\textsuperscript{1041}Ibid., para. 50 (referring to Appellate Body Report, US – Steel Safeguards, para. 498). (original emphasis; footnote omitted)
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{1044}United States' appellee's submission, para. 56.
\textsuperscript{1045}Brazil's response to questioning at the oral hearing; Brazil's other appellant's submission, para. 211.
\textsuperscript{1046}Appellate Body Report, EC – Hormones, para. 132.
\textsuperscript{1047}Ibid., para. 56. (footnote omitted)
\textsuperscript{1048}Ibid., para. 106.
\textsuperscript{1049}Panel Report, para. 7.879.
\textsuperscript{1050}Ibid., para. 7.879.
\textsuperscript{1051}Ibid.
circumvention. 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".

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. 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. Second, as we noted previously, 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. 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. 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.

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.

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.

3. Threat of Circumvention

(a) Scheduled Products Other than Rice and Unscheduled Products not Supported under the Export Credit Guarantee Programs

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.

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.

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.

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". The Panel therefore proceeded to "examine whether an unconditional statutory legal entitlement to an export credit guarantee exists in respect of such products".

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." 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. 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
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.\[^{1065}\]

Thus, the United States responds by asserting that Brazil mischaracterizes the Panel's findings. In contrast to Brazil's argument, the Panel’s findings do not circumscribe the circumvention of export subsidy commitments to situations in which the exchange of goods is prohibited. Rather, the Panel’s findings clearly are consistent with the Second Appellate Body Report, in which the United States argues, the Panel simply was responding to and declining to adopt Brazil’s erroneous factual and legal characterizations of the programs.\[^{1070}\]

Keeping the applicable burden of proof in mind, we therefore decline to find that the export credit guarantee programmes at issue are sufficient for a “threat” finding under Article 10.1 of the Agreement on Agriculture.\[^{1071}\]

We note that the ordinary meaning of the term “threaten” includes “constitute a threat to”, “be likely to injure” or “be a source of harm or danger”. We further observe that the ordinary meaning of the term “threaten” includes “applied in a manner which … threatens to lead to circumvention of export subsidy commitments”.\[^{1072}\]

Brazil explains that “to 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”.\[^{1073}\]

Accordingly, based on its ordinary meaning, the phrase “threaten[] to lead to … circumvention” as used in Article 10.1 of the Agreement on Agriculture is consistent with the Appellate Body’s observation, in the context of the ordinary meaning of “threaten” does not connote a sense of certainty.\[^{1074}\]

Brazil's other appellant's submission, paras. 107-108.

Brazil's other appellant's submission, para. 109.

Brazil's other appellant's submission, para. 110.

Brazil's other appellant's submission, para. 111.

Brazil's other appellant's submission, paras. 112-113.

Brazil's other appellant's submission, paras. 114-115.

Brazil's other appellant's submission, para. 116.

Brazil's other appellant's submission, para. 117.

Brazil's other appellant's submission, para. 118.

Brazil's other appellant's submission, para. 119.

Brazil's other appellant's submission, para. 120.

Brazil's other appellant's submission, para. 121.

Brazil's other appellant's submission, para. 122.

Brazil's other appellant's submission, para. 123.

Brazil's other appellant's submission, para. 124.

Brazil's other appellant's submission, para. 125.

Brazil's other appellant's submission, para. 126.

Brazil's other appellant's submission, para. 127.

Brazil's other appellant's submission, para. 128.

Brazil's other appellant's submission, para. 129.

Brazil's other appellant's submission, para. 130.

Brazil's other appellant's submission, para. 131.

Brazil's other appellant's submission, para. 132.

Brazil's other appellant's submission, para. 133.

Brazil's other appellant's submission, para. 134.

Brazil's other appellant's submission, para. 135.

Brazil's other appellant's submission, para. 136.

Brazil's other appellant's submission, para. 137.

Brazil's other appellant's submission, para. 138.

Brazil's other appellant's submission, para. 139.

Brazil's other appellant's submission, para. 140.

Brazil's other appellant's submission, para. 141.

Brazil's other appellant's submission, para. 142.

Brazil's other appellant's submission, para. 143.

Brazil's other appellant's submission, para. 144.

Brazil's other appellant's submission, para. 145.

Brazil's other appellant's submission, para. 146.

Brazil's other appellant's submission, para. 147.

Brazil's other appellant's submission, para. 148.

Brazil's other appellant's submission, para. 149.

Brazil's other appellant's submission, para. 150.
In concluding as it did, the Panel appears to have relied on the Appellate Body Report in US – Line Pipe, the Appellate Body stated that there is a "threat" of serious injury, itself. 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 9.1 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" and had no "discretionary element". The Appellate Body 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 the United States' export subsidy reduction commitments for all agricultural products eligible to receive these subsidies."

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. Our interpretation of "threatens to lead to ... circumvention" is that the relevant export subsidies as a condition for a finding of threat of circumvention. This means that, in order to pose a 'threat' 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, the obligations not to apply export subsidies in a manner that "threatens to lead to circumvention" of the export subsidy reduction commitments does not exist.

We note in this respect that Article 10 is titled "Prevention of Circumvention of Export Subsidy Commitments". Brazil's assertion that Article 10 requires WTO Members to take precautionary action would imply that the aim of the provision would also include the prevention of "threat of 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 for all agricultural products eligible to receive these subsidies. According to Brazil, the threat of circumvention is found by the Panel, does not operate in a manner that mitigates the threat of circumvention of the United States' export subsidy reduction commitments for all agricultural products eligible to receive these subsidies. The same is also true, 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, para. 187.)
asserts, "of product allocations, although the CCC makes relatively limited use of these". 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 ... [instead, 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]."

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". 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". 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".

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. 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 programme 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."

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). 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. 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. 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. (original emphasis)

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. 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. 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. (original emphasis)
expressly state it was exercising judicial economy.\footnote{111}{The Panel stated that it did not believe it "necessary to conduct any additional examination". (Panel Report, footnote 1061 to para. 7.882)} We agree with the United States, however, that the Panel's approach can be properly characterized as an exercise of judicial economy.\footnote{112}{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)} 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.\footnote{113}{Appellate Body Report, Australia -- Salmon, para. 223. See also Appellate Body Report, Canada -- Wheat Exports and Grain Imports, para. 133.}

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 I, albeit as context.\footnote{114}{Panel Report, para. 6.31.} 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 subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.\footnote{115}{Ibid., paras. 7.867 and 7.869.}

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...

... why this analysis may not also be applied directly in an examination of the merits of Brazil's claims under item (j) of Article 3.1(a) of the SCM Agreement in respect of the export credit guarantee programmes in this factual situation".\footnote{116}{Panel Report, para. 7.946. (footnote omitted)} 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.\footnote{117}{Ibid.}

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.\footnote{118}{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".\footnote{119}{Panel Report, para. 6.31.} 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."\footnote{120}{Ibid.}

724. The United States asked the Panel to reject Brazil's request, asserting that "the Panel had 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".\footnote{121}{Ibid.}

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
Trade-Related Aspects of Intellectual Property Rights

Article 3.7 of the Agreement

The panel also considered Brazil's argument that the Appellate Body's finding that Brazil had failed to establish a causal link between the United States' export credit guarantees and the injury to the Brazilian textile market was in error. Brazil noted that the Appellate Body had failed to consider the effect of the United States' export credit guarantees on the competitive position of Brazilian textile producers. Brazil argued that the Appellate Body had failed to take into account the fact that the United States' export credit guarantees provided a competitive advantage to United States producers, thereby undermining the competitiveness of Brazilian textile producers and resulting in injury to the Brazilian textile market.

The panel rejected Brazil's argument. The panel noted that the Appellate Body had taken into account the effect of the United States' export credit guarantees on the competitive position of Brazilian textile producers. The panel noted that the Appellate Body had considered the extent to which the United States' export credit guarantees provided a competitive advantage to United States producers, and had found that the United States' export credit guarantees did not provide a competitive advantage to United States producers.

The panel also noted that the Appellate Body had considered the effect of the United States' export credit guarantees on the market for United States textile products. The panel noted that the Appellate Body had found that the United States' export credit guarantees did not affect the market for United States textile products.

The panel concluded that Brazil had failed to establish a causal link between the United States' export credit guarantees and the injury to the Brazilian textile market. The panel noted that the Appellate Body had taken into account the effect of the United States' export credit guarantees on the competitive position of Brazilian textile producers, and had found that the United States' export credit guarantees did not provide a competitive advantage to United States producers. The panel also noted that the Appellate Body had considered the effect of the United States' export credit guarantees on the market for United States textile products, and had found that the United States' export credit guarantees did not affect the market for United States textile products.

The panel therefore rejected Brazil's argument that the Appellate Body's finding that Brazil had failed to establish a causal link between the United States' export credit guarantees and the injury to the Brazilian textile market was in error.
734. We turn to Brazil's claim that the Panel erred in the "interpretation and application of the burden of proof" in its analysis of the ETI Act of 2000 and the subsidies under Article 31(a) of the SCM Agreement, because they are prohibited under Articles 8 and 10.1 of the SCM Agreement. The Panel found that the United States' export credit guarantees to upland cotton, within the meaning of those Articles, are prohibited under the SCM Agreement in respect of upland cotton. While Brazil has supplemented the evidence and argumentation in this dispute, it remains the case that the United States' export credit guarantees are prohibited under Articles 8 and 10.1 of the SCM Agreement.

735. Before the Panel, Brazil argued that the ETI Act of 2000 provides an export subsidy to upland cotton, within the meaning of Article 8 of the SCM Agreement, 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 established any export subsidy commitments for upland cotton, as provided for in 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 Article 10.1 of the SCM Agreement.

736. The Panel began its analysis by noting that, apart from referring to the European Communities Panel and Appellate Body reports in the US – FSC (Article 21.5 – EC) dispute, Brazil provided no evidence or argumentation regarding the ETI Act of 2000. The Panel observed that Brazil appeared to seek a Panel process whereby it would seek a Panel process whereby the Panel would follow, prior to the Panel's findings concerning the Act, the reasoning and findings of the Appellate Body, in the US – FSC (Article 21.5 – EC) dispute. This approach is not consistent with the Panel's role under the DSU. An Appellate Body report shall be adopted by the DSB and unconditionally incorporated by reference into the Panel's findings and conclusions in that dispute, if the DSB has not already done so. Brazil acknowledged that, after the Panel Report was circulated, the United States enacted legislation... that seems to repeal... the illegal aspects of the ETI Act of 2000. However, Brazil contended that an approach whereby the Panel incorporates by reference the reasoning of another panel, as modified by the Appellate Body, is consistent with the Appellate Body's reasoning in the US – FSC (Article 21.5 – EC) dispute. The Panel saw no basis in the text of the DSU for such incorporation by reference of claims and findings not included in the Appellate Body's report in that case.

737. The Panel then noted that the Panel erred in its analysis of the burden of proof in the US – FSC (Article 21.5 – EC) dispute, as modified by the Appellate Body. In that case, the panel did not establish that the ETI Act of 2000 and the subsidies under Article 31(a) of the SCM Agreement, because they are prohibited under Articles 8 and 10.1 of the SCM Agreement, must be examined Article 5.5 and 5.6 of the SCM Agreement, and did not undertake the same analysis of the products in dispute, i.e., ocean-caught Pacific salmon and other Canadian salmon. (Appellate Body Report, Australia – Salmon, para. 223. As the United States argued, the circumstances of the case are different from those in Australia – Salmon. In that case, the panel concluded that the ETI Act of 2000 does not provide prohibited export subsidies to ocean-caught Pacific salmon and did not undertake the same analysis of the products in dispute, i.e., ocean-caught Pacific salmon and other Canadian salmon. (Appellate Body Report, Australia – Salmon, para. 223.) The present case does not involve the Panel's role in making factual findings concerning the Act, as it did not the Panel's findings. The Panel then noted that the Panel erred in its analysis of the burden of proof in the US – FSC (Article 21.5 – EC) dispute, as modified by the Appellate Body. In that case, the panel did not establish that the ETI Act of 2000 and the subsidies under Article 31(a) of the SCM Agreement, because they are prohibited under Articles 8 and 10.1 of the SCM Agreement, must be examined Article 5.5 and 5.6 of the SCM Agreement, and did not undertake the same analysis of the products in dispute, i.e., ocean-caught Pacific salmon and other Canadian salmon. (Appellate Body Report, Australia – Salmon, para. 223.) The present case does not involve the Panel's role in making factual findings concerning the Act, as it did not the Panel's findings. The Panel then noted that the Panel erred in its analysis of the burden of proof in the US – FSC (Article 21.5 – EC) dispute, as modified by the Appellate Body. In that case, the panel did not establish that the ETI Act of 2000 and the subsidies under Article 31(a) of the SCM Agreement, because they are prohibited under Articles 8 and 10.1 of the SCM Agreement, must be examined Article 5.5 and 5.6 of the SCM Agreement, and did not undertake the same analysis of the products in dispute, i.e., ocean-caught Pacific salmon and other Canadian salmon. (Appellate Body Report, Australia – Salmon, para. 223.) The present case does not involve the Panel's role in making factual findings concerning the Act, as it did not the Panel's findings.
taken as providing a final resolution to the part of the matter before [it] concerning the ETI Act of 2000".  

738. The Panel then identified other differences between the present dispute and US – FSC Articles 21.5 – EC.  These differences meant, according to the Panel, that the evidence and argument relating to the present dispute are distinct from those in US – FSC Article 21.5 – EC.  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".  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".  

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.  

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".  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 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.  According to Brazil, the United States did not dispute the identity between the measures.  

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.  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.  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.  

742. Brazil acknowledges that the "United States enacted legislation ... that seems to repeal most of the illegal aspects of the ETI Act of 2000".  Consequently, Brazil expressly states that, were we to modify the Panel's "interpretation and application of the burden of proof", 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. 

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".  For that reason alone, the Appellate Body should decline to decide Brazil's appeal.
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.

At the outset, we observe that Article 17.6 of the DSU provides that "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.

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 intended to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions". The Appellate Body, with respect to the WTO Agreement outside the context of resolving a particular dispute.

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. 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.

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.

1. **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.

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".

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". The Panel examined Article XVI:3 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.

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.

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
2. Analysis

757. Article XVI of the GATT 1994 contains two sections. "Section A" contains Articles 1-14, which lay down certain obligations for "Subsidies in General," and the "Subsidies Agreement." The "Section B," containing paragraphs 15-25 of Article XVI, provides for "Additional Provisions on Export Subsidies". Article XVI:3, therefore, recognizes that the second sentence of Article XVI:3 applies only to export subsidies as that term is now defined in the Agreement on Agriculture and the SCM Agreement. Brazil claims 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 as currently defined in the Agreement on Agriculture and the SCM Agreement, and that 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". 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.

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. It argued that, in the light of its ruling, neither the United States nor Brazil had made any special submission in this matter. The Panel decided to complete the analysis and find that the United States' price-contingent subsidies violate Article XVI:3, as they result in serious prejudice in terms of Articles 6.3(c) and 5(c) of the SCM Agreement. Brazil's other appellant's submission, para. 318.

759. Brazil's appeal has two elements. First, Brazil appeals to complete the analysis of Brazil's claim regarding violation of Article XVI:3 by the United States, which the United States argues is more than an "equitable share of world export trade" in upland cotton, in violation of Article XVI:3, second sentence. Brazil requests the Appellate Body to complete the analysis and find that the United States' price-contingent subsidies violate Article XVI:3, as they result in serious prejudice in terms of Articles 6.3(d) and 5(c) of the SCM Agreement. Brazil's other appellant's submission, paras. 323-327.

760. With respect to the second element of Brazil's appeal, we note that, above, we upheld the United States' finding that the United States' price-contingent subsidies are not export contingent. Brazil's other appellant's submission, para. 371-379. With respect to the second element of Brazil's appeal, we note that, above, we upheld the United States' findings that the United States' price-contingent subsidies are not export contingent. Brazil's other appellant's submission, paras. 371-379.

761. Brazil's other appellant's submission, para. 3.8.

762. Brazil's other appellant's submission, paras. 311-319.

763. Brazil's other appellant's submission, paras. 3.18.

764. Brazil's other appellant's submission, para. 3.18.

765. Brazil's other appellant's submission, paras. 311-319.

766. Brazil's other appellant's submission, para. 3.18.

767. Brazil's other appellant's submission, para. 3.18.

768. Brazil's other appellant's submission, para. 3.18.

769. Brazil's other appellant's submission, para. 3.18.
the Panel's ruling, in paragraph 7.69 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;" and

762. We therefore believe that the establishment of a finding, on an issue, despite the fact that a finding would not result in recommendations or rulings by the DSB, we find no compelling reason for doing so in this case in respect of this particular issue.

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

(a) 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 SCM Agreement, 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(a) of Annex 2 of the SCM Agreement, and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the SCM Agreement; and

(b) 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 SCM Agreement, and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the SCM Agreement; and

VIII. Findings and Conclusions

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

(a) in relation to production flexibility contract payments and market loss assistance payments, modifies the Panel's finding, in paragraph 7.128 of the Panel Report, that Articles 4.2 and 6.2 of the SCM Agreement, 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(a) of Annex 2 of the SCM Agreement, and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the SCM Agreement; and

(b) 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, deficiency payments, production flexibility contract payments, and crop insurance payments, and other payments that are "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.

765. 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 interpretation of the phrase "support to a specific commodity" in Article 13(b)(ii) of the SCM Agreement may be used to measure the value of the measures in question for purposes of the comparison required by Article 13(b)(ii) of the SCM Agreement, and

766. We therefore believe that an 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 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.

767. The Appellate Body has found that the "challenged domestic support measures" granted "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. The Appellate Body has also found that the "challenged domestic support measures" are within the terms of reference. (Appellate Body Report, US – Steel Safeguards, paras. 485-491) 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. 484)
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";

(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); and
- 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

(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

1192See Separate Opinion, supra, paras. 631-641.
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.

(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.
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," and are not exempt from actions under Article 13(c) of the Agreement on Agriculture. 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. 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"). 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. 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. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings

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1See, e.g., Panel Report, paras. 8.1(b), 7.337-7.414.
2See Panel Report, para. 7.337.
3See, e.g., Panel Report, paras. 8.1(c), 7.415-7.647.

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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—which 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." 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.

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. 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.

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. 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. 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, in this U.S. appeal the United States conditionally requests the Appellate Body to find that Brazil 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.
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)

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<tbody>
<tr>
<td>Step 2 payments (domestic users) *</td>
<td>102.7</td>
<td>165.8</td>
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<td>432.8</td>
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<tr>
<td>DP payments *</td>
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<td>CCP payments *</td>
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<td>866</td>
<td>1761</td>
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<td><strong>Total</strong></td>
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<td><strong>3043.1</strong></td>
<td><strong>2092.4</strong></td>
<td><strong>3798.5</strong></td>
<td><strong>2471</strong></td>
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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)

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<tr>
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<td>1761</td>
<td>636</td>
<td>2609</td>
<td>897.8</td>
</tr>
<tr>
<td>Step 2 payments (domestic users &amp; exporters) *</td>
<td>279.3</td>
<td>445.3</td>
<td>235.7</td>
<td>177.8</td>
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<tr>
<td>MLA payments *</td>
<td>432.8</td>
<td>438.3</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>2473.1</strong></td>
<td><strong>1519.6</strong></td>
<td><strong>3297</strong></td>
<td><strong>1940.5</strong></td>
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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.

* 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.

Table 3: Values Attributable to the Price-Contingent Subsidies

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World Trade Organization
Mexico — Tax Measures on Soft Drinks and Other Beverages
Report of the Appellate Body, 6 March 2006
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ABBREVIATIONS USED IN THIS REPORT

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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
Sacerdori, Member

1. 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"). 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 and to the distribution tax (the "bookkeeping requirements"). 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" and that it "recommend to the parties that they submit their respective grievances to an Arbitral Panel, under Chapter Twenty of the NAFTA["], 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

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1WT/DS308/R, 7 October 2005.
2These measures are described in more detail in paragraphs 2.2-2.5 of the Panel Report.
3Panel Report, para. 4.2.
4North American Free Trade Agreement (the "NAFTA").
The Panel rejected Mexico's defence under Article XX(d) of the GATT 1994, concluding that "the measures are not justified as measures that are necessary to secure compliance by the United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994." Mexico also stated that in the event the Panel decided to exercise jurisdiction, the United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994, Mexico would bring the inconsistent measures into conformity with the obligations under the GATT 1994.

5. In its Report, circulated to Members of the World Trade Organization (the WTO), on 7 October 2005, the Panel decided to exercise jurisdiction, and found that Mexico's sweetener imports into the United States were subject to internal taxes in excess of those applied to like domestic sweeteners, in a manner inconsistent with Article III:2, first sentence. The United States did not object to Mexico's request for jurisdiction, and the Panel declined to exercise its discretion to dismiss the request.

6. 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 for Appellate Review. On 9 January 2006, the Panel issued a preliminary ruling in which it rejected Mexico's request. In doing so, the Panel concluded that, "under the DSU, it had no discretion to decide whether or not to exercise the jurisdiction in a case properly before it." The Panel added that, "even if the Panel were to exercise its discretion, it would not be able to exercise it to the extent that would justify the corrections proposed by Mexico." The United States argued that the corrections were clerical in nature, and that the Panel did not have discretion to exercise its judgment in this case.

7. By letter dated 13 January 2006, the Appellate Body received an amicus curiae brief from Canada, the United States, and the European Communities, and filed a Notice of Appeal, pursuant to Article 16.4 of the DSU. On 16 January 2006, Mexico filed a third participant's submission. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

8. On 13 January 2006, the Appellate Body received an amicus curiae brief from Canada, the United States, and the European Communities, and filed a Notice of Appeal, pursuant to Article 16.4 of the DSU. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received.


10. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received.

11. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

12. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

13. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

14. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

15. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

16. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

17. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

18. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

19. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.

20. The Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant. No other comments were received. By letter dated 15 December 2005, the Appellate Body rejected Mexico's appeal, and upheld the Panel's findings on the applicability of Article XX(d) of the GATT 1994.
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. Mexico submits that this is incorrect and ignores the fact that, like other international bodies and tribunals, WTO panels have certain "implied jurisdictional powers"22 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"23 under which claims cannot be judicially enforced in the WTO, such as those NAFTA provisions or when one of the disputing parties refuses to take the matter to the "appropriate forum"24. Mexico contends, in this regard, that the United States' claims under Article III of the GATT 1944 are inextricably linked to a broader dispute25 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.

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".

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22Mexico's appellant's submission, para. 64 ("obliga a un Grupo Especial de la OMC a abordar las reclamaciones").
23Ibid., para. 65 ("facultades implícitas en relación con su competencia").
24Mexico's appellant's submission, para. 73 ("los elementos predominantes de una disputa derivan de reglas del derecho internacional").
25Ibid. ("foro adecuado").
26Ibid.
27Ibid., para. 67 ("función jurisdiccional").
28See 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."
29(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)
30Ibid., para. 98 ("destino", "resultado").
31Ibid., para. 102 ("aun si el resultado de la medida es totalmente incierto, impredecible, bien puede estar 'destinado a lograr la observancia de las leyes y reglamentos' en el sentido del artículo XX(d)").
32Ibid., 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 decreto (§2 del artículo XX)" (quoting Panel Report, para. 8.187)).
20. Finally, Mexico argues that the Panel, "separately and in addition," 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 with a law of regulations and ignores achieving the objectives sought by the countervailing measures within the meaning of Article XX(d)."

21. The United States notes that Mexico's request for the Panel to refrain from exercising jurisdiction over the dispute is based on the Panel's interpretation of the terms "necessary", "to secure compliance", and "law of regulations", which, according to the United States, must be interpreted in light of the DSU and Article XX(d) of the GATT 1994. The United States argues that the Panel's finding that the measures are "necessary" within the meaning of Article XX(d) is supported by the Panel's acknowledgement that Mexico's measures have "attracted the attention" of the United States and that they constitute a "disguised restriction on [international] trade" because they constitute "a measure that Mexico could and should have used in order to attain its legitimate objective.

17. Mexico further requests, in the event the Appellate Body should reverse the Panel's findings on jurisdiction, that it complete the analysis and conclude that the measures are "necessary" within the meaning of Article XX(d). Mexico observes that 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 of regulations. The United States, however, contends that the Panel's finding is based on the Panel's view that the measures are "necessary" within the meaning of Article XX(d).

18. Mexico observes that, before the Panel, the Appellate Body should reverse the Panel's finding on jurisdiction, it must be clear that the measures are "necessary" within the meaning of Article XX(d). Mexico argues that the measures are "necessary" within the meaning of Article XX(d) because they are "conceived to attain an end for which the law of regulations is intended", and that they are "necessary" within the meaning of Article XX(d) because they are "necessary" within the meaning of Article XX(d). Mexico adds that the measures are "necessary" within the meaning of Article XX(d) because they are "necessary" within the meaning of Article XX(d). Mexico further notes that, in the context of the NAFTA dispute, the Panel's finding that the measures are "necessary" within the meaning of Article XX(d) is supported by the Panel's acknowledgement that the measures have "attracted the attention" of the United States.

19. The United States observes that Mexico has referred to the principle of judicial economy as a reason for its request for the Panel to refrain from exercising jurisdiction over the dispute. The United States contends that the Panel's finding that the measures are "necessary" within the meaning of Article XX(d) is supported by the Panel's acknowledgement that the measures have "attracted the attention" of the United States and that they constitute a "disguised restriction on [international] trade" because they constitute "a measure that Mexico could and should have used in order to attain its legitimate objective." The United States adds that 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 of regulations.

20. The United States submits that the Panel properly rejected Mexico's request for the Panel to refrain from exercising jurisdiction over the dispute. The United States contends that 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 of regulations. The United States adds that 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 of regulations.

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23. The United States submits that the Panel properly rejected Mexico's request for the Panel to refrain from exercising jurisdiction over the dispute. The United States contends that 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 of regulations. The United States adds that 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 of regulations.

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laws or regulations." While the United States concedes that the Panel's findings could have been clearer, 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." The United States agrees with Mexico that without a doubt or with certainty, secure compliance with laws or regulations is not "designed" as measures to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994.

25. The United States submits that Article XX(d) of the GATT 1994 does not design measures for the purpose of securing compliance with laws or regulations. Article XX(d) of the GATT 1994 provides that measures "shall be measured by a standard of necessity that is both reasonable and objective. The United States submits that the Panel properly found that Mexico's tax measures are not designed "to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994." The United States agrees with Mexico that without a doubt or with certainty, secure compliance with laws or regulations is not "designed" as measures to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994.

26. The United States supports the Panel's interpretation of the term "international agreement" as used in Article XX(d) of the GATT 1994. The United States submits that the Panel properly found that Mexico's tax measures are not designed "to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994." The United States agrees with Mexico that without a doubt or with certainty, secure compliance with laws or regulations is not "designed" as measures to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994.

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31. The United States submits that the Panel properly found that Mexico's tax measures are not designed "to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994." The United States agrees with Mexico that without a doubt or with certainty, secure compliance with laws or regulations is not "designed" as measures to secure compliance and, thus, are not Article XX(d) measures within the meaning of Article XX(d) of the GATT 1994.
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'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) does not necessarily exclude measures that are the equivalent of "laws or regulations" in the domestic legal order of the WTO. The Panel erred in concluding that the interpretation of the terms "to secure compliance" in Article XX(d) does not necessarily exclude measures that are the equivalent of "laws or regulations" in the domestic legal order of the WTO, and the interpretation of the terms "to secure compliance" in Article XX(d) does not necessarily include measures that are the equivalent of "laws or regulations" in the domestic legal order of a WTO Member. The United States agrees with the United States that Article XX(d) does not cover international agreements, and the interpretation of the terms "to secure compliance" in Article XX(d) does not cover international agreements."
IV. The Panel's Exercise of Jurisdiction

A. Introduction

3. In its first written submission to the Panel, Mexico had 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).”88

In contrast to the United States' arguments, Mexico further emphasizes that “[i]t is not the case that the Panel decided, 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).’”89

5. 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.”90 According to Mexico, the Panel did not have any discretion to decide whether or not to exercise its jurisdiction in a case properly before it.

35. 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.”91 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 provisions of the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might grant more important rights. The Panel also noted that, if it declined to exercise its jurisdiction in this case, the functions and obligations of WTO Panels would be established on the basis of the DSU, and particularly Article 11 thereof.”

36. Before addressing Mexico's arguments, we note that “the Panel has jurisdiction to hear the United States' claims.”92 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 grant more important rights. The Panel also noted that, if it declined to exercise its jurisdiction in this case, the functions and obligations of WTO Panels would be established on the basis of the DSU, and particularly Article 11 thereof.”

B. Analysis

40. Mexico argues that in the GATT 1944, an agreement that is not subject to the WTO, that the Panel decided that a WTO panel “would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction.”93

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.”94 According to Mexico, the Panel did not have any discretion to decide whether or not to exercise its jurisdiction in a case properly before it. The Panel added that the

42. On appeal, Mexico contends that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of this dispute.

43. In contrast to the United States' arguments, Mexico further emphasizes that “[i]t is not the case that the Panel decided, 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).”95

44. The Panel, in its reasoning, stated 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.”96 According to Mexico, the Panel did not have any discretion to decide whether or not to exercise its jurisdiction in a case properly before it.

45. 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.”97 According to Mexico, the Panel did not have any discretion to decide whether or not to exercise its jurisdiction in a case properly before it. The Panel added that the
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, 11.1, 19.2, and 23 of the DSU. 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

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:

[T]he Panel shall examine the measures with a view to determining whether they are inconsistent with Articles of this Agreement.

49. Turning to Mexico's arguments on appeal, we note, first, Mexico's argument that WTO panels enjoy some discretion in establishing their own working procedures. Although panels enjoy some discretion in establishing their own jurisdictional powers, the Appellate Body has previously emphasized that panels "have only the authority to determine whether they have jurisdiction to deal with a particular matter." 94

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52. 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:

[T]he Panel shall examine the measures with a view to determining whether they are inconsistent with Articles of this Agreement.
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 to bring into effect Article 19.1 of the WTO. Article 19.1 provides that "any benefits accruing to [that Member] are being impaired by measures taken by another Member which are not inconsistent with the obligations of that Member under the covered agreements."

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 facts of the matter and, including an objective assessment of the applicable covered agreements, make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. To examine, in the light of the relevant provisions of the covered agreements, the rules and procedures of the DSB and the practice of Members, the panel must interpret the relevant provisions of the covered agreements and determine whether the obligations on that panel have been complied with.

Furthermore, Article 25 of the DSU states that Members of the WTO shall have recourse to the rules and procedures of the DSB when they seek redress of a violation of obligations under the covered agreements. The United States of America has claimed that Canada is violating obligations under the covered agreements. If this claim is upheld, it is essential to the effective functioning of the WTO that the United States of America have the right to bring a dispute to the DSB.

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 facts of the case and the applicability of and conformity with the relevant covered agreements. …

51. Article 11 of the DSU states that panels shall have recourse to the rules and procedures of the DSU when they seek redress of a violation of obligations under the covered agreements. Accordingly, a panel should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. …

52. Furthermore, Article 25 of the DSU states that Members of the WTO shall have recourse to the rules and procedures of the DSB when they seek redress of a violation of obligations under the covered agreements. The United States of America has claimed that Canada is violating obligations under the covered agreements. If this claim is upheld, it is essential to the effective functioning of the WTO that the United States of America have the right to bring a dispute to the DSB.

53. A panel's decision by a panel is binding if it is consistent with the obligations of the WTO. Article 19.2 of the DSU states that "recommendations 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 "recommendations 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 "recommendations 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 "recommendations 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 "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." 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that only a NAFTA panel could resolve the dispute as a whole. 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.” 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. 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 had not been “exercised.” 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. 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 protegí [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.

107Panel 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.

108Mexico’s response to questioning at the oral hearing.

109Article 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)

110Mexico’s response to questioning at the oral hearing.

111In 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 “called[ed] into question” 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. 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.”

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. 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 had[no] discretion to decline to exercise its jurisdiction in the case that had[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.

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

111Mexico’s appellant’s submission, para. 73 (“[es] cuestion[able].”)


113Mexico’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)

114We 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).

115Panel 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 or 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"

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 countermeasures136, 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

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)
129 Ibid., para. 8.194.
130 Ibid.
131 Ibid., para. 8.197.
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 otras
Acuerdos de la OMC no demuestran que los tales términos excluyan las reglas del derecho internacional"). (footnote omitted)
140 United States' appellee's submission, para. 30 (referring to definitions in Black's Law Dictionary,
141 Ibid., para. 37.
DSU by "permitting the suspension of concessions ... without DSB authorization and without any requirement to adhere to the rules established" in that provision.\textsuperscript{142}

B. \textit{Analysis}

1. Are Mexico's Measures Justified under Article XX(d)?

66. Article XX(d) of the GATT 1994 reads:

\textit{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:

\hspace{1em} (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 \textit{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",\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{148} In our view, the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member.\textsuperscript{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.\textsuperscript{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.\textsuperscript{151} Thus, the illustrative list reinforces the notion that the terms "laws or regulations" refer to rules that form part of

\textsuperscript{142}\textit{Ibid.}, para. 38. (footnote omitted)


\textsuperscript{144}\textit{Ibid.}


\textsuperscript{146}United States' appellee's submission, footnote 62 to para. 39; Mexico's response to questioning at the oral hearing.

\textsuperscript{147}Panel Report, footnote 419 to para. 8.193; United States' appellee's submission, para. 31.

\textsuperscript{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.

\textsuperscript{149}The European Communities notes that:

\[\text{[i]t is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforced against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the GATT [1994]].}\]

\textsuperscript{150}(European Communities' third participant's submission, para. 41)

\textsuperscript{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.

74. Our understanding of the terms ‘laws or regulations’ is consistent with the context of Article XX(d). As the United States points out, other provisions of the covered agreements refer to international agreements as well as to laws and regulations. Thus, a distinction is drawn in the same provision between ‘laws or regulations’ and ‘international agreements’. As the Appellate Body has explained previously, ‘the contribution made by the compliance measure to the enforcement of the law or regulation at issue’ is not the same as the measure’s design ‘to secure compliance’.

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 the international obligations of another WTO Member do not relate to the terms ‘to secure compliance’, the Panel’s reasoning does not focus on whether the achievement of Mexico’s objectives is uncertain. Rather, the Panel considers that international countermeasures (as the ones allegedly imposed by Mexico) are intrinsically unable to secure compliance with laws or regulations, which are not incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member. Thus, a measure cannot be considered to be designed ‘to secure compliance’ even if the measure cannot be guaranteed to achieve its result with absolute certainty.

76. It is not the case that if a measure is not designed ‘to secure compliance’ within the meaning of Article XX(d), the measure will achieve its objective. As the Panel’s reasoning does not focus on whether the achievement of Mexico’s objectives is certain or uncertain, the question is whether 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. Rather, the Panel’s reasoning is based on the premise that the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable. Therefore, the Panel’s conclusion that the outcome of international countermeasures is inherently uncertain is not a conclusion that is necessarily inescapable.

77. We turn to the terms ‘to secure compliance’, which were the focus of the Panel’s reasoning, and are the focus of Mexico’s arguments that the Panel erred in requiring a degree of certainty as to the results achieved. The Panel erred in requiring the Appellate Body Report in US – Gambling to guide its reasoning. The United States submitted that the US – Gambling Report did not support the conclusion that the Panel sought to draw from it. The United States also submitted that the US – Gambling Report did not 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, and the Panel erred in concluding that the Panel erred in concluding that the measures sought to be justified had to be ‘certainty’ and ‘coercion’.

78. The Panel erred in concluding that the measures sought to be justified had to be ‘certainty’ and ‘coercion’. Rather, Article XX(d) requires that the design of the measure contribute ‘to secure compliance with laws or regulations which are not inconsistent with the provisions of’ the GATT 1994.

79. 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 the international obligations of another WTO Member do not relate to the terms ‘to secure compliance’, the Panel’s reasoning does not focus on whether the achievement of Mexico’s objectives is certain or uncertain. Rather, the Panel considers that international countermeasures (as the ones allegedly imposed by Mexico) are intrinsically unable to secure compliance with laws or regulations, which are not incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member. Thus, a measure cannot be considered to be designed ‘to secure compliance’ even if the measure cannot be guaranteed to achieve its result with absolute certainty. Rather, the Panel’s reasoning is based on the premise that the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable. Therefore, the Panel’s conclusion that the outcome of international countermeasures is inherently uncertain is not a conclusion that is necessarily inescapable.
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). 165 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. 166 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. 167 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,168 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 countermesures 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.169 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,170 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 Appellate Body would thus become adjudicators of non-WTO disputes. 171 As we noted earlier,172 this is not the function of panels and the Appellate Body as intended by the DSU.173

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. 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. 174 Finally, we do not endorse the Panel's reliance on the Appellate Body's interpretation in US – Shrimp (Article 21.5 – Malaysia) to interpret the terms "to secure compliance" in Article XX(d). 175

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. 176 Mexico's request is based on 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.177

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165 Mexico's appellant's submission, paras. 174-178.
167 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.
168 United States' appellee's submission, para. 37.
169 Mexico's interpretation would also undermine the limitations in paragraphs 3 and 4 of Article 22 as to the magnitude and the scope sectors in which such countermesures could be taken. (Ibid., paras. 37-38)
170 At the oral hearing, Mexico argued that the terms "laws or regulations" would not include the WTO agreements because the latter are lex specialis.
171 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)
172 See supra, para. 56.
173 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. EPC/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)
174 See supra, paras. 69-71.
175 See supra, para. 74.
176 See supra, para. 74.
177 Mexico's appellant's submission, para. 138.
178 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**

82. Mexico argues, "separately and in addition" 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." 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." The United States submits that, contrary to Mexico's contention, the Panel did not "ignore" arguments or evidence submitted by Mexico. 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'."

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 had[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 93 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  Giorgio Sacerdoti
Member  Member
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(d) 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, 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.

\(^1\) 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.
\(^5\) Panel Report, paragraph 8.186.
\(^7\) Panel Report, paragraphs 8.181 and 8.186.
World Trade Organization

Brazil — Measures Affecting Imports of Retreaded Tyres

Report of the Appellate Body, 3 December 2007
BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

AB-2007-4

Report of the Appellate Body

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ANNEX I Notification of an Appeal by the European Communities under Article 16.4 and
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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"). The Panel was established to consider a complaint by the European Communities concerning the establishment of certain measures imposed by Brazil on the importation and marketing of retreaded tyres 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 Comercio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004").

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2Retreaded 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 of all the sidewalls. (See Panel Report, para. 2.1.) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retrading." 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.)
3Exhibits 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."

Ibid., paras. 2.7.
5Article 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 whoever 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.

Panel Report paras. 3.1 and 7.38.
7Ibid., 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.
8The 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 NCM code 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.
9Panel Report, para. 7.448.
Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were prima facie inconsistent with Article XI:1 of the GATT 1994. Brazil did not acknowledge any inconsistency of the fines with Article II:9 and II:10. Brazil did not contest that state measures prohibiting the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Articles I:1 and XIII:1 of the GATT 1994. Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines afforded to retreaded tyres imported from MERCOSUR countries was justified under Article XX(b) of the GATT 1994.

In its analysis, the Panel found further that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX(b) of the GATT 1994. In its analysis, the Panel also found that the import prohibition on retreaded tyres was inconsistent with Article II:9 and II:10. Brazil did not contest that state measures prohibiting the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.

The Panel accordingly recommended that the Appellate Body dispute the prohibition on retreaded tyres and associated fines afforded to imports of remoulded tyres imports from MERCOSUR countries was justified under Article XX(b) of the GATT 1994. The Panel did not find it necessary to take these caps on the巴西 Carla, 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 Humane Society International; Associação de Combate aos Poluentes (ACPO), Brazil; Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Brazil; and the United Nations Development Programme.

On 1 October 2007, Paraguay notified its intention to appear at the oral hearing as a third participant. The oral hearing was held on 15 and 16 October 2007. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal. 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, with the exception of Argentina, China, Guatemala, Mexico, Paraguay, and Thailand, made oral statements. 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, with the exception of Argentina, China, Guatemala, Mexico, Paraguay, and Thailand, made oral statements.
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 analysis. First, the European Communities argues that the Panel’s finding that “at least some domestic used tyres are being retreaded in Brazil” is based on a selective and distorted manner.

11. Moreover, the European Communities contends that the Panel ignored evidence that could make, or could have made, a contribution to the protection of human life or health, rather than simply determining whether the measure was “suitable” or “suitable and non-discriminatory.” (See European Communities’ submission, paras. 130 and 131.

12. In addition, the European Communities claims that the Panel erred in determining the contribution of the Import Ban to the realization of the ends pursued by it. The European Communities argues that the Panel 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 “two reasons to believe that retreaded tyres sold in Brazil are low-quality types,” that were incapable of being retreaded in Brazil, the Panel ignored evidence that demonstrated the existence of used tyres being retreaded in Brazil. The European Communities argues that the Panel’s finding that “at least some domestic used tyres are being retreaded in Brazil” is based exclusively on a statement contained in a report by the ABR (Brazilian Association of the Retreading Industry) (the “ABR Report”) 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).

14. Moreover, the European Communities argues that the Panel ignored evidence that the former is directly contradicted by a second report by the ABR, 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.

15. The European Communities argues that the Panel committed multiple errors in holding that there were monoplan available alternatives to the Import Ban, would lead to 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 improve the management of waste tyres, and measures to improve the management of waste tyres.

(b) Alternatives to the Import Ban

16. The European Communities argues that the Panel’s consideration of the alternatives to the Import Ban was not adequate. The European Communities contends that the Panel’s decision that “no meaningful weighing and balancing is possible” is not a proper basis for an objective assessment of the facts.

17. The European Communities also denounces the Panel’s failure to conduct the process of weighing and balancing the relevant factors. The European Communities points out that the Panel’s approach to assessing the alternatives to the Import Ban was not adequate, and that the Panel’s comparison of the alternatives was not sufficient to an objective assessment of the facts.

18. The Panel’s failure to conduct the process of weighing and balancing the relevant factors resulted in a failure to consider the extent of the contribution made by the measure, and speculation about future events is not a sufficient basis for an objective assessment of the facts.

19. The European Communities argues that the Panel ignored evidence that contradicted its findings regarding the retreadability of used tyres in Brazil, namely, a study by the consultancy LAFIS and the fact that domestic retreaders have sought court injunctions to obtain the right to import used tyres for further retreading in Brazil.

20. The European Communities also denounces the Panel’s alleged failure to conduct an overall assessment of the evidence, instead, referring to the evidence before it in a selective and distorted manner.

21. The European Communities argues that the Panel failed to consider the extent of the contribution made by the measure to the achievement of its stated objective. (See European Communities’ submission, para. 179.)

22. The European Communities argues that the Panel’s failure to conduct the process of weighing and balancing the relevant factors resulted in a failure to consider the extent of the contribution made by the measure, and speculation about future events is not a sufficient basis for an objective assessment of the facts.
16. In the view of the European Communities, the Panel's factual findings regarding the objective of the challenged measure. The European Communities also considers that the Panel improperly excluded measures to ensure the objective of the Import Ban on used tyres in Brazil, rather than with the number of waste tyres attributable to imported used tyres.

17. The European Communities further submits that the Panel erred by excluding as alternatives to the Import Ban measures that would allow Brazil to prevent the risks associated with the accumulation of waste tyres. Thus, the European Communities considers that the Panel should have analyzed an alternative that would allow Brazil to prevent the risks associated with the accumulation of waste tyres. Such narrow definition of “alternatives” wrongly links the notion of alternative measures to the measure at issue and overlooks the objectives of the Import Ban. The European Communities argues that the Panel erred by excluding as alternatives measures that would allow Brazil to prevent the risks associated with the accumulation of waste tyres.

18. Moreover, the European Communities contends further that the Panel’s factual findings regarding the implementation of the Import Ban only measures that avoid the generation of waste tyres. Such measures would be more appropriate to the objective of the Import Ban. The European Communities argues that the Panel erred by excluding as alternatives measures that would allow Brazil to prevent the risks associated with the accumulation of waste tyres.

19. Finally, the European Communities submits that the Panel’s factual findings regarding the cumulative effects of alternative measures are not based on an objective assessment of the facts. The European Communities argues that the Panel erred by excluding as alternatives measures that would allow Brazil to prevent the risks associated with the accumulation of waste tyres.

20. The European Communities also considers that the Panel erred by excluding as alternatives measures that would allow Brazil to prevent the risks associated with the accumulation of waste tyres. The European Communities argues that the Panel erred by excluding as alternatives measures that would allow Brazil to prevent the risks associated with the accumulation of waste tyres.
From the perspective of the European Communities, the MERCOSUR exemption is arbitrary and unjustifiable discrimination. The Appellate Body is requested to reverse the Panel’s finding 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 as defined in the chapeau of Article XX are not established in the Panel’s analysis. The "arbitrary" discrimination as defined in the chapeau of Article XX requires a balancing of the relevant factors and the alternatives that was required in order to determine whether the Import Ban is applied inconsistently with the chapeau of Article XX.

29. The European Communities submits that, in its analysis, the Panel wrongly defined "arbitrary" discrimination as being limited to "capricious", "unpredictable", or "random" discrimination. The European Communities also submits that the Panel’s definition of "arbitrary" discrimination failed to take into account the object and purpose of Article XX.

30. According to the European Communities, whether a measure involves arbitrary discrimination must be established in relation to the object and purpose of Article XX. The chapeau of Article XX expresses "requirements of good faith and requires a 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 achievement of the objective of the measure/write submission to the Panel, para. 152)."

31. It follows, according to the European Communities, that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the chapeau of Article XX. Should the Appellate Body accept this request, the European Communities further requests the Appellate Body to find that the Import Ban is inconsistent with the chapeau of Article XX. The fact that the chapeau of Article XX prohibits discrimination between countries where the same or similar measures have been introduced does not preclude a finding of "arbitrary" discrimination. The European Communities argues further that the volume of imports of retreaded tyres from MERCOSUR countries is irrelevant to the analysis of whether that exemption constitutes arbitrary or unjustifiable discrimination. The Appellate Body is requested 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.

25. 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") was made necessary to protect human, animal, or plant health, within the meaning of Article XX(b) of the GATT 1994. The Panel erred in finding that the exemption was made necessary by the Panel’s flawed analysis of reasonably available alternatives. The Panel also erred in finding that the MERCOSUR exemption was made necessary by the Panel’s flawed analysis of reasonably available alternatives.

26. For all of the above reasons, the European Communities requests the Appellate Body to reverse this finding and to find, instead, that the MERCOSUR exemption was not made necessary by the Panel’s flawed analysis of reasonably available alternatives. The Panel erred in finding that the MERCOSUR exemption was made necessary by the Panel’s flawed analysis of reasonably available alternatives.
the same conditions prevail" provides further support for the European Communities' interpretation, 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".

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, as it was only an indicator of the relevance of the exemption. The Panel's focus was on the nature of the ruling on the basis of which Brazil has acted. The European Communities also contests the Panel's conclusions 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.

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", and the Panel's reliance on Brazil's statement that the MERCOSUR exemption was "the only course of action available to Brazil in order to avoid the import ban". The nature of the ruling on the basis of which Brazil has acted is irrelevant for determining whether the MERCOSUR exemption constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The Panel's approach, based on the ruling of the MERCOSUR tribunal, is also inappropriate. 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.

34. The European Communities submits that import volumes under the MERCOSUR exemption are irrelevant for determining whether this exemption constitutes arbitrary or unjustifiable discrimination. The Panel erred in finding that such imports do not constitute a disguised restriction on international trade. The Panel's finding that the MERCOSUR exemption did not constitute arbitrary discrimination could arise only if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objectives of the Import Ban would be significantly undermined.

35. The European Communities argues that the Panel erred in finding that import volumes under the MERCOSUR exemption were not significant. The Panel's findings are based on the assumption that the MERCOSUR exemption was not implemented. However, the European Communities submits that the Panel's finding is not supported by the evidence.

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, as it was only an indicator of the relevance of the exemption. The Panel's focus was on the nature of the ruling on the basis of which Brazil has acted. The European Communities also contests the Panel's conclusions 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.

37. The European Communities also contests the Panel's conclusions that the MERCOSUR exemption did not constitute a disguised restriction on international trade. The Panel's finding was based on the assumption that the MERCOSUR exemption was not implemented. However, the European Communities submits that the Panel's finding is not supported by the evidence.

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.

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 constitute arbitrary or unjustifiable discrimination and a disguised restriction on international trade. The Panel erred in finding that such imports did not constitute a disguised restriction on international trade.

40. For the European Communities, the Panel erred in finding that the MERCOSUR exemption does not constitute a disguised restriction on international trade. The Panel's finding was based on the assumption that the MERCOSUR exemption was not implemented. However, the European Communities submits that the Panel's finding is not supported by the evidence.

41. For the European Communities, the Panel erred in finding that the MERCOSUR exemption does not constitute a disguised restriction on international trade. The Panel's finding was based on the assumption that the MERCOSUR exemption was not implemented. However, the European Communities submits that the Panel's finding is not supported by the evidence.
45. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII of the Agreement and with respect to Articles XX(a), (b), (c) and (d) of the GATT 1994, the Panel erred in deciding that a majority of the Panel erred in considering the use of court injunctions by the Brazilian authorities to prevent the importation of used tyres is a measure that significantly undermined the objective of the Import Ban. The European Communities claims that the Panel and the Appellate Body should have addressed the European Communities' claims under Articles I.1 and XIII of the Agreement and Articles XX(a), (b), (c) and (d) of the GATT 1994. The European Communities argues that the Panel erred in finding that the use of court injunctions did not constitute a significant undermining of the objective of the Import Ban. The European Communities submits that the Panel erred in finding that the use of court injunctions did not constitute a significant undermining of the objective of the Import Ban.

46. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII of the Agreement and with respect to Articles XX(a), (b), (c) and (d) of the GATT 1994, the Panel erred in considering the use of court injunctions by the Brazilian authorities to prevent the importation of used tyres is a measure that significantly undermined the objective of the Import Ban. The European Communities claims that the Panel and the Appellate Body should have addressed the European Communities' claims under Articles I.1 and XIII of the Agreement and Articles XX(a), (b), (c) and (d) of the GATT 1994. The European Communities argues that the Panel erred in finding that the use of court injunctions did not constitute a significant undermining of the objective of the Import Ban. The European Communities submits that the Panel erred in finding that the use of court injunctions did not constitute a significant undermining of the objective of the Import Ban.

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 (WT/DS332/R). First, Brazil failed to demonstrate consistent and effective implementation of its commitment, as required by Article XXIV:8(a) of the GATT 1994. As explained extensively in the European Communities' submissions to the Panel, Brazil did not satisfy the condition that the measure must be applied in an all-or-nothing manner. Brazil permitted second-hand imports through court injunctions, thereby failing to ensure that imports of used tyres were effectively excluded from the scope of the measure. Second, Brazil failed to demonstrate that the MERCOSUR exemption achieved a liberalization of “substantially all” trade within MERCOSUR, as required by Article XXIV:8(a)(i) of the GATT 1994. The European Communities contends that trade in the automotive, agro-industrial, and textile sectors has not been fully liberalized within MERCOSUR, and that imports of used tyres under court injunctions significantly undermine the objective of the Import Ban.

48. For all these reasons, 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 of the GATT 1994.
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” 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." 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 "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 fulfill 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.

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.” 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

(thel “GATS”). 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.” 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 in 

Dominican Republic – Import and Sale of Cigarettes

, para. 392. European Communities’ appellant’s submission, para. 392.

Ibid., para. 402 (quoting Appellate Body Report, Mexico – Taxes on Soft Drinks, para. 79).


Ibid., para. 81 (quoting Appellate Body Report, EC – Asbestos, para. 167). (emphasis added by Brazil)

Supra, footnote 41.

Supra, footnote 42.
which the European Communities claims the Panel should have taken into account, was a temporary short-term need to combat dengue more pressing.

59. In relation to stockpiling, Brazil submits that the evidence on record, including a study by the 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).

60. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in reaching its findings regarding alternative disposal methods. The Panel's findings that stockpiling presents risks to human health and environment can 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 claims the Panel should have considered, "controlled stockpiling is not a final disposal operation but merely 'temporary storage.'" 84 As the Panel acted within its discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks, Brazil contends that the Panel did not consider "all the evidence" on record, nor did the Panel base its findings on the evidence that "alternative recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives." 83

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 European Communities claims the Panel to have erred in its findings that material recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives. Brazil concludes that the Panel erred in concluding that "material recycling applications collectively lacked adequate disposal capacity." 85

56. Brazil contends that the Panel correctly determined that none of the measures suggested by the European Communities would achieve the primary aim of the Import Ban: to reduce the importation of retreaded tyres into Brazil. The Panel's finding that material recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives tapped the Panel's discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks. Brazil states that the Panel's finding that stockpiling presents risks to human health and environment can 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 claims the Panel should have considered, "controlled stockpiling is not a final disposal operation but merely 'temporary storage.'" 84

57. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in reaching its findings regarding alternative disposal methods. The Panel's findings that stockpiling presents risks to human health and environment can 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 claims the Panel should have considered, "controlled stockpiling is not a final disposal operation but merely 'temporary storage.'" 84 As the Panel acted within its discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks, Brazil contends that the Panel did not consider "all the evidence" on record, nor did the Panel base its findings on the evidence that "alternative recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives." 83

58. Furthermore, Brazil argues that the Panel's findings on the availability of alternative measures are based on an objective assessment of the facts, as required by Article 11 of the DSU, and the Panel did not exceed its authority in reaching its findings. The Panel's findings that stockpiling presents risks to human health and environment can 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 claims the Panel should have considered, "controlled stockpiling is not a final disposal operation but merely 'temporary storage.'" 84 As the Panel acted within its discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks, Brazil contends that the Panel did not consider "all the evidence" on record, nor did the Panel base its findings on the evidence that "alternative recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives." 83

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60. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in reaching its findings regarding alternative disposal methods. The Panel's findings that stockpiling presents risks to human health and environment can 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 claims the Panel should have considered, "controlled stockpiling is not a final disposal operation but merely 'temporary storage.'" 84 As the Panel acted within its discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks, Brazil contends that the Panel did not consider "all the evidence" on record, nor did the Panel base its findings on the evidence that "alternative recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives." 83

61. Brazil adds that the Panel's finding that material recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives tapped the Panel's discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks. Brazil states that the Panel's finding that material recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives tapped the Panel's discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks. Brazil states that the Panel's finding that material recycling applications could dispose of existing volumes of waste tyre stockpiles without compromising the health and environment objectives tapped the Panel's discretion in determining the weight attributed to several reports that the stockpiling of waste tyres presents human health and environmental risks.
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 remoulded 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 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" 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 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".90

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".91 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.

87Ibid., para. 213. (footnote omitted)
88 Ibid., para. 214.
89Exhibit BRA-175 submitted by Brazil to the Appellate Body.
90Brazil's appellee's submission, para. 225 (referring to Panel Report, para. 7.288).
91Ibid., para. 229.
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."

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.53

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.

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53Brazil's appellee's submission, para. 245.


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".55 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."56 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.

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 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).

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.
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 suggests that since MERCOSUR members are not applying Article XXIV exemptions to third countries for discrimination, they are not limiting their trade with third countries. Therefore, Brazil contends that a Member should not be allowed to demonstrate the necessity of its measure as of the time a customs union is formed, but rather when it comes into existence. Brazil notes 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).

Brazil contends that the European Communities' assertion that MERCOSUR is inconsistent with Article XXIV is contradicted by the evidence it submitted to the Panel. According to Brazil, the evidence before the Panel demonstrates that MERCOSUR is consistent with the requirements of Article XXIV and therefore exempt under Article XXIV:5(a).

Moreover, Brazil argues that the Panel incorrectly applied the term "to secure compliance" within the meaning of Article XX(d) to the MERCOSUR case. Brazil contends that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d).

Finally, Brazil argues that the Panel should have considered the evidence of MERCOSUR's compliance with Article XX(d) in its conclusion that MERCOSUR is inconsistent with Article XXIV. Brazil submits that the evidence before the Panel demonstrated that MERCOSUR is consistent with Article XX(d). Therefore, Brazil contends that the Panel's conclusion that MERCOSUR is inconsistent with Article XXIV is incorrect.

In conclusion, Brazil argues that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d) and is therefore consistent with Article XXIV. Brazil contends that the Panel's conclusion that MERCOSUR is inconsistent with Article XXIV is therefore incorrect and should be reversed.
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 require the Panel to consider whether there were reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

112. Argentina also submits that the Panel erred in concluding 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.

113. Argentina argues 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”.

114. The Panel correctly found that the alternative measures identified by the European Communities did not constitute alternatives that could be applied as a substitute for the Import Ban. Argentina submits, however, that it was not required to quantify the contribution of the Import Ban to the realization of the objective pursued.

115. As to the Panel’s finding that the measures identified by the European Communities did not constitute alternatives, Argentina submits that the measures did not properly address the risk of human, animal, or plant life or health to risks arising from waste tyres. Argentina also argues that the Panel incorrectly excluded a better enforcement of the import ban on used tyres as an alternative measure.

116. The Panel’s reasoning that the measures did not constitute alternatives was based on the Panel’s consideration that the measures did not serve the same ends as the Import Ban. Argentina submits that the Panel erred in finding that the measures did not serve the same ends as the Import Ban.

117. Argentina 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) requires that a measure be “necessary” to pursue the ends of protection. Argentina submits that the Panel erred in failing to consider whether there were reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

118. As to the Panel’s finding that there were no reasonably available alternatives to the Import Ban, Argentina submits that the Panel erred in finding that the measures identified by the European Communities did not constitute alternatives.

119. As to the Panel’s finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination, Argentina submits that the Panel erred in finding that the measures did not serve the same ends as the Import Ban.

120. As to the Panel’s finding that the measures did not constitute alternatives, Argentina submits that the Panel erred in failing to consider whether there were reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

121. As to the Panel’s finding that the measures did not serve the same ends as the Import Ban, Argentina submits that the Panel erred in finding that the measures did not constitute alternatives.

122. As to the Panel’s finding that the measures did not constitute alternatives, Argentina submits that the Panel erred in finding that the measures did not serve the same ends as the Import Ban.
whether discrimination was “arbitrary” and the need to apply the chapeau of Article XX, the Panel stressed that this approach requires panels to “make a judgement on the subjective elements in evaluating the manner in which a measure is applied and the extent to which the measure is consistent with the terms of Article XX.”

96. In addition, Japan argues that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres is based on a violation of Article 11 of the DSU, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

97. Finally, Japan suggests that Brazil’s disposal capacity is a more reasonable threshold, because it is directly related to the reduction of waste tyre accumulation in Brazil. This is in contrast to the Panel’s recommendation that Brazil address the “need to be able to ‘defend’ or convincingly explain the rationale for any discrimination in the application of a measure.”

98. With respect to the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, the Panel correctly concluded that the measure’s inconsistency with the GATT 1994’s non-discrimination obligations was not necessarily related to the specific import volumes. In assessing the applicability of the chapeau of Article XX, Japan argues that the Panel erred in finding that the Brazilian court injunctions that permitted imports of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX. According to Japan, the Panel’s finding that the Brazilian court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX was a key part of the Panel’s conclusions.

99. Finally, Japan submits that the Panel erred in concluding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres in Brazil, because the Panel’s reliance on the “need to be able to ‘defend’ or convincingly explain the rationale for any discrimination in the application of a measure” is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

100. For Korea, the Panel’s findings that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was in violation of Article 11 of the DSU. It is important to note that the Panel’s findings that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres were based on the Panel’s conclusion that the measure was inconsistent under the chapeau of Article XX, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

Korea

10. In Korea’s view, the Panel’s conclusion that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was based on an assessment of the measure’s compatibility with the GATT 1994’s non-discrimination obligations, but not on an assessment of the measure’s consistency with the terms of Article XX. Therefore, Korea argues that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

11. Korea adds that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was inconsistent with the Panel’s conclusion that the measure was inconsistent under the chapeau of Article XX, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption. Therefore, Korea argues that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

12. Finally, Korea suggests that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was inconsistent with the Panel’s conclusion that the measure was inconsistent under the chapeau of Article XX, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption. Therefore, Korea argues that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

13. Japan

14. Japan argues that the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994 was based on an assessment of the measure’s compatibility with the GATT 1994’s non-discrimination obligations, but not on an assessment of the measure’s consistency with the terms of Article XX. Therefore, Japan argues that the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994 was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

15. Japan adds that the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994 was inconsistent with the Panel’s conclusion that the measure was inconsistent under the chapeau of Article XX, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption. Therefore, Japan argues that the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994 was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

16. Finally, Japan suggests that the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994 was inconsistent with the Panel’s conclusion that the measure was inconsistent under the chapeau of Article XX, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption. Therefore, Japan argues that the Panel’s finding that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994 was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.

17. Japan concludes that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was inconsistent with the Panel’s conclusion that the measure was inconsistent under the chapeau of Article XX, which is not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption. Therefore, Japan argues that the Panel’s finding that the Import Ban was capable of contributing to the overall reduction of the amount of waste tyres was not relevant to the application of a measure that is inconsistent in relation to the MERCOSUR exemption.
5. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the MERCOSUR exemption did not constitute "arbitrary discrimination between countries where the same conditions prevail" because the MERCOSUR exemption was introduced in support of the argument that the MERCOSUR exemption was "derivative" and related to the reduction in the number of waste tyres, which may have a "knock-on effect". Rather, it should be considered to be "inconsistent" in the light of the underlying justification, that is, the protection of humans from mosquito-borne diseases and typhus, which may have a "knock-on effect"

6. Korea argues further that the Panel erred in finding that the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Korea submits that the Panel erred in finding that the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Korea argues that the Panel had the same potential to damage human life or health as retreaded tyres exported from non-MERCOSUR countries. Therefore, the Panel erred in finding that the 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.

7. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues that the Panel erred in finding that the MERCOSUR exemption was consistent with Article XX of the GATT 1994. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the MERCOSUR exemption was "inconsistent" with Article XX, and that Brazil's adoption of an import ban on retreaded tyres, a loophole in the ban would undermine Brazil's asserted objective. The MERCOSUR exemption is just such a loophole, and the Panel's finding that the MERCOSUR exemption was consistent with Article XX is therefore, arbitrary.

8. Finally, Korea argues that there was no legal basis for the Panel to find that the MERCOSUR exemption was consistent with Article XX. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues further that the Panel erred in finding that the MERCOSUR exemption was consistent with Article XX based on the novel standard of significantly undermining the objective that the Panel had construed. Korea argues that the Panel erred in finding that the MERCOSUR exemption was consistent with Article XX based on the novel standard of significantly undermining the objective that the Panel had construed. Korea argues that the Panel erred in finding that the MERCOSUR exemption was consistent with Article XX based on the novel standard of significantly undermining the objective that the Panel had construed.

9. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the MERCOSUR exemption was "inconsistent" with Article XX, and that Brazil's adoption of an import ban on retreaded tyres, a loophole in the ban would undermine Brazil's asserted objective. The MERCOSUR exemption is just such a loophole, and the Panel's finding that the MERCOSUR exemption was consistent with Article XX is therefore, arbitrary.
The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also argues that the 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.

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.

115. Secondly, the United States maintains that the Panel erred in relying on the number of retreaded tyres imported into Brazil from non-MERCOSUR countries, and that this constituted a disguised restriction on international trade.

116. Finally, should the Appellate Body reach the European Communities' conditional appeal and decide to rule on the European Communities' conditional appeal, 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 contain the Import Ban, and that the Panel's reference to Article XXIV reflects a finding that the MERCOSUR exemption is inconsistent with Article XXIV of the GATT 1994. According to the United States, the Panel's reference to Article XXIV was incorrect.
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.

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 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

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.

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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

148 Panel Report, para. 2.1.
149 Ibid., para. 2.2.
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 Panel Report, para. 2.1.
152 "Ibid., para. 2.1.
153 Panel Report, para. 7.109. See also ibid., paras. 7.53-7.83.
154 Panel Report, para. 7.112.
well as remedial measures aimed at managing and disposing of tyres that can no longer be used or recycled, such as landfilling, stockpiling, and conversion into energy, as well as recycling.

122. Article 40 of the Brazilian Ministry of Development, Industry, and Foreign Trade (SECEX), dated 17 November 2004 (SECEX No. 14/2004), reads as follows:

**Article 40 – An import license will not be granted for retreaded tyres or 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 4012.14.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.**

**B. The Measure at Issue**

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of SECEX No. 14/2004, but not the import ban or the used tyres. In its request for the establishment of the panel, the European Communities identified the Import Ban and the MERCOSUR exemption as the measures at issue.

124. Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claim made against Article XIX.1 of the GATT 1994, stating that it then turned to Brazil's related defence under Article XX(b) of the GATT 1994, and could not be justified under the inter-enumerative $31$ of the GATT 1994. Thus, the Panel rejected the challenge by Brazil to the ban on the import of retreaded tyres, which it has been found to be inconsistent with Article XI:1 of the GATT 1994.

125. 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. The Panel also found that the MERCOSUR exemption, which is an action that derogates from the obligation to take measures necessary to ensure that the import ban for remoulded tyres originating in other Mercosur countries is incompatible with the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1. Therefore, the Panel concluded that the MERCOSUR exemption was not consistent with Article XI:1 of the GATT 1994, and could not be justified under Article XXIV:5 of the GATT 1994 or the General Agreement on Trade in Services (GATS). The Panel, therefore, rejected the challenge to the MERCOSUR exemption.

126. The European Communities confirmed, in response to questioning at the oral hearing, that it has not challenged the ban on the import of retreaded tyres or 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 4012.14.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.
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. 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. 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.

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. 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.

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. 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" 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. Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out

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 amended174, 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 2002176, created a collection and disposal scheme that makes it mandatory for domestic manufacturers

172See para. 154 and footnote 253 thereto of this Report.
173Panel Report, para. 7.137.
174Ibid., para. 2.11.
175Ibid., para. 2.12.
176Ibid., paras. 7.66, 7.174, 7.175, and 7.178.
177Ibid., paras. 7.241 and 7.92-7.305.
178Ibid., para. 7.304.
180European Communities' appellant's submission, para. 166.
181Ibid., para. 209.
a proper, if any, weighing and balancing of the relevant factors.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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”,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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”,\textsuperscript{197} because it “compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres.”\textsuperscript{198} The Panel then assessed whether domestic

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”\textsuperscript{199}, that Brazil “has the production capacity to retread domestic used tyres”\textsuperscript{200}, and that new tyres sold in Brazil have the potential to be retreaded.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{205} The Panel concluded that:

\[\text{... the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.}\]

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.\textsuperscript{206} The European Communities argues that the Panel applied an “erroneous legal standard”\textsuperscript{207} 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”.\textsuperscript{208} 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.\textsuperscript{209} Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban.\textsuperscript{210} For the European Communities, “[t]he very indirect nature of the

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\textsuperscript{187}Ibid., para. 285.

\textsuperscript{188}Panel Report, para. 7.115.

\textsuperscript{189}Ibid., para. 7.108. (footnote omitted)

\textsuperscript{190}Ibid., para. 7.115.

\textsuperscript{191}Panel Report, para. 7.122.

\textsuperscript{192}Ibid., paras. 7.126-7.130.

\textsuperscript{193}Ibid., para. 7.130.

\textsuperscript{194}Ibid.

\textsuperscript{195}Ibid., para. 7.132.

\textsuperscript{196}Ibid., para. 7.133.

\textsuperscript{197}Ibid., para. 7.134. (footnote omitted)

\textsuperscript{198}Ibid.
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.\footnote{European Communities’ appellant’s submission, para. 177.}  

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"\footnote{Brazil’s appellee’s submission, para. 81 (quoting Appellate Body Report, EC – Asbestos, para. 167). (emphasis added by Brazil)} 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.\footnote{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.} First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX.\footnote{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)} 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\footnote{Appellate Body Report, US – Gasoline, para. 164.}, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.\footnote{Appellate Body Report, US – Gasoline, para. 306. (footnote omitted)}  

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'\footnote{Appellate Body Report, US – Gasoline, para. 161.}. The Appellate Body added: Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XXId. 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".\footnote{Appellate Body Report, Korea – Various Measures on Beef, para. 161.} (footnote omitted)  

... 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.\footnote{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 'necessary' than a measure with intense or broader restrictive effects." (Appellate Body Report, Korea – Various Measures on Beef, para. 163)}  

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\footnote{Panel Report, para. 7.102.} 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."\footnote{Panel Report, para. 7.108 (referring to Brazil’s first written submission, para. 101).}  

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\footnote{Appellate Body Report, Korea – Various Measures on Beef, para. 161.} 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.\footnote{Appellate Body Report, Korea – Various Measures on Beef, para. 161.} 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.\footnote{Appellate Body Report, Korea – Various Measures on Beef, para. 161.} 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.'\footnote{Appellate Body Report, Korea – Various Measures on Beef, para. 161.}}\footnote{Ibid., para. 7.114.}
domestic producers to good-quality used tyres 

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. In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified. To the contrary, in EC – Asbestos, the Appellate Body emphasized that there is “no requirement under Article XX(b) of the GATT 1994 that such a contribution be quantified.” To the contrary, in Korean – Various Measures on Beef, the Panel found that “the measure produces restrictive effects on international trade as severe as those resulting from an import ban, and it is difficult to determine whether the contribution of the measure to the achievement of its objective is sufficient.” 

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 achievement of its objective. In other words, the Panel’s choice of a qualitative analysis of the contribution of the Import Ban to the achievement of its objective is consistent with the latitude that it enjoys in choosing a methodology for the analysis of the contribution, which can be done either in quantitative or qualitative terms.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective by evaluating the extent to which the introduction of the Import Ban results in a reduction of waste tyres and to determine the number of waste tyres that would be replaced as a result of the Import Ban. In our view, the Panel’s choice of a qualitative analysis for the analysis of the contribution of the Import Ban is within the bounds of the latitude that it enjoys in choosing a methodology for the analysis of the contribution, which can be done either in quantitative or qualitative terms.

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 waste tyres. The Panel also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the risks to human, animal, and plant life and health.

150. As the Panel recognized, an import ban is “by design as trade-restrictive as can be.” We agree with the Panel that there may be situations where such measures can be said to be necessary. However, we do not accept the European Communities’ contention that the Import Ban is “necessary” within the meaning of Article XX(b) of the GATT 1994. We also recall that, in Korea – Various Measures on Beef, the Panel found that “the measure produces restrictive effects on international trade as severe as those resulting from an import ban, and it is difficult to determine whether the contribution of the measure to the achievement of its objective is sufficient.” We disagree with Brazil’s suggestion that a qualitative analysis is sufficient to conclude that the Import Ban is “necessary.”

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 a qualitative analysis may be necessary in cases where the contribution of a measure to the achievement of its objective cannot be measured quantitatively. However, we do not accept the European Communities’ contention that the Panel’s choice of a qualitative analysis was within the bounds of the latitude that it enjoys in choosing a methodology for the analysis of the contribution.

152. In determining whether the Import Ban is “necessary,” we agree with the Panel’s conclusion that the maximum extent of protection required by Article XX(b) is not necessarily material or significant. However, we do not accept the European Communities’ contention that an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.

153. As the Panel recognized, an import ban “... cannot be considered necessary unless 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 the actual reduction in the number of waste tyres.” (Panel Report, para. 7.146)
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, or with new tyres that are retreadable. As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres" 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." As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres and that "at least some domestic used tyres are being retreaded in Brazil." The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres, and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded. 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 automotive vehicles and bicycles covered by this Regulation are as follows:

I – as of 1 January 2002: for every two new tyres produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

II – as of 1 January 2003: for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres.

III – as of 1 January 2004: 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 one unusable tyre; b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres; c) for every two new tyres produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres.

252 Panel Report, para. 7.130.

253 Panel Report, paras. 7.126-7.130.

254 Ibid., paras. 7.131-7.142.

255 Ibid., para. 7.130.

256 Panel Report, para. 7.130.

257 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.

258 Ibid., para. 7.136.

259 Ibid., para. 7.137.

260 Ibid.

261 Ibid., para. 7.133.
As 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

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. 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." 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." 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." 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." 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.

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. 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 were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

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 so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable." 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."

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. 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.

Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

The European Communities referred mainly to two collection and disposal schemes. 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." 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 programme, "would not seem able to achieve the same level of protection as the import ban." The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks. 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.

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257 Ibid., para. 309. (original emphasis)
258 Ibid., para. 308.
259 Ibid., para. 311.
261 Ibid., para. 311.
262 Panel Report, para. 7.159.
263 Ibid., para. 7.169.
264 Ibid.
265 Ibid.
266 Panel Report, 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 in the light of the objective pursued. The Panel also noted that even if they were completely harmless, material recycling applications are entirely safe. In addition, the Panel 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 landfill"). 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 landfill.

164. Regarding stockpiling, the Panel found that even the so-called controlled stockpiling that is restricted to "controlled" tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfill"). The Panel also noted that the evidence of this method did not disprove off-waste risks to human health and the environment. The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.

165. With regard to the incineration of waste tyres, the Panel found that sufficient evidence demonstrated that even the so-called controlled stockpiling that is restricted to "controlled" tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfill"). The Panel also noted that the evidence of this method did not disprove off-waste risks to human health and the environment. The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.

166. Finally, the Panel examined material recycling applications. Regarding civil engineering applications, the Panel found that demand for these applications is still limited and that the evidence does not demonstrate that recycling can be considered an alternative to the Import Ban. Consequently, the Panel concluded that recycling does not constitute a reasonably available alternative in the light of the objective pursued.

167. 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. Therefore, efforts to reduce the accumulation of waste tyres, a category into which the Import Ban falls, 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.
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".  

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.  

295 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"  

308, according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres"  

309, or one "equal to a waste non-generation measure".  

310 For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure"  

311, 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  

312, 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"  

313 to the maximum extent possible.  

314 In this respect, we believe, like the Panel, that non-generation measures are more apt to 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  

315, or the risk of toxic emissions that might arise from the incineration of waste tyres.  

316 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.  

317 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.  

318 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.  

320 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".  

321 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."  

322 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."  

323 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".  

324 In sum, the European Communities argues that


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 Parana Rodado Limpo have already been implemented in Brazil". (Ibid, para. 7.176)  

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.  


304 Ibid., para. 7.102.  

305 Ibid., para. 7.108. (footnote omitted) See also ibid., para. 7.152:  

306 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)
the Panel conducted a "superficial analysis" 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."

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 tires is "substantial." Brazil adds that, because imports of retreaded tires by definition increase the amount of waste tires in Brazil, the contribution of the Import Ban to the reduction of risks arising from waste tires to the maximum extent possible is "both direct and certain".

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. It is through this process that a panel determines whether a measure is necessary.

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 tires. 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 tires and that the objective of protecting human life and health against such diseases is both vital and important in the highest degree. 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. 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.

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 comprehensive policy. 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 tires in Brazil would be safely eliminated, as is intended by the current import ban." 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. 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. 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, 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.

317Brazil's appellee's submission, para. 177.
323European Communities' appellant's submission, para. 285.
324For example, measures to encourage domestic retreading and improve the retreadability of domestic used tires, a better implementation of the import ban on used tires, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.
325Ibid., para. 7.214. (emphasis added)
326Panel Report, para. 7.213.
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. 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” and the Appellate Body “will not interfere lightly with the panel’s exercise of its discretion”. 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, and that the Panel ignored "substantial evidence" produced by the European Communities demonstrating the existence of "low-quality non-retreadable tyres" 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".

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". 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 tyres sold in Brazil had no factual basis. 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. 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" 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". The Panel simply attached more weight to other pieces of evidence that were before it, as Article 11 of the DSU entitles it to do.

191. The European Communities asserts further that the Panel relied on "arbitrarily chosen pieces of evidence" and failed to consider contradictory evidence in basing its finding that "at least some domestic used tyres are being retreaded in Brazil" exclusively on a statement contained in a report by the Associação Brasileira do Setor de Reforma de Pneus (the "ABR") (Brazilian Association of the Retreading Industry) (the "ABR Report"). According to the European Communities, the Panel neglected to consider evidence contained in a second report by the ABR that contradicted this statement. We do not find merit in this argument. The Panel relied on various studies and reports other than the ABR Report. Moreover, the Panel took into account the evidence in the second report by the ABR as the express reference it made to that report confirms.

338European Communities’ appellant’s submission, para. 184.
339Panel Report, para. 7.137.
340Ibid.
341Ibid., 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).
342Appellate Body Report, para. 7.136.
343Panel Report, para. 7.136.
345European Communities’ appellant’s submission, para. 185.
349Panel Report, para. 7.136; European Communities’ appellant’s submission, paras. 183 and 184.
350European Communities’ appellant’s submission, paras. 183. (footnote omitted)
351Brazil’s appellee’s submission, para. 116.
352Footnote 1232 to para. 161.
353Panel Report, para. 7.137; European Communities’ appellant’s submission, paras. 183 and 184.
354Panel Report, para. 7.137; European Communities’ appellant’s submission, paras. 183 and 184.
355Panel Report, para. 7.137.
356Panel Report, para. 7.137.
357Panel Report, para. 7.137.
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)\textsuperscript{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.\textsuperscript{353}

193. It is well settled that a panel may consider a piece of evidence that post-dates its establishment.\textsuperscript{364} 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 as the trier of facts.

194. The European Communities further maintains that the Panel ignored evidence contained in a study by the consultancy LAFIS\textsuperscript{355} indicating that the rate of retreading of passenger car tyres in Brazil is below 9.99 per cent.\textsuperscript{356} 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.\textsuperscript{357} 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"\textsuperscript{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".\textsuperscript{361} However, the Panel's finding that "mandatory inspections are taking place"\textsuperscript{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 conducted its review\textsuperscript{363}, and is not vitiating 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.\textsuperscript{364} The European Communities claims that the Panel engaged in a "wilful exclusion"\textsuperscript{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.\textsuperscript{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.\textsuperscript{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"\textsuperscript{368} and that "domestic used tyres are suitable for retreading".\textsuperscript{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".\textsuperscript{370} The European Communities also charges the Panel with

\textsuperscript{351}See Panel Report, footnote 1238 to para. 7.135 (referring to Exhibit BRA-157, supra, footnote 43).
\textsuperscript{352}Exhibit BRA-163 submitted by Brazil to the Panel.
\textsuperscript{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)).
\textsuperscript{354}This was confirmed by the Appellate Body in its Report, EC – Selected Customs Matters, at para. 188.
\textsuperscript{355}European Communities' appellant's submission, para. 189 and footnote 56 thereto.
\textsuperscript{356}Panel Report, European Communities' appellant's submission, para. 1240 to para. 7.135.
\textsuperscript{357}European Communities' appellant's submission, para. 190 (referring to LAFIS report, supra, footnote 45, p. 11).
\textsuperscript{358}Ibid., para. 190.
\textsuperscript{359}Panel Report, para. 7.135 and footnote 1237 thereto.
\textsuperscript{360}European Communities' appellant's submission, para. 195.
\textsuperscript{361}Panel Report, para. 7.138.
\textsuperscript{362}Ibid.
\textsuperscript{363}Panel Report, para. 7.138 (referring to Exhibit BRA-157, supra, footnote 43).
\textsuperscript{364}Exhibit BRA-163 submitted by Brazil to the Panel.
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\textsuperscript{368}Panel Report, European Communities' appellant's submission, para. 1240 to para. 7.135.
\textsuperscript{369}European Communities' appellant's submission, para. 190 (referring to LAFIS report, supra, footnote 45, p. 11).
\textsuperscript{370}Ibid., para. 190.
\textsuperscript{371}Panel Report, para. 7.135 and footnote 1237 thereto.
\textsuperscript{372}European Communities' appellant's submission, para. 195.
\textsuperscript{373}Panel Report, para. 7.138.
\textsuperscript{374}Ibid.
Agency study that concludes, in relation to controlled stockpiling, that "all tire and rubber storage facilities should be considered high-risk storage facilities."383

With respect to material recycling applications such as civil engineering, rubber asphalt, rubber products, and devulcanization, the Panel found that it is "not clear whether some of these engineering applications are sufficiently safe. [...] It is on the basis of these findings that the Panel concluded that "it is not clear whether some of these engineering applications are sufficiently safe."388 It also expressed the view that "the evidence is relevant for its reasoning on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures."389 Furthermore, the Panel also referred to a report which concluded that "emissions of toxic organics [...] cannot be recovered from the stackpiling with proper control can be used only for temporary storage before an end-of-life tire is forwarded to a recovery operation."390 It is on the basis of these findings that the Panel concluded that "it is not clear whether some of these engineering applications are sufficiently safe."388 It also expressed the view that "the evidence is relevant for its reasoning on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures."389 Furthermore, the Panel also referred to a report which 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Indeed, the Panel determined that evidence adduced in relation to civil engineering\(^{393}\), rubber asphalt\(^{394}\), rubber products\(^{395}\), and de-wulcanization\(^{396}\) suggested that each of these applications involves 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". The European Communities argues that the Panel erred in rejecting material recycling applications on the basis of their costs\(^{397}\), 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.

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.\(^{398}\) 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."\(^{399}\) 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.\(^{400}\) 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.

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.

The European Communities argued that the Panel erred in rejecting material recycling applications on the basis of their costs, 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.

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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.

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\(^{393}\)Ibid., para. 7.201 and footnote 1358 thereto (referring to 2006 report by the European Tyre and Rubber Manufacturers' Association (Exhibit EC-44 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.
214. The chapeau of Article XX of the GATT 1994 reads: "within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."

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. The Panel acknowledged that "certain arguments used in MERCOSUR proceedings, as well as clausings originally used in MERCOSUR, may be relevant in this proceeding."

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. The Panel concluded that, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant." 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.

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 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." (See infra, footnote 443)

221. 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," the Panel found that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.

222. The European Communities argues 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 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." (See infra, footnote 443)
the exceptions specified in the paragraphs of Article XX. The Appellate Body stated that "the chapeau of Article XX is, in fact, but one expression of the principle of good faith." The Court asserted that a measure involving arbitrary or unjustifiable discrimination can undermine the objective of the measure. It follows, according to the European Communities, that the Panel erred in finding that the Import Ban was applied in a manner that would not undermine the objective of the Import Ban. 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.

221. The first explanation provided by the United States for such discrimination was the impracticability of imposing the statutory baseline requirement on domestic refiners as well. 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. 29, DSR 1996:1, at 27)

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 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.

223. 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 of the process of determining whether the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The Appellate Body noted that the chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not undermine the objective of the measure. The Appellate Body found that the measure at issue was applied reasonably, in a manner that did not undermine the objective of the measure. The Appellate Body concluded that the measure at issue was not applied in a manner that would constitute "unjustifiable discrimination".

224. We began our analysis by reciting that the function of the chapeau is the prevention of abuse of the exceptions. The chapeau sets a general standard for the application of the exceptions. It applies to all exceptions and requires that they be applied reasonably. The Appellate Body stated that "the chapeau is not a catch-all for every exception. It is a general standard for the application of the exceptions, and it applies to all exceptions. The Appellate Body concluded that the measure at issue was not applied in a manner that would constitute "unjustifiable discrimination".

225. As it found them unsatisfactory, the Appellate Body concluded that the application of the baseline establishment rules resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part of the process of determining whether the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The Appellate Body noted that the chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not undermine the objective of the measure. The Appellate Body found that the measure at issue was applied reasonably, in a manner that did not undermine the objective of the measure. The Appellate Body concluded that the measure at issue was not applied in a manner that would constitute "unjustifiable discrimination".

226. Accordingly, 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 of the process of determining whether the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The Appellate Body noted that the chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not undermine the objective of the measure. The Appellate Body found that the measure at issue was applied reasonably, in a manner that did not undermine the objective of the measure. The Appellate Body concluded that the measure at issue was not applied in a manner that would constitute "unjustifiable discrimination".
US – Shrimp (Article 21.5 – Malaysia)

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 the EU's imposition of anti-dumping duties on imported shrimp. This ruling, however, did not take place in such a way as to be consistent with the objective of protecting and conserving sea turtles. Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged 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.

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 those exceptions from being used in such a way as to defy the objectives of the WTO.

The Panel considered that the MERCOSUR exemption resulted in discrimination between countries where the same conditions prevail, but that this discrimination would be unjustifiable if it were applied in a manner that constitutes arbitrary or unjustifiable discrimination.

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 corresponding domestic products", and that the "trade effects" of a measure at issue may not be relevant in determining whether the measure discriminates amongst different countries. The Appellate Body added that "it is irrelevant that the trade effects, as reflected in the volumes of imports, are insignificant or even non-existent." 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..."
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" 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 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, 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.442 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,443 show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.444

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".445

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 disguised means to conceal the pursuit of trade-restrictive objectives".446 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"447, and "in principle deprives Brazilian retreaders of the opportunity to source casings from abroad."448

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."449 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".450 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.451 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."452

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

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440 Panel Report, para. 7.281.
441 Ibid., para. 7.272.
442 See supra, paras. 227 and 228.
443 Panel Report, paras. 7.275 and 7.276.
444 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;

445 See Panel Report, para. 7.275.

446 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.

449 Ibid., para. 7.343.
450 Ibid.
451 Ibid., para. 7.350.
452 Ibid., para. 7.352 (footnote omitted)
453 Ibid., para. 7.353.
454 Ibid., para. 7.354 (footnote omitted) See also supra, footnote 417.
exemption\textsuperscript{454} and the imports of used tyres through court injunctions\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{459} Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

\textsuperscript{454}Panel Report, paras. 7.350-7.355.  
\textsuperscript{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.  
\textsuperscript{456}European Communities' appellant's submission, para. 366.  
\textsuperscript{457}Ibid., paras. 367 and 368.  
\textsuperscript{458}Supra, Section VIA.1.  
\textsuperscript{459}Panel Report, para. 7.243.  
\textsuperscript{450}Panel Report, paras. 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)  
\textsuperscript{451}Ibid., para. 7.294.  
\textsuperscript{452}Ibid., para. 7.295.  
\textsuperscript{453}Ibid. (original emphasis)  
\textsuperscript{454}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)  
\textsuperscript{455}Ibid., para. 7.306.  
\textsuperscript{456}European Communities' appellant's submission, para. 357.  
\textsuperscript{457}Ibid.  
\textsuperscript{458}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—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"—is flawed. 472 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 arbitrary or unjustifiable discrimination

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 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
the Panel's finding, in paragraph 7.215 of the Panel Report, that the Panel did not breach its duty under Article 11 of the DSU to

254. After noting that the MERCOSUR exemption and the Import Ban have the same legal basis, namely, Article 40 of Portaria SECEX 14/2004, 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." 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 XXVII 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.

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 XXVII 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 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 XXVII 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," 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 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

480See Panel Report, para. 7.453.
482Ibid., para. 7.455.

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; 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 Import Ban has resulted in volumes of imports of used tyres under court injunctions 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

484Appellate 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

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.

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 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;

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- 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 of only 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.
World Trade Organization

United States — Measures Affecting the Production and Sale of Clove Cigarettes

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**WORLD TRADE ORGANIZATION APPELLATE BODY**

United States – Measures Affecting the Production and Sale of Clove Cigarettes

**United States, Appellant**

Indonesia, Appellee

Brazil, Third Participant

Colombia, Third Participant

Dominican Republic, Third Participant

European Union, Third Participant

Guatemala, Third Participant

Mexico, Third Participant

Norway, Third Participant

Turkey, Third Participant

**I. Introduction**

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes¹ (the "Panel Report"). The Panel was established on 20 July 2010 to consider a complaint by Indonesia with respect to a measure adopted by the United States that prohibits cigarettes with characterizing flavours, other than tobacco or menthol.

2. Before the Panel, Indonesia claimed that the United States acted inconsistently with its substantive and procedural obligations under the Agreement on Technical Barriers to Trade (the "TBT Agreement") and the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"). In particular, Indonesia claimed that Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act² (the "FFDCA")—as amended by the Family Smoking Prevention and Tobacco Control Act³ (the "FSPTCA")—was inconsistent with Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the TBT Agreement. Alternatively, Indonesia claimed that Section 907(a)(1)(A) was inconsistent with Article III:4 of the GATT 1994⁴, and could not be justified under Article XX(b) thereof.⁵

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¹WT/DS406/R, 2 September 2011.
²Codified at United States Code, Title 21, Chapter 9, section 387g(a)(1)(A).
⁴Panel Report, para. 3.1.
⁵Panel Report, para. 7.299 (referring to Indonesia's first written submission to the Panel, paras. 114-127).
3. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 2 September 2011. The Panel found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the TBT Agreement because it accorded to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin. Having found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the TBT Agreement, the Panel declined to rule on Indonesia's alternative claim under Article III:4 of the GATT 1994 and on the United States' related defence under Article XX(b) of the GATT 1994.

4. The Panel further found that the United States acted inconsistently with Article 2.9.2 of the TBT Agreement by failing to notify to WTO Members, through the Secretariat, the products to be covered by the proposed Section 907(a)(1)(A), together with a brief indication of its objective and rationale, at an appropriate early stage when amendments and comments were still possible. The Panel also found that the United States acted inconsistently with Article 2.12 of the TBT Agreement by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A).

5. Conversely, the Panel rejected Indonesia's claims under Articles 2.2, 2.5, 2.8, 2.9.3, 2.10, and 12.3 of the TBT Agreement. More specifically, the Panel found that Indonesia failed to demonstrate that Section 907(a)(1)(A) was inconsistent with Article 2.2 of the TBT Agreement to the extent that its ban on clove cigarettes was more trade restrictive than necessary to fulfill the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create. The Panel also concluded that Indonesia failed to demonstrate that the United States had acted inconsistently with Article 2.5 of the TBT Agreement, because Indonesia did not request the United States to explain the justification for Section 907(a)(1)(A) "in terms of Articles 2.2 and 2.4 of the TBT Agreement". Similarly, the Panel found that Indonesia failed to demonstrate that it would be "appropriate" to formulate the technical regulation in Section 907(a)(1)(A) in terms of "performance" rather than design or descriptive characteristics, within the meaning of Article 2.8 of the TBT Agreement.

6. The Panel further found that Indonesia failed to demonstrate that the United States had acted inconsistently with Article 2.9.3 of the TBT Agreement, because Indonesia did not request the United States to provide particulars or copies of Section 907(a)(1)(A) while it was still in draft form. The Panel also found that, in the absence of any evidence or arguments that "urgent problems of safety, health, environmental protection or national security" arose or threatened to arise upon adoption of Section 907(a)(1)(A), Article 2.10 of the TBT Agreement would not be applicable to the present dispute. Finally, the Panel found that Indonesia failed to demonstrate that the United States had acted inconsistently with Article 12.3 of the TBT Agreement by failing to take account of the special development, financial, and trade needs of Indonesia in the preparation and application of Section 907(a)(1)(A).

7. Accordingly, the Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring Section 907(a)(1)(A) into conformity with its obligations under Articles 2.1, 2.9.2, and 2.12 of the TBT Agreement.

8. On 5 January 2012, 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 Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), and filed a Notice of Appeal and an appellant's submission pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review (the "Working Procedures"). On 23 January 2012, Indonesia filed an appellee's submission. On 26 January 2012, Brazil, Colombia, the European Union, Mexico, Norway, and Turkey each filed a third participant's submission. On the same date, the Dominican Republic and Guatemala notified their intention to appear at the oral hearing as third participants.

9. On appeal, the United States claims that the Panel erred in finding that the United States acted inconsistently with Article 2.1 of the TBT Agreement. In particular, the United States claims that the Panel erred in finding that imported clove cigarettes and domestic menthol cigarettes were like products within the meaning of Article 2.1. The United States also challenges the Panel's finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic like products. The United States claims further that the Panel acted inconsistently with Article 11 of the DSU in reaching these findings. The United States also claims that the Panel erred in finding that the United States acted inconsistently with Article 2.12 of the TBT Agreement by not...
II. Arguments of the Participants and the Third Participants

A. Claims of Error by the United States – Appellant

1. Article 2.1 of the TBT Agreement – “Like Products”

13. The United States claims on appeal that the Panel erred in its interpretation and specific application of the term “like products,” under Article 2.1 of the TBT Agreement, and requests the Appellate Body to reverse the Panel’s findings in this respect. In particular, while agreeing with the overall approach adopted by the Panel in its like product analysis—specifically, that it determined likeness based on the traditional “likeness” criteria, and in the light of the legal provision at issue and the public health nature of the measure being challenged—13 the United States contends that the Panel conducted an incomplete and flawed analysis with respect to two of the traditional “likeness” criteria: namely, end-uses and consumer tastes and habits.23

14. The United States claims that the Panel erred by failing to perform a complete analysis of the different end-uses of clove and menthol cigarettes and by concluding that the end-use for both products is “to be smoked.” In the United States’ view, the Panel improperly dismissed the possible different end-uses presented by the United States—that is, satisfying an addiction to nicotine, and creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. 24

15. The United States submits that a panel, when conducting an end-use analysis, must consider the different end-uses of the products in question and not just the fact that they are a "common denominator."25 According to the United States, it is only by forming a complete picture of the various end-uses for the products that a panel can assess the significance of the fact that products share a limited number of end-uses.26 According to the United States, it is only by forming a complete picture of the various end-uses for the products that a panel can assess the significance of the fact that products share a limited number of end-uses.27 The United States relies on statements of the Appellate Body in EC – Asbestos28 that “a panel must also examine the other, different end-uses for the product and it [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.”29

12 United States’ appellant’s submission, para. 37 and 41.
23 United States’ appellant’s submission, para. 42.
24 United States’ appellant’s submission, para. 43 (quoting Panel Report, para. 7.199).
25 United States’ appellant’s submission, para. 44.
26 United States’ appellant’s submission, para. 45 (quoting Appellate Body Report, EC – Asbestos, para. 119 (original emphasis)).
"satisfy the nicotine addictions of millions of smokers in the United States", whereas clove cigarettes are primarily used "for experimentation and special social settings" and generally are not smoked to satisfy nicotine addiction in the US market.28

16. The United States further takes issue with the Panel's rejection of the different end-uses of clove and menthol cigarettes based on the argument that these end-uses are related to the reasons why a person might smoke a cigarette, and maintains that the Panel erred in finding that end-uses and consumer tastes and habits are "mutually exclusive concepts".29 Referring to the Appellate Body report in EC – Asbestos, the United States notes that, although consumer tastes and habits constitute a "likeness" criterion separate from end-uses, consumer preferences are nonetheless relevant to how products are capable of being used.30 However, the United States contends that the Panel incorrectly considered end-uses "absent the relevant, real-world context"31 of how the products at issue are used in the relevant market. Clove and menthol cigarettes have different and "multi-faceted" end-uses—that is, "habitual use and satisfying addiction versus occasional, experimental use"32—which cannot, in the United States' view, be reduced to the simple, undisputed fact that both types of cigarettes are used for smoking. This is particularly true, the United States adduces, where the public health context relates to the different ways in which cigarettes are used in the relevant market. According to the United States, the Panel erred by failing to consider the "complete picture" and by disregarding evidence relating to such differences in use.33

(b) Consumer Tastes and Habits

17. The United States claims that the Panel failed to perform a complete analysis of consumer tastes and habits related to clove and menthol cigarettes. In the United States' view, the Panel first made a legal error by excluding the tastes and habits of current adult consumers from its analysis. The United States further contends that the Panel acted inconsistently with Article 11 of the DSU by refusing to examine evidence on how consumers in the relevant market use clove and menthol cigarettes.34

18. First, the United States maintains that the Panel erred in determining that it need not examine the tastes and habits of current adult consumers as part of its analysis. In the United States' view, by disregarding how current consumers perceive and use the products at issue, the Panel erroneously limited the scope of consumer tastes and habits to one aspect of the public health basis for Section 907(a)(1)(A) of the FDCA—use by young people—and failed to capture the other aspect—use by adult smokers—thereby nullifying consumer tastes and habits as a meaningful criterion.35 Consistent with the principle stated by the Appellate Body in EC – Asbestos, the Panel was required to examine evidence related to each of the criteria set forth in the GATT Working Party report in Border Tax Adjustments, and to weigh "all of the relevant evidence".36 Accordingly, the United States claims that the Panel committed a fundamental error in excluding, a priori, an essential element from the analysis of consumer tastes and habits.37

19. Moreover, the United States posits that, given the particular nature of this dispute, the tastes and habits of current adult consumers are highly relevant. First, Section 907(a)(1)(A) draws regulatory distinctions among cigarettes based not only on their appeal to potential smokers, but based on their uses by current adult smokers as well. Banning cigarettes that are used by adults on a regular basis entails a risk of "straining the healthcare system or exacerbating the illicit market".38 Second, clove and other banned flavoured cigarettes are used in very small numbers and almost exclusively by young people, thus being "trainer" or "starter" cigarettes, whereas menthol cigarettes are consumed by 20 to 26 per cent of adult smokers in the United States.39 Consequently, the United States argues, the products at issue pose different public health challenges: clove cigarettes present a unique risk to young, uninitiated smokers, while menthol cigarettes also have a significant impact on adults.40 Finally, the particular flavour matters, in the sense that adult smokers seldom use clove-flavoured cigarettes and do not perceive them to be like menthol cigarettes.41

20. The United States further claims that the exclusion of current adult consumer tastes and habits cannot be justified by the Panel's finding on the declared legitimate objective of Section 907(a)(1)(A) to prevent new young smokers from becoming addicted to cigarettes.42 Albeit agreeing with the Panel that the characteristics of the products at issue must be examined in the light of the public health basis of the measure at issue43, the United States contends that there is no textual basis in Article 2.1 of the TBT Agreement to limit the consideration of the public health distinctions to the immediate objective

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28United States' appellant's submission, para. 46.
29United States' appellant's submission, para. 48.
30United States' appellant's submission, para. 49.
32United States' appellant's submission, para. 48.
33United States' appellant's submission, para. 49.
34United States' appellant's submission, para. 49 (quoting Appellate Body Report, EC – Asbestos).
35United States' appellant's submission, para. 50.
36United States' appellant's submission, para. 58.
37United States' appellant's submission, para. 56 (quoting Appellate Body Report, EC – Asbestos, paras. 109 (in turn referring to GATT Working Party Report, Border Tax Adjustments) and 113 (original emphasis)).
38United States' appellant's submission, para. 53.
39United States' appellant's submission, para. 54.
40United States' appellant's submission, para. 58 (referred to Panel Report, paras. 2.24, 2.25, and 7.391).
41United States' appellant's submission, para. 55.
42United States' appellant's submission, para. 56.
43United States' appellant's submission, para. 59 (referred to Panel Report, paras. 7.116, 7.119, 7.201, and 7.206).
44United States' appellant's submission, para. 59 (referred to Panel Report, paras. 7.245-7.249).
of the measure. Rather, technical regulations inevitably reflect a balancing of other considerations relevant to public welfare—in this case, the additional health concerns associated with heavily used cigarettes, such as possible increases in unregulated black market cigarettes or strain on the healthcare system. The United States submits that the Panel based its exclusion of current adult consumers on a narrow view of the measure's objective, which was actually targeting a group of tobacco products "that uniquely appeal to youth" without precluding access by adults to those cigarettes that are "most heavily used in the U.S. market". Even assuming that the Panel was correct to limit its assessment of the product distinctions on the basis of the primary legitimate objective of Section 907(a)(1)(A)—that is, the "reduction of youth smoking"—the United States contends that, precisely because of the measure's distinction between adult and youth smoking behaviour, the Panel was required to take into account the comparative patterns of use in the relevant market.

21. Second, the United States claims that the Panel acted inconsistently with Article 11 of the DSU by disregarding critical evidence on how consumers use and perceive the products, and thereby came to a "fatally flawed" conclusion on consumer tastes and habits. In the United States' view, the Panel improperly disregarded critical survey evidence submitted by both parties on the basis that it was not clear and that the information presented therein was "not directly comparable", without duly examining such evidence according to its probative force. According to the United States, the survey data were particularly relevant because the data provided evidence on how consumers and potential consumers "used and perceived different cigarettes in the United States". In addition, the United States agrees that the Panel based its conclusions entirely on speculation and conjecture, without any evidentiary support on the record, and ultimately concluded that, for potential consumers, "any cigarette would likely be fine to start smoking". However, the United States submits, the reports used as evidence by the Panel "do not tell the whole story", because they focus on cigarettes with characterizing flavours, but do not present the whole picture as to how cigarettes actually are used and perceived in the United States, the relevant market in this dispute.

22. The United States claims that the Panel erred in finding that Section 907(a)(1)(A) of the FFDCA accords to imported clove cigarettes less favourable treatment than that accorded to like domestic products, and requests the Appellate Body to reverse this finding. The United States also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU when it found: (i) that there were no domestic cigarettes with characterizing flavours other than menthol at the time of the ban; and (ii) that Section 907(a)(1)(A) imposes no costs on any US entity.

23. First, the United States argues that the Panel erroneously limited the scope of the products to be compared for the purposes of its less favourable treatment analysis to one banned imported product—Indonesian clove cigarettes—and one non-banned like domestic product—menthol cigarettes—thereby reaching the "flawed conclusion" that Indonesian clove cigarettes are treated less favourably than like domestic products. Referring to the Appellate Body report in EC – Asbestos, the United States posits that "the relevant analysis is how the measure treats like imported products, as a group, and like domestic products, as a group". Accordingly, the Panel was required to consider the "treatment of all domestic and imported cigarettes with characterizing flavors". However, in the United States' view, the Panel improperly excluded, with respect to like domestic products, the treatment accorded by the measure to domestic cigarettes with other characterizing flavours and, with respect to like imported products, the treatment accorded to menthol cigarettes from other countries. According to the United States, a proper less favourable treatment analysis that considers all cigarettes that meet the criteria of "like products" demonstrates that Section 907(a)(1)(A) bans only products comprising "a very small market segment in the United States", and "does not alter the conditions of competition" as between like imported products, as a group, and like domestic products, as a group.

24. For the United States, the reference to treatment accorded to the products imported from the territory of "any other Member" in Article 2.1 does not compel the conclusion that only the treatment
accorded to the complaining Member's products are relevant. In the United States' view, the main purpose of a *de facto* less favourable treatment analysis is to assess whether Section 907(a)(1)(A) legitimately draws distinctions among like products or whether it creates "a proxy for singling out the like products of the complaining Member for less favorable treatment". In order to make such an assessment, the analysis should consider the entire range of like products addressed by the measure. The question of less favourable treatment is not answered by the sole fact that clove cigarettes were banned while a single like domestic product (menthol cigarettes) was not. In this case, the United States contends that the ban affected some imported and domestic products, but "did not affect other domestic and imported like products".

25. In addition, to the extent that the Panel took the view that it was limited by its terms of reference to consider only the products mentioned in Indonesia's request for the establishment of a panel, the United States claims that the Panel erred in concluding that Indonesia, as the complaining party, "set the field of products to be compared"—that is, "imported clove cigarettes *versus* domestic menthol cigarettes". While defining which measures and claims a panel may consider, the terms of reference do not define the scope of the relevant products to analyze with respect to a discrimination claim, nor do they limit which defences a responding party may invoke. The United States notes that the question of which products should be compared in the less favourable treatment analysis was a point of argument between the parties in the present dispute, and stresses that the complainant cannot *a priori* limit the scope of the comparison by its selection of products in its panel request.

26. Second, the United States takes issue with the Panel's statement that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol." The United States submits that such a statement reflects a "mis-application of the legal standard" under Article 2.1 of the *TBT Agreement*. The Panel "improperly restrict[ed] the legal analysis" when it limited the comparison to only products that were on the market at the time the ban went into effect, without regard to the years preceding or forthcoming. Article 2.1 of the *TBT Agreement* does not contain any "rigid temporal limitation" to the evidence a panel may consider in conducting a less favourable treatment analysis. Therefore, the Panel should have taken into account the fact that there were domestic cigarettes with characterizing flavours other than menthol in the years preceding the effective date of the ban. Moreover, the Panel incorrectly dismissed the fact that Section 907(a)(1)(A) was enacted specifically "to respond to an emerging trend of products" that US producers "were actively exploring". In that respect, the United States stresses that the focus of Section 907(a)(1)(A) was "primarily U.S. production", and that it is not unusual that producers will stop investing in products "even before the ban goes into effect". This should not be construed, however, as evidence that US production "was not affected".

27. Third, the United States claims that the Panel failed to make an objective assessment of the facts, in violation of Article 11 of the DSU, by ignoring unrebutted evidence showing that cigarettes with characterizing flavours other than menthol were marketed in the United States at the time of the ban. The facts on record do not support the Panel's finding that there were no domestically produced flavoured cigarettes—other than menthol—at the time of the ban. In particular, the United States recalls that the Panel had already found that: (i) there was at least one domestically produced brand of clove cigarettes on the market prior to the ban; (ii) the list of cigarettes authorized for sale in 2008 and 2009 in several US states included at least 20 different brands of domestic flavoured cigarettes other than menthol; and (iii) by 2008, just one year before the ban went into effect, at least four US companies were producing flavoured cigarettes.

28. Fourth, the United States claims that the Panel erred in concluding that any detriment to the competitive conditions for clove cigarettes in the US market could not be explained by factors unrelated to the foreign origin of the products. Even assuming *arguendo* that the Panel had properly identified the like imported and domestic products to be compared, its analysis of whether the less favourable treatment accorded to clove cigarettes was related to the origin of the imported products was in error.

29. For the United States, under Article 2.1 of the *TBT Agreement*, a technical regulation may impose costs or burdens associated with imported products as compared to like domestic products without necessarily according less favourable treatment to the imported product, where these burdens

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60 United States' appellant's submission, para. 84 (referring to Panel Report, para. 7.275).
61 United States' appellant's submission, para. 84.
62 United States' appellant's submission, para. 85. (original underlining)
63 Request for the Establishment of a Panel by Indonesia, WT/DS406/2.
64 United States' appellant's submission, para. 87.
65 United States' appellant's submission, para. 86 (quoting Panel Report, para. 7.147 (original emphasis)).
66 United States' appellant's submission, para. 87.
67 United States' appellant's submission, para. 90 (quoting Panel Report, para. 7.289).
68 United States' appellant's submission, para. 91.
69 United States' appellant's submission, para. 91.
70 United States' appellant's submission, para. 92 (referring to Indonesia's first written submission to the Panel, footnote 29 to para. 22; United States' first written submission to the Panel, para. 51; ACNielsen 2008 Data on Flavored Cigarettes in the United States (Panel Exhibit US-52); Examples of Cigarettes Certified for Sale in the United States as of 2009 (Panel Exhibit US-62); New York List of Fire-Safe Certified Cigarettes as of 20 January 2009 (Panel Exhibit US-63); and Maine List of Fire-Safe Certified Cigarettes as of 29 July 2009 (Panel Exhibit US-64)).
71 United States' appellant's submission, para. 93. (original emphasis)
72 United States' appellant's submission, para. 94.
73 United States' appellant's submission, para. 97 (referring to Panel Report, para. 2.27).
74 United States' appellant's submission, paras. 97 and 98 (quoting Panel Report, paras. 2.27, 2.28, and footnote 524 to para. 7.289, in turn quoting Panel Exhibits US-52 and US-62 (*supra*, footnote 70)).
75 United States' appellant's submission, para. 99.
are explained by a factor or circumstance other than the origin of the products. In this regard, the United States stresses that there are a number of prior WTO reports in which a detrimental effect on an imported product was not related to its origin, but rather to other factors—such as the product's particular market share or import profile, a difference in the real or perceived safety of the products at issue, or the choices of the producers themselves, as private actors. According to the United States, the Panel failed to consider any arguments or evidence bearing upon other relevant factors (unrelated to origin) that could have explained the detriment to the competitive situation of imported clove cigarettes.

30. In the United States' view, in finding that the reason for excluding menthol cigarettes from the ban under Section 907(a)(1)(A) related to "the costs that might be incurred by the United States were it to ban menthol cigarettes", the Panel failed to examine whether the detriment to the competitive situation of clove cigarettes was related to their origin. Besides the fact that "it is unclear" what the Panel meant by "costs", the United States submits that the text of Article 2.1 requires panels to focus on the comparative treatment of products. Therefore, Article 2.1 contains "no basis" for a comparison of costs imposed on foreign producers with those avoided by "any U.S. entity." In any case, the United States posits, the Panel's finding does not show that any detrimental effect to the competitive conditions for clove cigarettes compared to menthol cigarettes was related to the national origin of imported products. In fact, the costs incurred by the United States if it were to ban menthol cigarettes—that is, "the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes"—would remain unaltered regardless of where menthol cigarettes were produced, and even if all menthol cigarettes were imported.

31. In addition, the United States claims that the Panel acted inconsistently with its duties under Article 11 of the DSU by finding, without an appropriate evidentiary basis, that Section 907(a)(1)(A) does not impose "any costs on any U.S. entity." The United States recalls that Article 11 requires a panel to refrain from issuing "affirmative findings that lack a basis in the evidence contained in the panel record." In this dispute, the United States posits, there was no basis for the Panel to conclude that the measure avoids costs to any US entity, as underscored by the fact that the Panel "barely cited the record." According to the United States, the Panel ignored the fact that the United States Food and Drug Administration (the "FDA") was charged with enforcing the measure, thereby incurring "costs" as a US entity. Moreover, the Panel did not take into account that the effect of the measure on US production was "pre-emptive and closed off a potential market that U.S. producers were actively exploring", nor did it consider that, by reducing youth smoking, Section 907(a)(1)(A) reduces demand for all cigarettes and thus "shrinks the U.S. adult cigarette market".

3. Article 2.12 of the TBT Agreement — "Reasonable Interval"

32. The United States claims that the Panel's analysis under Article 2.12 of the TBT Agreement contains three errors that led it to find, incorrectly, that the United States acted inconsistently with Article 2.12. First, the United States argues that the Panel attributed an incorrect "interpretative value" to the Doha Ministerial Decision on Implementation-Related Issues and Concerns (the "Doha Ministerial Decision") in interpreting the meaning of Article 2.12. Second, the United States argues that the Panel incorrectly found that Indonesia had established a prima facie case of inconsistency with Article 2.12. Lastly, the United States argues that, regardless of whether the Panel was correct in finding that Indonesia had established a prima facie case of inconsistency with Article 2.12, the Panel incorrectly determined that the United States did not rebut Indonesia's arguments.

33. The United States first claims that the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision by treating paragraph 5.2 as though it were an authoritative interpretation adopted by the Ministerial Conference pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), despite not having found that it has this legal status. The United States further argues that the legal value of paragraph 5.2 of the Doha Ministerial Decision is, at most, a "means of supplemental interpretation" under Article 32 of the Vienna Convention on the Law of Treaties. Therefore, while paragraph 5.2 of the Doha Ministerial Decision may be used to confirm the meaning of the term "reasonable interval" in Article 2.12 of the TBT Agreement, it may not be applied as a
"rule" that can be relied upon as the exclusive basis for concluding that the term "reasonable interval" means "not less than six months."94

34. According to the United States, the Doha Ministerial Decision "preceded by several months"95 a TBT Committee decision that took note of paragraph 5.2 of the Doha Ministerial Decision and, therefore, the Ministerial Conference could not have acted on a recommendation of the Council for Trade in Goods, as Article IX:2 of the WTO Agreement requires for the adoption of multilateral interpretations of agreements contained in Annex 1 to the WTO Agreement.

35. Second, the United States claims that the Panel incorrectly found that Indonesia had established a prima facie case of inconsistency with Article 2.12 where it did not establish that the interval period was unreasonable in the light of the impact on the ability of exporting Members to adapt to the requirements of Section 907(a)(1)(A) of the FFDCA.96 The United States submits that Indonesia never provided any evidence or legal argument that demonstrates that the three-month period allowed by the United States prejudiced the ability of any foreign producer, including Indonesian producers, to adapt to the requirements of Section 907(a)(1)(A).97

36. The United States argues further that, "[e]ven assuming arguendo that the Panel was correct in deciding that the elements of the prima facie case could be drawn exclusively from paragraph 5.2", the Panel erred in finding that Indonesia had succeeded in establishing a prima facie case under the terms of that paragraph98, because Indonesia would have had to establish "with evidence and argument" that Section 907(a)(1)(A) presents a "normal" situation and does not constitute one of the non-urgent cases where it would be reasonable to have a shorter interval.99 The United States submits that Indonesia would also have had to establish that "allowing an interval period of at least six months would not render the fulfillment of the objective pursued by Section 907(a)(1)(A) ineffective".100

37. According to the United States, the Panel based its finding that Indonesia had established a prima facie case entirely on a "single" statement made by Indonesia that "neither the Act itself nor any other statement by the United States indicates that having [Section 907(a)(1)(A)] enter into force 90 days after signing was necessary to fulfill the objectives of the Act."101 According to the United States, "Indonesia's assertion does not demonstrate what the Panel claimed Indonesia needed to prove—that a six month interval period would be effective in fulfilling the legitimate objective of Section 907(a)(1)(A)".102

38. Third, the United States claims that, even if Indonesia did establish a prima facie case, the Panel improperly found that the United States did not rebut that prima facie case. According to the United States, "no matter what weight"103 is attributed to the Doha Ministerial Decision, Indonesia was required to establish a prima facie case under the terms of Article 2.12 of the TBT Agreement. In the United States' view, the evidence and argument before the Panel on whether the interval period chosen allowed time for Indonesian producers to adapt their products to the requirements of Section 907(a)(1)(A) showed that "the difference between the three and six month interval periods had no impact on Indonesian producers".104 According to the United States, the fact that "Indonesian producers, even 16 months after the enactment of the FSPITA, had not adjusted their product lines to produce tobacco or menthol-flavoured cigarettes"105 is sufficient evidence to rebut the prima facie case that the Panel found Indonesia to have established. Accordingly, the Panel committed legal error in finding that "the United States has not rebutted" Indonesia's prima facie case.106

B. Arguments of Indonesia – Appellee

1. Article 2.1 of the TBT Agreement – "Like Products"

39. Indonesia requests the Appellate Body to reject the United States' appeal against the Panel's finding that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the TBT Agreement. In Indonesia's view, the United States' objection is not about the legal findings of the Panel, but about the appropriate weight to give to certain evidence and findings of fact. According to Indonesia, in many of its claims, the United States is simply attempting to disguise its disagreement with the Panel's findings of fact as legal error.107 Indonesia also recalls that the United States did not appeal the Panel's conclusion that clove and menthol cigarettes share similar physical characteristics.108

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94United States' appellant's submission, para. 126 (quoting Panel Report, para. 7.559). (footnote omitted)
95United States' appellant's submission, para. 125.
96United States' appellant's submission, para. 131.
97United States' appellant's submission, para. 133.
98United States' appellant's submission, para. 135.
99United States' appellant's submission, paras. 135 and 138.
100United States' appellant's submission, para. 147 (quoting Panel Report, para. 7.587, in turn quoting Indonesia's first written submission to the Panel, para. 145).
101United States' appellant's submission, para. 149. (footnote omitted)
102United States' appellant's submission, para. 132.
103United States' appellant's submission, para. 152. (original emphasis)
104United States' appellant's submission, para. 153 (quoting Panel Report, para. 7.583).
105United States' appellant's submission, para. 153 (quoting Panel Report, para. 7.594).
106Indonesia's appellee's submission, para. 65.
107Indonesia's appellee's submission, para. 66.
(b) Consumer Tastes and Habits

40. Indonesia first submits that the Panel examined end-uses pursuant to prior guidance from the Appellate Body. In particular, in accordance with the Appellate Body's guidance in EC – Asbestos, the Panel noted that the definition of "end-uses" is "the extent to which two products are capable of delivering nicotine", and that the end-uses of clove and menthol cigarettes were not both capable of delivering nicotine. Indonesia argues that the Panel did not commit errors of law or fail to make an objective assessment of the evidence, and requests the Appellate Body to uphold the Panel's conclusion that clove and menthol cigarettes share the same end-use of "being smoked".

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42. Second, Indonesia submits that the Panel did not ignore the alternative end-uses for the products at issue proposed by the United States. In particular, the Panel did not ignore the alternative end-uses for the products at issue proposed by the United States, including those additional end-uses put forth by the United States. According to Indonesia, the Panel addressed the question of whether "regular use" is different from "occasional use", and carefully laid out in its Report the United States' argument that delivering nicotine to addicted smokers must be considered as a separate end-use. However, the Panel eventually found that the United States' argument was "circular", and then determined which consumers to routinely purchased product.

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in this case as "young smokers and potential young smokers". In addressing the United States' specific claims, Indonesia argues that the Panel did not sufficiently identify or distinguish evidence, rather, in Indonesia's view, the Panel focused on the survey evidence and did not provide clear guidance on the linkage between the health protection objective of the technical regulation at issue and the public health aspects of Section 907(a)(1)(A) of the Act, and only subsequently took issue with the Panel's approach to the survey evidence.123 Indonesia contends that the Panel's focus on the survey evidence not only depended on a misreading of the evidence but also did not examine it in a balanced manner.124 According to Indonesia, the Panel did not sufficiently identify the facts and only subsequently took issue with the Panel's approach to the survey evidence.

47. Indonesia further submits that the Panel did not provide clear guidance on how it interpreted the United States' approach to the survey evidence, as evidenced by the fact that both the United States and Indonesia had different understandings of the Panel's focus on the survey evidence.125 Indonesia notes that the Panel carefully reviewed the survey evidence and devoted two paragraphs and fivefootnotes in its Report to explain how the data did not provide clear guidance on comparing consumer tastes and habits, given that the research parameters varied from survey to survey and the survey evidence was not directly relevant to the Panel's focus.126 Indonesia contends that the Panel's approach to the survey evidence hardly amounts to providing clear guidance on comparing consumer tastes and habits, as required by the Appellate Body.127 In Indonesia's view, the Panel carefully reviewed the survey evidence and devoted two paragraphs and five footnotes in its Report to explain that the survey data did not provide clear guidance on comparing consumer tastes and habits, given that the research parameters varied from survey to survey and the survey evidence was not directly relevant to the Panel's focus.128 Indonesia contends that the Panel's approach to the survey evidence hardly amounts to providing clear guidance on comparing consumer tastes and habits, as required by the Appellate Body.

48. Lastly, Indonesia adds that the Panel did not commit an egregious error in declining to accord the same weight as the United States sought regarding the addiction rates of use of clove and menthol cigarettes by youth and adults. Referring to Appellate Body reports in EC – Bed Linen (Article 21.5 – India), Australia – Salmon (Article 19), and Canada – Wheat Exports and Grain Imports (Article 21.5 – India), Indonesia highlights that the Panel correctly recognized the complexity and significance of the health protection objective of the technical regulation at issue and the Panel's decision not to rely on some of the facts submitted by one of the parties would not by itself constitute legal error. In conclusion, Indonesia requests the Appellate Body to reject the United States' claims with respect to the Panel's findings on consumer tastes and the health protection objective of the technical regulation at issue.
habits, and to uphold the Panel's determination that clove and menthol cigarettes are like products for purposes of Article 2.1 of the TBT Agreement.138

2. Article 2.1 of the TBT Agreement - "Treatment No Less Favourable"

49. Indonesia claims that the Panel did not err in finding that, under Section 907(a)(1)(A) of the FFDCA, imported clove cigarettes are treated less favourably than domestic menthol cigarettes for the purposes of Article 2.1 of the TBT Agreement. In particular, Indonesia contends that the Panel did not commit error in identifying the products to be compared for its less favourable treatment analysis, and properly found that the less favourable treatment accorded to clove cigarettes cannot be explained by factors unrelated to their foreign origin. Indonesia further maintains that the Panel did not fail to make an objective assessment of the facts in evaluating the evidence before it, thereby acting consistently with Article 11 of the DSU.

50. First, Indonesia argues that the United States misinterprets the Appellate Body report in EC – Asbestos and the panel report in US – Tuna II (Mexico) as requiring the Panel to have included treatment of cigarettes with characterizing flavours other than clove and menthol in its less favourable treatment analysis.139 While the panels in both of the above disputes had conducted an initial like product analysis of a group of products140, the scope of the like products to be considered in evaluating less favourable treatment was limited to the imported and domestic products at issue, and did not extend to "other potentially 'like' products in general".141 Since the products at issue in this dispute had been identified as being imported clove cigarettes and domestically produced menthol cigarettes in the United States, the Panel correctly assessed likeness only as between these two categories of products and, as a consequence, properly identified those products for comparison in its less favourable treatment analysis.142 Moreover, because neither party argued before the Panel that clove cigarettes were like cigarettes with other characterizing flavours, had the Panel included cigarettes with characterizing flavours other than clove and menthol in its analysis, it would have made a finding on a claim that was not before it, thus acting inconsistently with Article 11 of the DSU.143

51. Indonesia further rejects the United States’ contention that the Panel incorrectly narrowed the scope of products to be compared on the basis of its terms of reference. Indonesia dismisses this argument as speculative and emphasizes that the Panel referred to its terms of reference in the context of its like products analysis.144 The Panel never contemplated that flavoured cigarettes other than clove and menthol cigarettes could be included in the like products analysis, which would be consistent with its terms of reference. Moreover, Indonesia’s panel request and its subsequent submissions demonstrate that Indonesia raised no claims and made no arguments with respect to cigarettes with characterizing flavours other than clove or menthol.145 Accordingly, the question of whether the Panel’s terms of reference "could have allowed a finding of likeness" between clove cigarettes and other flavoured cigarettes is moot.146 Indonesia considers that, "absent a finding of likeness between clove and cigarettes with other characterizing flavors", the Panel could not have included these other flavoured cigarettes in its less favourable treatment analysis.147

52. Second, Indonesia argues that the Panel did not exceed its discretion when considering the effect of Section 907(a)(1)(A) on those products that existed at the time the measure went into effect. Indonesia characterizes the United States’ argument in this respect as "irrelevant"148, and adds that the Panel acted within the limits of its discretion in determining the time period for which a comparison was to be made. While Indonesia agrees that there is "no rigid temporal limitation"149 on the timeframe for analyzing less favourable treatment, neither is there a mandate to consider any specific timeframe for this analysis.150 Moreover, Indonesia submits that the United States is arguing that the Panel should have assessed the treatment of the imported product—clove cigarettes—and a domestic product that had not been found to be like—other flavoured cigarettes. However, the "relevant comparison" had to be whether the measure at issue modified the conditions of competition "to the detriment of imported clove cigarettes as compared to menthol cigarettes, which were not banned".151

53. Third, Indonesia disagrees with the United States’ claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider evidence demonstrating that cigarettes with characterizing flavours other than clove or menthol were being sold in the United States at the time the measure went into effect. According to Indonesia, because the appropriate products for comparison in the less favourable treatment analysis were clove and menthol cigarettes, the existence of other flavoured cigarettes at the time the ban was imposed is immaterial. Furthermore, Indonesia

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138Indonesia's appellee's submission, para. 118.
139Indonesia's appellee's submission, para. 121 (referring to United States' appellant's submission, para. 77).
140Indonesia's appellee's submission, para. 126.
141Indonesia's appellee's submission, para. 130.
142Indonesia's appellee's submission, para. 139 (referring to Panel Report, para. 7.277).
143Indonesia's appellee's submission, paras. 140 and 141; see also para. 142 (quoting Appellate Body Report, Chile – Price Band System, para. 173).
144Indonesia's appellee's submission, paras. 147 and 148 (quoting United States’ appellant’s submission, para. 86; and Panel Report, paras. 7.124-7.127).
145Indonesia's appellee's submission, paras. 149 and 150 (referring to Indonesia’s panel request, pp. 1-2; and Indonesia's responses to Panel Questions 27 and 85).
146Indonesia's appellee's submission, para. 150.
147Indonesia's appellee's submission, para. 151.
148Indonesia's appellee's submission, para. 152 (quoting United States' appellant's submission, para. 89).
149Indonesia's appellee's submission, para. 152; see also para. 154 (quoting Panel Report, US – Tuna II (Mexico), paras. 7.299 and 7.300).
150Indonesia's appellee's submission, para. 157.
are not—is not—or insufficient to make a finding that the United States acted inconsistently with Article 2.1 of the TBT Agreement.

Section 907(a)(1)(A) does not impose a cost to protect domestic jobs.

In evaluating and weighing such evidence, the Panel assessed the facts within the limits of its discretion, and did not act inconsistently with Article 11 of the DSU.

41 Indonesia submits that the Panel assigned the correct interpretative value to paragraph 5.2 of the Panel Report. Indonesia maintains that the Appellate Body has not provided useful guidance in the present context. The Panel's conclusion that imported clove cigarettes are treated less favourably than domestic menthol cigarettes—because the former are banned from the US market, whereas the latter are not—is not sufficient to make a finding that the United States acted inconsistently with Article 2.1 of the TBT Agreement. Indonesia also notes that evidence on the record showed that the domestically produced brand of clove cigarettes "accounted for a negligible share of all clove cigarettes sold in the United States." 

42 Indonesia's view, the fact that the Panel did not place the same weight on such evidence as the United States does not amount to a violation of Article 11 of the DSU.

43 Fourth, Indonesia takes issue with the United States' claim that the Panel applied the incorrect legal framework in determining whether the less favourable treatment accorded to clove cigarettes under the measure at issue was the result of a political compromise with the US tobacco industry and an effort to protect domestic jobs.

50 The United States is "attempting to create a new criterion" when it suggests that a finding of less favourable treatment under Article 2.12 of the TBT Agreement would be possible only if a measure's interpretation adopted by the Ministerial Conference pursuant to Article IX:2 of the WTO Agreement.

51 In other words, Indonesia contends that the Panel's conclusion that imported clove cigarettes are treated less favourably than domestic menthol cigarettes—because the former are banned from the US market, whereas the latter are not—is not sufficient to make a finding that the United States acted inconsistently with Article 2.1 of the TBT Agreement.
58. In response to the United States' argument that the Doha Ministerial Decision is "at most" a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention, Indonesia submits that the Panel properly determined that paragraph 5.2 of the Doha Ministerial Decision is a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention. Moreover, Indonesia argues that the Panel did not err in its interpretation of the term "normally" in paragraph 5.2 of the Doha Ministerial Decision. According to Indonesia, the Panel correctly concluded that the term "normally" must be interpreted as meaning "under normal or usual conditions; as a rule." 

59. Second, Indonesia submits that the Panel did not err in finding that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement. According to Indonesia, the United States incorrectly argues that the Panel based its finding that Indonesia had established a prima facie case "exclusively" on the basis of the text of paragraph 5.2 of the Doha Ministerial Decision. Indonesia contends that the Panel Report clearly shows that the Panel considered both Article 2.12 of the TBT Agreement and paragraph 5.2 of the Doha Ministerial Decision. Indonesia contends that this is "categorically stated" by the Panel when it noted that "Indonesia ha[d] persuaded the Panel that, in the light of Article 2.12 of the TBT Agreement and paragraph 5.2 of the Doha Ministerial Decision, an interval of less than six months was not reasonable in the circumstances of this case." 

60. In response to the United States' argument that Indonesia provided no evidence or argumentation that the three-month interval period prejudiced the ability of Indonesian producers to adapt to the requirements of Section 907(a)(1)(A) of the FFDC, Indonesia contends that it adduced sufficient argument and evidence to establish a presumption that the United States had acted inconsistently with its obligation under Article 2.12. According to Indonesia, it did establish a prima facie case that the 90-day interval provided by the United States was significantly shorter than the six months normally required, the burden shifted to the United States to refute the claimed inconsistency. According to Indonesia, the Panel correctly stressed that the United States had failed to explain why it deemed that allowing a longer interval period between the publication and the entry into force of Section 907(a)(1)(A) would not have been effective in fulfilling the objective pursued by the measure, while a three-month interval was. Indonesia also posits that the United States did not explain why six months would have been ineffective, especially taking into account that it did not notify Section 907(a)(1)(A) as an urgent measure pursuant to Article 2.10 of the TBT Agreement.

61. Third, with regard to the United States' claim that, even assuming that the Panel correctly found that Indonesia had established a prima facie case, the Panel committed legal error in finding that the United States had not rebutted Indonesia's prima facie case, Indonesia responds that, since it had made out a prima facie case, the onus shifted to the United States "to bring forward evidence and arguments to disprove the claim". Since the 90-day interval provided by the United States was significantly shorter than the six months normally required, the burden shifted to the United States to refute the claimed inconsistency. According to Indonesia, the Panel correctly stressed that the United States had failed to explain why it deemed that allowing a longer interval period between the publication and the entry into force of Section 907(a)(1)(A) would not have been effective in fulfilling the objective pursued by the measure, while a three-month interval was. Indonesia also posits that the United States did not explain why six months would have been ineffective, especially taking into account that it did not notify Section 907(a)(1)(A) as an urgent measure pursuant to Article 2.10 of the TBT Agreement.

62. According to Indonesia, the Panel weighed and balanced the evidence and arguments on the record and, while it was "convinced of the validity of the claim advanced by Indonesia", it "was not convinced by the rebuttal arguments" presented by the United States. In Indonesia's view, therefore, the Panel acted consistently with its duties since, "in the absence of effective refutation by the defending party, a panel, as a matter of law, is required to rule in favor of the complaining party presenting the prima facie case".

C. Arguments of the Third Participants

1. Brazil

63. Brazil generally agrees with the views expressed by the Panel concerning the legal standard for the assessment of likeness under Article 2.1 of the TBT Agreement. For Brazil, the absence of a provision similar to Article III:1 of the GATT 1994, combined with the sixth recital of the preamble that its claim against the United States under Article 2.12 was true. Accordingly, Indonesia submits that the Panel did not commit a legal error in finding that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement.
of the TBT Agreement, seems to indicate that the objectives of a technical regulation should play an important role in ascertaining the characteristics of products alleged to be like. 176 Despite there being no direct reference in Article 2.1 of the TBT Agreement to the legitimate objectives of the technical regulation, Brazil notes that the use of an overarching analytical concept to inform all paragraphs of a provision is an issue that has already been accepted in WTO jurisprudence. 177 In Brazil's view, the objective pursued by a Member adopting a technical regulation is a central element of the likeness analysis under Article 2.1, given its context and object and purpose. 180 However, Brazil posits, it does not seem reasonable to require a panel to examine the intentions of the regulator and its implications that go beyond the explicit legitimate objective of a measure. The objectives pursued through technical regulations must be assessed as objectively as possible, looking at the measure's structure, architecture, and design. 181 Once the legitimate objectives pursued by a Member are properly revealed, Brazil is of the view that they should inform the likeness analysis under Article 2.1 of the TBT Agreement.

64. Brazil further notes that the United States pursues an interpretation of the term "treatment no less favourable" that would require evidence of origin-based detrimental effects to the imported product as a prerequisite for showing de facto discrimination. 183 Accordingly, Brazil explains, the United States considers that if any factor, other than the foreign origin of the product, were found to be the basis for the discrimination, there would be no violation of Article 2.1 of the TBT Agreement. In Brazil's view, both under Article III:4 of the GATT 1994 and under Article 2.1 of the TBT Agreement, a key question is to what extent the application of a measure results in less favourable treatment to the like imported product, regardless of the measure's stated objective. 184 The difference between these two provisions is that, while under Article 2.1 of the TBT Agreement the measure's objectives are relevant in defining whether the products at issue are like, under Article III:4 of the GATT 1994, likeness is assessed from a competition perspective. 185 Under both provisions, Brazil contends, once the imported and domestic products are found to be like, the manner in which the measure is applied and the prevailing circumstances of the relevant market for the affected products are more important in a less favourable treatment determination than the measure's objectives. According to Brazil, this conclusion is even more relevant in the context of an analysis of a de facto discrimination. 186

2. Colombia

65. Colombia submits that the Panel erred in its legal interpretation of paragraph 5.2 of the Doha Ministerial Decision. In its view, the Panel decided to give the Doha Ministerial Decision the status of an authoritative interpretation because it was agreed by all WTO Members meeting in the form of the Ministerial Conference, the highest ranking body of the WTO. 187 According to Colombia, however, this legal conclusion is incorrect. Colombia notes that the Ministerial Conference did not act on the basis of a recommendation by the Council overseeing the functioning of the TBT Agreement as mandated by Article IX:2 of the WTO Agreement, and, consequently, the first condition of Article IX:2 was not present in this case. 188 Furthermore, the Panel dismissed this condition on the basis that it was only a formal requirement. Colombia considers such reasoning to be in error: first, because the procedural nature of a condition does not mean that it can be overlooked; and, second, because the fact that all Members agreed on a certain interpretation is not sufficient to conclude that such interpretation was adopted pursuant to Article IX:2 of the WTO Agreement. With respect to the latter point, Colombia submits that neither the Ministerial Conference nor the General Council have the authority to disregard the previously given consent by all WTO Members embodied in the covered agreements. 189 Colombia further is of the view that the Appellate Body should clarify whether the Doha Ministerial Decision could be considered to constitute, pursuant to Article 31(3)(a) of the Vienna Convention, a "subsequent agreement between the parties" on the interpretation of Article 2.12 of the TBT Agreement.

3. European Union

66. The European Union first submits that the term "like product" appears to be used by the parties and the Panel in two different ways. The first use relates to the "comparison between the import and domestic sides" (the "horizontal line") 190, while the second use concerns the "relationship among the things that are to be considered together" as a product on both the import and domestic sides (the "vertical line"). 191 In the European Union's view, the "horizontal line" comparison requires the import and domestic categories to be described in terms that are identical in all respects, otherwise

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176Brazil's third participant's submission, para. 8.
177Brazil's third participant's submission, para. 11 (referring to Appellate Body Report, EC – Asbestos, para. 98; and Appellate Body Reports, Philippines – Distilled Spirits, para. 119).
178Brazil's third participant's submission, para. 12.
179Brazil's third participant's submission, para. 17.
180Brazil's third participant's submission, para. 20 (referring to Appellate Body Report, Japan – Alcoholic Beverages II, p. 29, DSU 1996:1, 97, at 120; Appellate Body Report, Chile – Alcoholic Beverages, paras. 61 and 62; and Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 112).
181Brazil's third participant's submission, para. 23 (referring to United States' appellant's submission, paras. 101-106).
182Brazil's third participant's submission, para. 28 (referring to Appellate Body Report, Japan – Alcoholic Beverages II, p. 28, DSU 1996:1, 97, at 119).
183Brazil's third participant's submission, para. 29.
184Brazil's third participant's submission, para. 30.
185Colombia's third participant's submission, para. 6 (quoting Panel Report, para. 7.576).
186Colombia's third participant's submission, para. 10.
187Colombia's third participant's submission, para. 14.
188Colombia's third participant's submission, para. 15.
189Colombia's third participant's submission, para. 19.
190European Union's third participant's submission, para. 17. (original underlining)
191European Union's third participant's submission, para. 18. (original underlining)
one cannot meaningfully test for *de facto* discrimination. The “vertical line” comparison, on the other hand, does not require that all things within the set of a “product” be identical in all respects because the comparison is made on the basis of a market definition (that is, by reference to cross-elasticity of supply and demand), hence quite heterogeneous things can be taken together as a single product. The European Union is of the view that, to determine whether there is *de facto* discrimination, it is necessary to consider whether the regulatory distinction is related to the foreign origin of the product. For this reason, the European Union contends that even if clove and menthol cigarettes would be reasonably grouped together as part of a “product”, this does not mean that the situation in respect of menthol cigarettes and youth smoking, and clove cigarettes and youth smoking, is necessarily the same or similar.

67. With respect to the less favourable treatment analysis under Article 2.1 of the TBT Agreement, the European Union stresses that the relationship between trade and regulation is complex. In its view, the problem is to distinguish between the exercise of regulatory autonomy that is acceptable, and that which is not. This necessarily entails looking at whether the design of the measure is, expressly or by proxy, related to the foreign origin of the regulated products. The European Union also considers that any “countervailing explanations” should be considered together with the inquiry into whether there is some relation with foreign origin, because such an approach provides for the most flexibility when considering a wide range of potential factual situations. In addition, the European Union raises concerns regarding the Panel’s approach in allocating the burden of proof under Article 2.1 of the TBT Agreement. In particular, according to the European Union, the Panel seems to reason that, because both menthol and clove cigarettes appeal to youth, the only plausible explanation for the failure to extend the ban to menthol cigarettes is *de facto* discrimination. However, this reasoning overlooks the possibility advocated by the United States that the attractiveness of clove cigarettes to youth is more pronounced than in the case of menthol cigarettes. The European Union contends that the Panel did not explain how Indonesia had discharged its burden of proving that the situation with respect to menthol cigarettes and youth smoking was the same as or similar to the situation with respect to clove cigarettes. If Indonesia failed to provide evidence in that respect, the European Union wonders how Indonesia may be considered to have discharged its burden of proof with respect to an alleged “in fact” breach of Article 2.1 of the TBT Agreement.  

68. Lastly, with respect to Article 2.12 of the TBT Agreement, the European Union considers that paragraph 5.2 of the Doha Ministerial Decision is relevant either pursuant to Article 31(3)(a) of the Vienna Convention, or as a fact. It further contends that Indonesia had the burden of proving, under Article 2.12 of the TBT Agreement, that the time actually allowed by the measure was not reasonable. With respect to the question of whether or not six months would be ineffective in fulfilling the legitimate objective pursued, the European Union finds nothing in the Doha Ministerial Decision that expressly reverses the burden of proof. It recalls, in that regard, that the Appellate Body in EC – *Sardines* placed the burden of proof on the complainant under Article 2.4 of the TBT Agreement.

4. **Mexico**

69. Mexico submits that it is difficult to incorporate the objective of a technical regulation into the like products analysis. In its view, when the purpose of a technical regulation is to protect the highest values, such as human life or health, the analysis of the four criteria will itself be sufficient to reach a correct interpretation of likeness because “the product differences themselves will have inspired the objective of the technical regulation, and not the opposite”. Mexico contends, in particular, that the consumer tastes and habits criterion needs to be approached very carefully because regulatory intervention by a Member can “shape consumer perceptions”. Moreover, Mexico submits that the creation of sub-categories of like products on the basis of different end-uses, as suggested by the United States, could lead to circumvention of the disciplines in Article 2.1 of the TBT Agreement. Mexico further stresses that, if regulatory distinctions could be used to determine like products, this could "render the concept of *de facto* discrimination meaningless".

70. With respect to the Panel’s less favourable treatment analysis, Mexico disagrees with the United States that the group of like imported products should include like imported products from all WTO Members and not just from the complaining Member. According to Mexico, the term “any
[Member] under Article 2.1 of the TBT Agreement provides "considerable flexibility" when assessing conformity with this provision, and hence the focus can be on like products from "one Member, some Members or all Members". In Mexico's view, the Panel correctly focused on the treatment accorded to like products from Indonesia. In addition, contrary to the United States' argument that the Panel should have compared the treatment accorded to imported and like domestic products as a group, Mexico submits that the Panel's "efficient approach" to applying the "group" comparison when determining less favourable treatment was "not a legal error". On the contrary, the Panel properly found that the "vast majority" of imports of Indonesian cigarettes with characterizing flavours were banned while "all or almost all" of the US cigarettes with characterizing flavours were excluded from the ban.

71. Mexico lastly addresses three additional issues concerning the less favourable treatment analysis. First, it agrees with the Panel's reasoning that a measure is discriminatory when it minimizes the costs for the domestic producers while triggering costs to the foreign producers. In Mexico's view, the Panel's approach is also applicable to any case where the technical regulation is designed in such a way that, either de facto or de jure, avoids or minimizes costs for the domestic producers and triggers costs to the foreign producers. Second, with respect to the United States' argument that there is no temporal limitation on the analysis of de facto less favourable treatment Mexico posits that the date of a panel's establishment is "the key date" when assessing whether de facto discrimination exists. Mexico considers that, although past and possibly future events may inform an assessment of de facto discrimination at the time of the establishment of the panel, "great care must be taken when incorporating such facts into the assessment". Third, Mexico is concerned with the interpretation that the non-discrimination obligations in Article 2.1 of the TBT Agreement are not violated if the adverse impact is primarily the result of factors "unrelated to the foreign origin of the product". According to Mexico, de facto discrimination precisely occurs, by its very nature, when the challenged measure does not, on its face, discriminate on the basis of origin.

72. Norway agrees with the United States that a panel's terms of reference are not limited by the products listed in a panel request. In this regard, Norway is not convinced by the Panel's reasoning that "the identification of the specific products at issue in a panel request pertains to the claim at issue". In Norway's view, since the product scope of the likeness analysis may influence the outcome of a discrimination claim, a panel should be entitled to define "the product scope of its own analysis" to determine the existence of discrimination, "without being subject to limitations chosen by the complainant, for whatever reason, in its panel request".

73. With respect to the analysis of less favourable treatment, Norway first notes that the Panel compared "one like product (i.e. clove cigarettes), from one source (i.e. Indonesia), to one like domestic product in the United States (i.e. menthol cigarettes)". In its view, however, the Panel should have compared the impact of the measure at issue on "all like imported products, from all WTO Members" vis-à-vis its impact "on all like domestic products". According to Norway, the correct starting point for the analysis should be "the entire group of products identified as like products". Second, Norway disagrees with the United States' assertion that, because its measure was "banned while "all or almost all" of the US cigarettes with characterizing flavours were excluded from the ban", to circumstances that differ from those prevailing in that dispute. A proper assessment of de facto discrimination turns on whether the like imported products are predominantly subject to less favourable treatment, while like domestic products are predominantly subject to more favourable treatment. If there is such de facto discrimination, whether a measure's policy objective justifies that discrimination belongs more properly to the analysis under an applicable exception.
6. **Turkey**

74. Turkey considers that the Panel did not commit a legal error in its general interpretation of the term "like products" in Article 2.1 of the *TBT Agreement*. In its view, the Panel properly considered the *TBT Agreement* as immediate context while also taking into account the jurisprudence on Article III:4 of the GATT 1994. Turkey thus contends that the Panel correctly found that the declared legitimate public health objective of the measure, namely, reducing youth smoking, "must permeate and inform [its] likeness analysis". Regarding the general assessment of the criteria for determining likeness, Turkey notes that the Appellate Body has rejected a "one-fits-all" approach and has advocated a case-by-case analysis. As for the end-use criterion, Turkey believes that a competition-based approach to determine likeness should not be as influential under the *TBT Agreement* as under Article III of the GATT 1994. Instead, the public health aspect of the measure "creates the immediate context". With respect to consumer tastes and habits, Turkey considers the Panel's focus on the relevant group of consumers—young smokers—not to be erroneous. In its view, it is not necessary to show that consumers are "actually substituting one product for the other"; rather, it is sufficient to show that consumers "can potentially substitute" them.

75. Turkey further submits that the Panel did not commit legal error in limiting its analysis to a comparison between treatment of menthol cigarettes and clove cigarettes under Section 907(a)(1)(A) of the FFDCA. In its view, the Panel was under an obligation to make a comparison between the products specified in its terms of reference because, "at least in this case", the product specification was part of Indonesia's claim itself. In addition, Turkey notes that, in a less favourable treatment analysis, detrimental effects stemming from factors other than the origin of a product are "an essential issue". In assessing this key issue, Turkey contends, the critical benchmark is whether imported and domestic products are treated equally, taking account of all economic and social factors. Turkey therefore considers that the Panel was correct in concluding that the purpose of the *TBT Agreement* would be defeated if Members were "allowed to remove their domestic products" from the application of technical regulations "to avoid potential costs that it might otherwise incur".

76. **III. Issues Raised in This Appeal**

(a) Whether the Panel erred in finding that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement*, and in particular:

(i) Whether the Panel erred in finding that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:

- whether the Panel performed an incomplete analysis of the different end-uses of the products at issue;

- whether the Panel erred in its analysis of consumer tastes and habits; and

- whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits;

(ii) Whether the Panel erred in finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:

- whether the Panel improperly narrowed the product scope of its analysis by comparing treatment accorded to imported clove cigarettes and to domestic menthol cigarettes;

- whether the Panel erred in assessing less favourable treatment at the time the ban on flavoured cigarettes came into effect;

- whether the Panel erred in finding that the detrimental impact on competitive opportunities of imported clove cigarettes could not be explained by reasons unrelated to the foreign origin of those products; and

- whether the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:

- whether the Panel performed an incomplete analysis of the different end-uses of the products at issue;

- whether the Panel erred in its analysis of consumer tastes and habits; and

- whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits;
cigarettes less favourable treatment than that accorded to domestic menthol cigarettes; and

(b) Whether the Panel erred in finding that, by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the TBT Agreement, and in particular:

(i) whether the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision in interpreting the term "reasonable interval" in Article 2.12 of the TBT Agreement; and

(ii) whether the Panel incorrectly found that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement that the United States failed to rebut.

IV. Background

77. Before commencing our analysis of the issues of law and legal interpretations raised in this appeal, we briefly outline certain pertinent facts and background information. This dispute concerns Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act239 (the "FFDCA"). Section 907(a)(1)(A) was added to the FFDCA by Section 101(b) of the Family Smoking Prevention and Tobacco Control Act240 (the "FSPTCA")241, and became law on 22 June 2009.242

78. Under Section 907(a)(1)(A), beginning three months after the enactment of the FSPTCA—that is, as from 22 September 2009:

… a cigarette or any of its components (including the tobacco, filter, or paper) shall not contain, as a constituent … or additive, an artificial or natural flavour (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, liqueurice, cocoa, chocolate, coffee, or coffee, that is a characterizing flavour of the tobacco product or tobacco smoke.

79. The specific objective of Section 907(a)(1)(A) is not set forth in the FSPTCA itself. However, a report prepared by the House Energy and Commerce Committee243 (the "House Report") articulates both the objectives of the FSPTCA overall, and of Section 907(a)(1)(A) in particular. According to the House Report, "[t]he objectives of [the FSPTCA] are to provide the Secretary with the proper authority over tobacco products in order to protect the public health and to reduce the number of individuals under 18 years of age who use tobacco products."

80. According to the Guidance for Industry and FDA Staff244 ("FDA Guidance"), Section 907(a)(1)(A) applies to all flavoured tobacco products245 that meet the definition of a "cigarette" in Section 3(1) of the Federal Cigarette Labeling and Advertising Act246, that is: "(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco"; or "(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described [under] (A)."247 The ban contained in Section 907(a)(1)(A) also extends to flavoured loose tobacco and rolling papers, and filters intended to be used in "roll-your-own" cigarettes.248

81. The Panel identified the products at issue in this dispute as being clove cigarettes and menthol cigarettes.249 Clove cigarettes are composed of tobacco combined with flavouring additives, which is presented to the consumer in a paper-wrapped with a filter.250 More specifically, clove cigarettes are generally manufactured with 60 to 80 per cent tobacco content, usually resulting from a blend of...

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239Supra, footnote 2.
240Supra, footnote 3.
241Panel Report, para. 2.4.
242Panel Report, para. 2.5 (referring to Indonesia's first written submission to the Panel, footnote 1 to para. 1).
246General Questions and Answers on the Ban of Cigarettes that Contain Characterizing Flavors (Edition 2), 23 December 2009 (Panel Exhibit IND-41).
247The Panel noted that, in referring to cigarettes not containing any characterizing flavours, the parties often used the terms "regular" and "tobacco-flavoured" cigarettes interchangeably, and found this ambiguity to be "susceptible of causing confusion". The Panel observed that referring to tobacco-flavoured cigarettes may confuse the reader into believing that cigarettes such as clove-flavoured or menthol-flavoured cigarettes do not contain tobacco. In fact, all cigarettes contain tobacco, but "flavoured" cigarettes such as menthol, kretex, bidis, and so on, contain, as well, an additive that imparts a characterizing flavour to cigarettes. Therefore, the Panel decided to use the term "regular" cigarettes, and not "tobacco-flavoured" cigarettes, as it better describes the fact that they do not include additional characterizing flavours. (Panel Report, para. 7.131)
248United States Code, Title 15, Chapter 36.
249FDA Guidance, answer to Question 2.
250FDA Guidance, answers to Questions 3 and 4.
251Panel Report, para. 7.147.
252Panel Report, para. 7.157 (referring to Indonesia's first written submission to the Panel, para. 54; and Indonesia's second written submission to the Panel, para. 67).
different varieties of tobacco. As for the additives, clove cigarettes contain approximately 20 to 40 per cent cloves, either in the form of clove buds or ground/minced cloves. They also generally include a "sauce" as part of the flavouring ingredients chosen by each manufacturer, as well as other components inherent to cloves, such as benzyl acetate, methyl salicylate, trans-anethole, and methyl eugenol. Before the Panel, the parties did not dispute that clove cigarettes contain eugenol—a substance that the United States defined as "a common topical anesthetic used in dental procedures"—and they also agreed that the Polzin paper, a study on certain ingredients of Indonesian clove cigarettes, shows that 19 of 33 clove cigarette brands analyzed contained coumarin, a flavouring additive.

82. Menthol cigarettes, in contrast, have approximately 90 per cent tobacco content by weight and are composed of a blend of Virginia, Maryland burley, Oriental, and reconstituted tobacco. The Panel noted that the March 2011 report by the Tobacco Products Scientific Advisory Committee to the FDA specifies that "[m]enthol cigarettes are typically blended using more flue-cured and less burley tobacco ... because some of the chemicals in burley tobaccos create an incompatible taste character with menthol." The main additive in menthol cigarettes is menthol oil, a chemical compound extracted from the peppermint plant (Mentha piperita), the com munt plant (Mentha arvensis), or produced by synthetic or semi-synthetic means. Menthol is added to cigarettes in several different ways and diffuses throughout the cigarette, irrespective of the means of application. According to the March 2011 TPSAC Report, menthol is added to cigarettes both as a characterizing flavour and for other taste reasons, which include brightening the flavour of tobacco blends and/or smoothing the taste of the blend. Menthol amounts to roughly 1 per cent of the content of the cigarette, although the specific amount varies from brand to brand. Moreover, menthol may have cooling, analgesic, or irritating properties, and is reported to reduce sensitivity to noxious chemicals, including nicotine.

83. In this Report, we first consider the United States' claim that the Panel erred in finding that clove and menthol cigarettes are "like products within the meaning of Article 2.1 of the TBT Agreement." We then address the United States' claim that the Panel erred in finding that the United States acted inconsistently with Article 2.1 of the TBT Agreement by according to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes. Lastly, we consider the United States' claim that the Panel erred in finding that, by not allowing a period of not less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement.

V. Article 2.1 of the TBT Agreement

A. Introduction

84. The Panel found that Section 907(a)(1)(A) of the FFDCA is a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement, and that it is inconsistent with Article 2.1 of the TBT Agreement because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin. In particular, the Panel found that "clove cigarettes and menthol cigarettes are 'like products' for the purpose of Article 2.1 of the TBT Agreement," and that, "by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) does accord imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, for the purpose of Article 2.1 of the TBT Agreement."

85. The United States appeals the Panel's finding that Section 907(a)(1)(A) of the FFDCA is a "like products" for the purpose of Article 2.1 of the TBT Agreement, and argues that the Panel erred in finding that clove and menthol cigarettes are like products and that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to like products of national origin within the meaning of Article 2.1 of the TBT Agreement. We address separately in this Report the United States' claims in respect of the Panel's findings on like products and on less favourable treatment under Article 2.1 of

According to Indonesia, the menthol content can range up to 3 per cent. (Panel Report, para. 7.169 (referring to Indonesia's response to Panel Question 32))
the TBT Agreement. Before doing so, however, we consider Article 2.1 as a whole in its context and in the light of the object and purpose of the TBT Agreement.

86. Article 2.1 of the TBT Agreement provides that, with respect to their central government bodies:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

87. Article 2.1 of the TBT Agreement contains a national treatment and a most-favoured nation treatment obligation. In this dispute, we are called upon to clarify the meaning of the national treatment obligation. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. The United States' appeal concerns only the second and the third elements of this test of inconsistency, namely, whether the products at issue are like and whether the treatment accorded to clove cigarettes imported from Indonesia is less favourable than that accorded to like domestic products in the United States. 270

88. In sections V.B and V.C of this Report, we interpret Article 2.1 of TBT Agreement and, in particular, the terms "like products" and "treatment no less favourable". However, before engaging in this interpretative effort, we wish to make some observations of general import on: the preamble of the TBT Agreement; the definition of "technical regulation"; the relevance of Article III:4 of the GATT 1994 in interpreting Article 2.1 of the TBT Agreement; and the absence among the provisions of the TBT Agreement of a general exception provision similar to Article XX of the GATT 1994.

89. The preamble of the TBT Agreement is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement. We find guidance for the interpretation of Article 2.1, in particular, in the second, fifth, and sixth recitals of the preamble of the TBT Agreement.

90. The second recital links the TBT Agreement to the GATT 1994. It states:

Desiring to further the objectives of GATT 1994;

91. While this recital may be read as suggesting that the TBT Agreement is a "development" or a "step forward" from the disciplines of the GATT 1994 271, in our view, it also suggests that the two agreements overlap in scope and have similar objectives. If this were not true, the TBT Agreement could not serve to "further the objectives" of the GATT 1994. The second recital indicates that the TBT Agreement expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner.

92. The fifth recital reflects the trade-liberalization objective of the TBT Agreement by expressing the "desire" that technical regulations, technical standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. It states:

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

93. We see the fifth recital reflected in those TBT provisions that aim at reducing obstacles to international trade and that limit Members' right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1) or requiring that technical regulations be no more trade restrictive than necessary to fulfil a legitimate objective (Article 2.2).

94. The objective of avoiding the creation of unnecessary obstacles to international trade through technical regulations, standards, and conformity assessment procedures is, however, qualified in the sixth recital by the explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives. The sixth recital states:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement;

95. We read the sixth recital as counterbalancing the trade-liberalization objective expressed in the fifth recital. The sixth recital "recognizes" Members' right to regulate versus the "desire" to avoid creating unnecessary obstacles to international trade, expressed in the fifth recital. While the fifth recital clearly suggests that Members' right to regulate is not unbounded, the sixth recital affirms

270We recall that it was not disputed before the Panel that Section 907(a)(1)(A) is a technical regulation and that the United States has not appealed the Panel's finding that Section 907(a)(1)(A) is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement (Panel Report, paras. 7.21 and 7.41).

271Panel Report, para. 7.112.
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 the importing Member's own production in respect of all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use.

60. The national treatment obligations of Article 2.1 and Article 14.1 of the TBT Agreement are built on the same core terms, namely, "like products" and "treatment no less favourable". We further note that technical regulations and requirements affecting the internal sale, offering for sale, transportation, distribution or use are necessary to fulfill certain legitimate policy objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement. The sixth recital suggests that Members have a right to regulate so long as measures taken are necessary to fulfill certain legitimate policy objectives, and provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement. We thus understand the sixth recital to suggest that Members have a right to use their national treatment obligations as a means of achieving legitimate policy objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.

96. The balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement, gives an indication that, under the TBT Agreement, measures making distinctions based on product characteristics are in principle permitted. However, the fact that a technical regulation defines a product's characteristics with a view to fulfilling a legitimate policy objective does not mean that it may do so by treating imported products less favourably than like domestic products.

97. In setting out its interpretative approach to Article 2.1 of the TBT Agreement, the Panel considered that "like and whether less favourable treatment has been accorded to imported products. The Panel's findings that clove and menthol cigarettes are like products, and that Section 907(a)(1)(A) of the TBT Agreement applies only in respect of technical regulations, are consistent with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use their national treatment obligations as a means of achieving legitimate policy objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.

98. We observe that the TBT Agreement applies only in respect of technical regulations, which are defined in Annex 1.1 as documents laying down product characteristics that are in principle relevant to the determination of whether products are like and whether less favourable treatment has been accorded to imported products. The Panel's findings that clove and menthol cigarettes are like products, and that Section 907(a)(1)(A) of the TBT Agreement applies only in respect of technical regulations, are consistent with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use their national treatment obligations as a means of achieving legitimate policy objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.

99. We consider that, in interpreting Article 2.1 of the TBT Agreement, a panel should focus on the text of Article 2.1, read in the context of the TBT Agreement, including its preamble and the context of the provision subject to interpretation before reaching for an interpretative aid that is further removed. (Panel Report, para. 7.103)

100. With these observations of general import in mind, we turn to the United States' appeal of the Panel's findings that clove and menthol cigarettes are like products, and that Section 907(a)(1)(A) of the TBT Agreement applies only in respect of technical regulations, which are defined in Annex 1.1 as documents laying down product characteristics that are in principle relevant to the determination of whether products are like and whether less favourable treatment has been accorded to imported products. We further note that technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement, give an indication that, under the TBT Agreement, measures making distinctions based on product characteristics are in principle permitted. However, the fact that a technical regulation defines a product's characteristics with a view to fulfilling a legitimate policy objective does not mean that it may do so by treating imported products less favourably than like domestic products.
Panel erred in its interpretation and application of the "likeness" criteria of end-use and consumer tastes and habits, as well as to its claim that the Panel acted inconsistently with Article II of the DSU in its assessment of consumer tastes and habits. The United States does not appeal the Panel's findings concerning the products' physical characteristics and tariff classification.

1. **"Like Products" under Article 2.1 of the TBT Agreement**

104. The Panel found that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the TBT Agreement. The Panel reached this conclusion after having evaluated the traditional "likeness" criteria (physical characteristics, end-uses, consumer tastes and habits, and tariff classification), "bearing in mind that the measure at issue is a technical regulation, with the immediate purpose of regulating cigarettes having a characterizing flavour, with a view to attaining the legitimate objective of reducing youth smoking". Before addressing the United States' appeal of the Panel's specific findings in respect of the "likeness" criteria of end-uses and consumer tastes and habits, we first consider the Panel's approach to interpreting "like products" in the context of Article 2.1 of the TBT Agreement.

105. The Panel considered that "it is far from clear that it is always appropriate to transpose automatically the competition-oriented approach to likeness under Article III:4 of the GATT 1994 to Article 2.1 of the TBT Agreement" in the absence of a general principle such as that expressed in Article III:1 of the GATT 1994. The Panel also noted that, despite the similarity in wording, Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 differ in that the former only applies to technical regulations whereas the latter applies to a much broader range of measures. The Panel stated that Article III:4 of the GATT 1994 could not be regarded as immediate context to Article 2.1 of the TBT Agreement and noted that the Appellate Body's reference to an "accordion" of "likeness" allows, and potentially mandates, different interpretations of the term "like products" under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

106. The Panel turned to what it considered the immediate context of the term "like products" in Article 2.1 of the TBT Agreement, namely, Article 2.1 itself and the TBT Agreement as a whole, and to that Agreement's object and purpose as set out in its preamble. The Panel considered that the fact that Section 907(a)(1)(A) of the FFDCA is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, which has the immediate purpose of regulating cigarettes with characterizing flavours with the view to attaining the legitimate objective of reducing youth smoking, should have some weight and potentially considerable weight in the determination of whether the products at issue are like. The Panel also noted that the sixth recital of the preamble of the TBT Agreement, which recognizes Members' right to take measures for legitimate objectives, and Article 2.2 could justify a different interpretation of "likeness" under Article 2.1 of the TBT Agreement from that developed under Article III:4 of the GATT 1994.

107. The Panel thus found that, in the circumstances of this case, the interpretation of Article 2.1 of the TBT Agreement should not be approached primarily from a competition-oriented perspective, but that the weighing of the evidence relating to the "likeness" criteria should be influenced by the fact that Section 907(a)(1)(A) is a technical regulation having the immediate purpose of regulating cigarettes with a characterizing flavour for public health reasons. Having developed this interpretative approach, the Panel turned to the analysis of the traditional "likeness" criteria, namely, the physical characteristics of the products, end-uses, consumer tastes and habits, and tariff classification. The Panel gave particular weight to the health objective of Section 907(a)(1)(A) in its assessment of the products' physical characteristics and of consumer tastes and habits.

108. We agree with the Panel that the interpretation of the term "like products" in Article 2.1 of the TBT Agreement should start with the text of that provision in the light of the context provided by Article 2.1 itself, by other provisions of the TBT Agreement, and by the TBT Agreement as a whole. We also agree that the relevant context includes the fact that Article 2.1 applies to technical regulations, which are documents laying down the characteristics of products. We further note that the preamble of the TBT Agreement recognizes Members' right to regulate through technical regulations. As explained below, however, we are not persuaded that these contextual elements and the object and purpose of the TBT Agreement suggest that the interpretation of the concept of "like products" in Article 2.1 of the TBT Agreement cannot be approached from a competition-oriented perspective.

109. As we have observed above, the balance that the preamble of the TBT Agreement strikes between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994. The second recital of the preamble links the two Agreements by expressing the "desire" to further the objectives of the GATT 1994, while the "recognition" of a Member's right to regulate in the sixth recital is balanced by the "desire" expressed in the fifth recital to ensure that technical
the purpose of determining likeness in isolation from the measure at issue, to the extent that the latter informs the physical characteristics of the products and/or consumer preferences.

112. In the light of the above, we disagree with the Panel’s interpretation of the concept of “likeness” in Article 2.1 of the TBT Agreement that focuses on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products.

113. We further observe that measures often pursue a multiplicity of objectives, which are not always easily discernible from the text or even from the design, architecture, and structure of the measure. Determining likeness, in the narrow sense of identifying the objective of the measure rather than on the competitive relationship, would require the identification of all the relevant objectives of the measure, as well as an assessment of which objectives among others are relevant or should prevail in determining whether the products are like. It seems to us that it would not always be possible for a panel to identify all the objectives relevant to the determination of likeness based on the regulatory purposes of the measure and/or whether the products are like, or not.

114. The appeal by the United States of the Panel’s determination of consumer tastes and habits, which we address further below, highlights the difficulties that arise when attempting to determine likeness based on the competitive relationship between and among products. The Panel relied on the objective of the measure, which is identified as relating youth smoking, to determine the likeness of the products. It seems to us that it would not always be possible for a panel to determine all the objectives of a measure and/or whether the products are like, or not.

115. Measures, such as technical regulations, may have more than one objective. However, a panel that is tasked with determining whether two products are like may not be able to reach a coherent result if, in determining likeness, it has to rely on various possible regulatory objectives of the measure. The United States identifies the competition between and among products, the Panel’s narrow focus on the immediate objective of the measure, which is identified as relating youth smoking, to determine the likeness of the products. The Panel relied on the objective of the measure, which is identified as relating youth smoking, to determine the likeness of the products.

116. The TBT Agreement’s Article 2.1 seeks to prevent Members from applying internal taxes and regulations “so as to afford protection to domestic production”. We observe, in this respect, that, in the EC – Asbestos, the Appellate Body considered that the “general principle” articulated in Article III:1 of the GATT 1994 “seeks to prevent M[embers] from applying internal taxes and regulations in a manner which affords protection to domestic production”. So as to afford protection to domestic production, the Panel was of the view that the absence of a provision like Article III:1 of the GATT 1994 in the TBT Agreement would prevent the transposition of the GATT competition-oriented approach to likeness to Article 2.1 of the TBT Agreement. We observe, in this respect, that, in the EC – Asbestos, the Appellate Body considered that the “general principle” articulated in Article III:1 of the GATT 1994 “seeks to prevent Members from applying internal taxes and regulations in a manner which affords protection to domestic production.”

117. The conclusion in Article III:1 is about the “nature and extent of a competitive relationship between and among products”. Rather, the Appellate Body did not base its conclusion in Article III:1 on the “nature and extent of a competitive relationship between and among products” expressed in Article III:1.

118. We agree that the very concept of “treatment no less favourable”, which is expressed in the same words in Article III:4 of the GATT 1994 and in Article 2.1 of the TBT Agreement, informs the determination of likeness, suggesting that likeness is about the “nature and extent of a competitive relationship between and among products.” Indeed, the concept of “treatment no less favourable” links the products to the marketplace, because it is only in the marketplace that it can be determined how the measure treats like imported and domestic products. We note, however, that, in determining likeness, a panel should discount any distortive effects that the measure at issue may have on the competitive relationship, and reserve the consideration of such effects for the analysis of less favourable treatment.

In such cases, a panel should determine the nature and the extent of the competitive relationship for what are like products at issue, which, in turn, has implications for the determination of whether heavy used cigarette products that are used in the same manner as other cigarettes may be considered to be products that are like imported and domestic products.

284 See Panel Report, Japan – Alcoholic Beverages II, paras. 6, 14.
286 See Panel Report, Japan – Alcoholic Beverages II, para. 6.
less favourable treatment has been accorded. Moreover, we note that a purpose-based approach to the determination of likeness does not, necessarily, leave more regulatory autonomy for Members, because it almost invariably puts panels into the position of having to determine which of the various objectives purportedly pursued by Members are more important, or which of these objectives should prevail in determining likeness or less favourable treatment in the event of conflicting objectives.

116. More importantly, however, we do not consider that the concept of "like products" in Article 2.1 of the TBT Agreement lends itself to distinctions between products that are based on the regulatory objectives of a measure. As we see it, the concept of "like products" serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products. If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. This would inevitably distort the less favourable treatment comparison, as it would refer to a "marketplace" that would include some like products, but not others. As we consider further below in respect of the United States' appeal of the Panel's less favourable treatment finding, distinctions among products that have been found to be like are better drawn when considering, subsequently, whether less favourable treatment has been accorded, rather than in determining likeness, because the latter approach would alter the scope and result of the less favourable treatment comparison.

117. Nevertheless, in concluding that the determination of likeness should not be based on the regulatory purposes of technical regulations, we are not suggesting that the regulatory concerns underlying technical regulations may not play a role in the determination of whether or not products are like. In this respect, we recall that, in EC – Asbestos, the Appellate Body found that regulatory concerns and considerations may play a role in applying certain of the "likeness" criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness under Article III:4 of the GATT 1994.

118. In EC – Asbestos, the Appellate Body found that, in examining whether products are like, panels must evaluate all relevant evidence, including evidence relating to the health risks associated with a product, which was the underlying concern of the challenged measure in that dispute. The Appellate Body found that such evidence would not be examined as a separate criterion but, rather, under the traditional "likeness" criteria. In particular, the Appellate Body stated that a product's health risks are relevant to the determination of the competitive relationship between products, and addressed health risks as part of the products' physical characteristics and of the tastes and habits of consumers. In respect of physical characteristics, the Appellate Body considered that a panel should examine fully the physical properties of products, in particular, those physical properties that are likely to influence the competitive relationship between products in the marketplace. These include those physical properties that make a product toxic or otherwise dangerous to health. In respect of consumer tastes and habits, the Appellate Body found that the health risks associated with a product could influence the preference of consumers.

119. Similarly, we consider that the regulatory concerns underlying a measure, such as the health risks associated with a given product, may be relevant to an analysis of the "likeness" criteria under Article III:4 of the GATT 1994, as well as under Article 2.1 of the TBT Agreement, to the extent they have an impact on the competitive relationship between and among the products concerned.

120. The interpretation of the concept of "likeness" in Article 2.1 has to be based on the text of that provision as read in the context of the TBT Agreement and of Article III:4 of the GATT 1994, which also contains a similarly worded national treatment obligation that applies to laws, regulations, and requirements including technical regulations. In the light of this context and of the object and purpose of the TBT Agreement, as expressed in its preamble, we consider that the determination of likeness under Article 2.1 of the TBT Agreement, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue. To the extent that they are relevant to the examination of certain "likeness" criteria and are reflected in the products' competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness.

121. With this interpretative approach in mind, we now turn to the claims by the United States that the Panel committed errors in its assessments of the end-uses of clove and menthol cigarettes and of the tastes and habits of consumers of clove and menthol cigarettes, as well as to the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits. We begin by examining the Panel's finding that clove and menthol cigarettes have the same end-use.

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291The Appellate Body noted that a characteristic of chrysotile asbestos fibres was that the microscopic particles and filaments of these fibres were carcinogenic for humans when inhaled. Thus, the Appellate Body concluded that the carcinogenicity, or toxicity, constituted a defining aspect of the physical properties of chrysotile asbestos fibres as opposed to polyvinyl alcohol, cellulose, and glass (PCG) fibres, which did not present the same health risk. (Appellate Body Report, EC – Asbestos, para. 114)
292The Appellate Body found that the health risks associated with chrysotile asbestos fibres influenced the behaviour of both manufacturers (who incorporate fibres into another product) and ultimate consumers. The Appellate Body noted that a manufacturer cannot ignore the preferences of the ultimate consumers of a product and, if the risks posed by a particular product are sufficiently great, the ultimate consumers may simply cease to buy that product (Appellate Body Report, EC – Asbestos, para. 122)
2. End-Uses

certain function does not exclude that it may nevertheless be capable of performing that function.

122. In examining the end-uses of clove and menthol cigarettes, the Panel found that both clove
and menthol cigarettes have the same end-use, that is, "to be smoked" 295, and disagreed with the
United States that the end-uses of a cigarette include "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke." The Panel considered that the end-uses presented by the United States relate to the reasons why people smoke, but that does not mean that cigarettes have several end-uses. In particular, the
Panel considered that the United States' comments on the appeal of flavours to certain smokers relate more properly to consumer tastes and habits than to end-use.

123. The United States claims that a panel, when conducting an end-use analysis, must consider the
"creating a pleasurable experience" as well as the "satisfying an addiction to nicotine" and that the
Panel improperly limited its analysis to considering only this common use between the clove
and menthol cigarettes. The United States argues that the other end-uses of the products at issue, such as "to create a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke," are used for smoking, but that the Panel improperly limited its analysis to considering only this common use between the clove
and menthol cigarettes. In particular, the United States contends that the Panel failed to examine other, different end-uses for the products. The Appellate Body noted that 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.

124. Indonesia responds that the Panel did not err in finding that the end-use of clove and menthol cigarettes is "to be smoked." In Indonesia's view, moreover, even assuming arguendo that the
end-use put forward by the United States is "creating a pleasurable experience" as well as the "satisfying an addiction to nicotine," the Panel did not err in finding that the
cigarettes are "to be smoked." In Indonesia's view, moreover, even assuming arguendo that the
cigarettes are "to be smoked," the Panel did not err in finding that the
end-use put forward by the United States is "creating a pleasurable experience" as well as the "satisfying an addiction to nicotine." Indonesia contends that the United States' comments on the appeal of flavours to certain smokers relate more properly to consumer tastes and habits than to end-use.

125. We observe that end-uses describe the possible functions of a product, while consumer tastes
and habits reflect the consumers' appreciation of these functions. In EC – Asbestos, the Appellate
Body described end-uses as "the extent to which products are capable of performing the same, or
similar, functions," and consumer tastes and habits as "the extent to which consumers are willing
to view those products in the same way." Thus, while consumer tastes and habits are not the same as consumer end-uses, they may influence which end-uses are selected and how frequently they are used.

126. We do not consider that it is correct to characterize "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke" as consumer tastes and habits and end-uses. To the extent that they describe the possible functions of the products, rather than the consumers' appreciation of these functions and habits, consumer tastes and habits should indicate to what extent consumers are willing to substitute clove cigarettes and menthol cigarettes with other products. Consumer tastes and habits should also indicate to what extent consumers are willing to substitute clove cigarettes and menthol cigarettes with other products.

127. The Appellate Body has also considered that, while each criterion addresses, in principle, a
different aspect of the products involved, which should be examined separately, the different criteria are "interrelated" and not mutually exclusive 302, so that certain evidence may well fall under more than one criterion. 303. Thus, in our view, that consumers smoke to satisfy an addiction or that they
smoke for pleasure are relevant to the examination of both end-uses and consumer tastes and habits, and accordingly, so is the question of whether consumers are willing to substitute clove and menthol cigarettes with other products.

128. We also recall that, in EC – Asbestos, the Appellate Body found that the panel had not
provided a complete picture of the "various end-uses of the different fibres in issue," because its analysis was "based on a small number of applications for which the products were substitutable," and because it is not disputed that both clove and menthol cigarettes are "to be smoked." Nevertheless, it is not exhaustive to describe the functions of cigarettes in this way. As a consequence, to find, as the Panel did, that the end-use of both clove and menthol cigarettes is "to be smoked," does not, in our view, provide sufficient guidance as to whether such products are like products within the meaning of Article 2.1 of the TBT Agreement.

129. An analysis of end-uses should be comprehensive and specific enough to provide meaningful
guidance as to whether the products in question are like products. It is not disputed that both clove
and menthol cigarettes are "to be smoked." Nevertheless, it is not exhaustive to describe the functions of cigarettes in this way. As a consequence, to find, as the Panel did, that the end-use of both clove and menthol cigarettes is "to be smoked," does not, in our view, provide sufficient guidance as to whether such products are like products within the meaning of Article 2.1 of the TBT Agreement.

295 Panel Report, para. 7.199.
296 United States' appellant's submission, para. 43.
297 United States' appellant's submission, para. 46.
298 United States' appellant's submission, para. 47.
299 United States' appellee's submission, para. 73.
300 United States' appellee's submission, para. 74.
302 Appellate Body Reports, Philippines – Distilled Spirits, para. 131. In that dispute, the Appellate
Body considered that factors such as the perceptibility of differences among the products and the products' presentation and labelling concern both physical characteristics and consumer tastes and habits. (Ibid., paras. 128 and 132).
Also cigars, loose tobacco, and herbs share the same end-use of being "smoked", although this does not say much as to whether all these products are like.\textsuperscript{305}

130. In our view, the Panel did not perform an analysis of the end-uses of clove and menthol cigarettes that was sufficiently comprehensive and specific to provide significant indications as to the likeness of these products. We agree with the United States that there are more specific permutations and functions of "smoking", which are relevant to the end-uses of cigarettes, such as "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". The Panel should have considered these permutations and functions in its evaluation of whether the products at issue are like. We also note, however, the argument by Indonesia that, even assuming that the end-uses put forward by the United States were "legitimate end-uses", the United States did not show that clove and menthol cigarettes were not both capable of performing the functions of "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".\textsuperscript{306}

131. The United States argues on appeal that menthol cigarettes are used to satisfy the nicotine addictions of millions of smokers in the United States, while clove cigarettes are primarily used for experimentation and special social settings and generally are not used to satisfy addiction. The Panel, however, found that "both menthol and clove cigarettes appeal to youth because of the presence of an additive that gives them a characterizing flavour having the effect of masking the harshness of tobacco".\textsuperscript{307} Both types of cigarettes are capable of performing a social/experimentation function and, thus, share the end-use of "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". At the same time, both clove and menthol cigarettes are capable of performing the function of "satisfying an addiction to nicotine", considering that both types of cigarettes contain nicotine, whose addictiveness is scientifically proven.\textsuperscript{308} The fact that more "addicts" smoke menthol than clove cigarettes does not mean that clove cigarettes cannot be smoked to "satisfy an addiction to nicotine". As we have observed above, what matters in determining a product's end-use is that a product is capable of performing it, not that such end-use represents the principal or the most common end-use of that product.

\textsuperscript{305}Similarly, to state that the end-use of alcoholic beverages is "to be drunk" would not distinguish alcoholic beverages from water, milk, or orange juice that are also consumed by drinking. In contrast, in \textit{Philippines – Distilled Spirits}, the specific end-use of alcoholic beverages was described as "thirst quenching, socialization, relaxation, pleasant intoxication". (Appellate Body Reports, \textit{Philippines – Distilled Spirits}, para. 171 (quoting Panel Reports, \textit{Philippines – Distilled Spirits}, para. 7.81))

\textsuperscript{306}Indonesia's appellee's submission, para. 73.

\textsuperscript{307}Panel Report, para. 7.231.

\textsuperscript{308}In its response to Panel Question 37, the United States notes that, "[w]ith respect to the addictive effects of regular, menthol and clove cigarettes, all of these products contain nicotine and are thus addictive." (United States' response to Panel Question 37, para. 85)

132. In the light of the above, we disagree with the Panel that the end-use of cigarettes is simply "to be smoked" and agree with the United States that there are more specific end-uses of cigarettes such as "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". We consider, however, that, based on the Panel's findings referred to above, it can be concluded that both clove and menthol cigarettes share the end-uses of "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". Accordingly, we consider that the more specific products' end-uses put forward by the United States also support the Panel's overall finding that clove and menthol cigarettes are like products.

3. Consumer Tastes and Habits

133. In addressing consumer tastes and habits in respect of clove and menthol cigarettes, the Panel stated that the legitimate objective of Section 907(a)(1)(A) of the FFDCA, namely, reducing youth smoking, delimited the scope of the consumers whose tastes and habits should be examined under this criterion.\textsuperscript{309} Accordingly, the Panel considered it appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers, which included young smokers and those ready to become smokers (potential consumers).\textsuperscript{310} The Panel found that the evidence submitted by the parties showed that both clove and menthol cigarettes, because of their characterizing flavours, which help to mask the harshness of tobacco, appeal to youth and are better vehicles for youth to start smoking than regular cigarettes.\textsuperscript{311} Therefore, the Panel concluded that, from the point of view of the consumers at issue in this case, menthol-flavoured and clove-flavoured cigarettes are "similar for the purpose of starting to smoke".\textsuperscript{312}

134. The United States claims that the Panel erred in considering the tastes and habits of only young smokers and potential young smokers, and not of current adult smokers. The United States notes that Section 907(a)(1)(A) makes regulatory distinctions among cigarettes based not only on their appeal to young and potential smokers, but also on their use by current adult smokers.\textsuperscript{313} The United States argues that nothing in the text of Article 2.1 of the \textit{TBT Agreement} provides a basis for the Panel to have limited its consideration of the public health distinctions drawn under the measure according to what the Panel construed to be the immediate objective of the measure.\textsuperscript{314}

\textsuperscript{309}Panel Report, para. 7.206.

\textsuperscript{310}Panel Report, para. 7.214.

\textsuperscript{311}Panel Report, para. 7.217.

\textsuperscript{312}Panel Report, para. 7.232.

\textsuperscript{313}United States' appellant's submission, para. 54.

\textsuperscript{314}United States' appellant's submission, para. 60.
135. The United States contends that a like product analysis under Article 2.1 must take account of the regulatory distinctions drawn under the measure at issue, which are not limited to the immediate or primary objective of a measure, but that often reflect a balancing of other considerations relevant to the public welfare. In particular, the United States argues that, even though the primary or immediate purpose of Section 907(a)(1)(A) is to reduce youth smoking, the measure was developed based on a consideration of the health benefits, risks, and consequences to the population as a whole, including the possible negative consequences of banning a type of cigarette, such as menthol cigarettes, to which millions of adults are chemically and psychologically addicted.\footnote{United States' appellant's submission, para. 62. The United States cites in particular to "possible increases in unregulated black market cigarettes or strain to the healthcare system". (United States' appellant's submission, para. 61.)}

136. We have disagreed with the Panel's approach to interpreting the concept of "likeness" in Article 2.1 of the TBT Agreement in the light of the regulatory objectives of the measure, rather than based on the competitive relationship between and among the products.\footnote{Section V.B.1 of this Report.} In particular, we have observed that the context of the TBT Agreement and its object and purpose do not suggest that the regulatory objectives of a technical regulation should play a role that is separate from the determination of a competitive relationship between and among products. We have also noted that determining likeness primarily in the light of the regulatory objectives of the measure is further complicated by the fact that measures, including technical regulations, often have multiple objectives. In contrast, we have considered that the determination of likeness under Article 2.1 of the TBT Agreement is a determination about the nature and the extent of a competitive relationship between and among products, and that the regulatory concerns that underlie a measure may be considered to the extent that they have an impact on the competitive relationship.\footnote{See supra, para. 119.}

137. In the light of the above, we also consider that the Panel was wrong in confining its analysis of consumer tastes and habits to those consumers (young and potential young smokers) that are the concern of the objective of the regulation (to reduce youth smoking). In an analysis of likeness based on products' competitive relationship, it is the market that defines the scope of consumers whose preferences are relevant. The proportion of youth and adults smoking different types of cigarettes may vary, but clove, menthol, and regular cigarettes are smoked by both young and adult smokers. To evaluate the degree of substitutability among these products, the Panel should have assessed the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers of clove and menthol cigarettes, particularly where it is clear that an important proportion of menthol cigarette smokers are adult consumers.

138. Moreover, without at this stage entering into the merits of the other objectives of the regulation advocated by the United States, the Panel's approach discounts the fact that the technical regulation at issue may also have other objectives that concern other actual and potential consumers of the products at issue. Therefore, we disagree with the Panel that the legitimate objective of Section 907(a)(1)(A), that is, reducing youth smoking, delimits the scope of the consumers whose tastes and habits should be examined to young smokers and potential young smokers.\footnote{Panel Report, paras. 7.206.}

139. Having determined that the Panel was wrong in confining its analysis of consumer tastes and habits to young and potential young smokers, we now consider whether the Panel's failure to evaluate the tastes and habits of current adult consumers of menthol cigarettes undermines the proposition that there is a sufficient degree of substitutability between clove and menthol cigarettes to support an overall finding of likeness under Article 2.1 of the TBT Agreement.

140. The United States claims that "evidence comparing the tastes and habits of younger, potential smokers and the tastes and habits of older, established smokers is directly relevant to the issue of consumer tastes and habits", because clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly among young and adult smokers. Accordingly, the United States argues, clove cigarettes present a unique risk to young, uninitiated smokers and have little to no impact on adults, while menthol cigarettes are a risk to young, uninitiated smokers, but also have a significant impact on adults.\footnote{United States' appellant's submission, para. 55.}

141. Indonesia submits that the United States failed to present evidence showing that consumers, whether adult or youth, would be unwilling to substitute clove and menthol cigarettes for the end-use of smoking. Indonesia argues that the United States is wrong in presuming that consumer tastes and habits must be identical to be like, considering that the Appellate Body found that products that are close to being perfectly substitutable can be like products. Indonesia contends that there is sufficient evidence on record supporting the fact that young smokers and pre-smoking youth view clove and menthol cigarettes "as at least close to substitutable".\footnote{Indonesia's appellant's submission, para. 82 (referring to Appellate Body Reports, Philippines – Distilled Spirits, para. 149).}

142. We consider that, in order to determine whether products are like under Article 2.1 of the TBT Agreement, it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like. In Philippines – Distilled Spirits, the Appellate Body considered that the standard of "directly
145. In the light of the above, we are of the view that, while the Panel should not have limited its analysis of consumer tastes and habits to young and potential young smokers to the exclusion of current adult smokers, this does not undermine the Panel's finding regarding consumer tastes and habits and its ultimate finding of likeness. This is so because the degree of competition and substitutability that the Panel found for young and potential young smokers is sufficiently high to support a finding of likeness under Article 2.1 of the TBT Agreement.

146. Finally, we turn to the claim by the United States that the Panel acted inconsistently with Article 11 of the DSU when it reached the conclusion that clove cigarettes and menthol cigarettes are perceived similarly by the consumers at issue in this case, and that it disregarded critical evidence on how consumers actually use and perceive the products at issue in the relevant market.

147. The United States emphasizes that clove cigarettes are smoked disproportionately by young, novice smokers while menthol cigarettes are smoked more evenly by young people and adults. It recalls that both parties presented evidence—in particular a set of surveys—aimed at shedding light on the tastes and habits of consumers in the United States in respect of clove and menthol cigarettes. However, the United States argues, the Panel disregarded this evidence after having erroneously concluded that it could not "rely on the information provided in the surveys on the basis that this information was not directly comparable". The United States submits that the survey data before the Panel were "directly relevant to the question" before it because the data provided evidence on how consumers and potential consumers "used and perceived different cigarettes in the United States".

148. Indonesia responds that, given that the research parameters varied from survey to survey, the Panel properly concluded that the survey data did not provide clear guidance on "consumer tastes and habits". In its view, the Panel's approach to that evidence "hardly amounts to excluding it a priori". Instead, the Panel "clearly articulated the difficulties it encountered in comparing the survey data and simply did not place the same weight on the evidence as did the United States. Indonesia further argues that the Panel identified and relied on evidence showing that both clove and menthol cigarettes

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Footnotes:

321 Appellate Body Reports, Philippines – Distilled Spirits, para. 220.
322 Appellate Body Reports, Philippines – Distilled Spirits, para. 221 (referring to Panel Report, Chile – Alcoholic Beverages, para. 7.43). (original emphasis)
323 In EC – Asbestos, the Appellate Body, while not defining the precise scope of the concept of "like products" in Article III:4, found that Article III:4 applies to products that are in a competitive relationship and that "the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence". (Appellate Body Report, EC – Asbestos, para. 99)
324 Panel Report, para. 7.232.
325 United States' appellant's submission, para. 64.
326 United States' appellant's submission, para. 66 (quoting Panel Report, para. 7.210).
327 United States' appellant's submission, para. 67. (original emphasis)
328 N/A
329 Indonesia's appellee's submission, para. 106.
330 Indonesia's appellee's submission, para. 115.
are "trainer" or "starter" cigarettes that appeal to youth. Based on this evidence on record, the Panel properly found that "all these flavoured cigarettes are perceived as vehicles to start smoking".

We observe that Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. Thus, Article 11 requires a panel to "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." In addition, panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties." In this respect, the Appellate Body will not "interfere lightly" with a panel's fact-finding authority, and will not "base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding". Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the initial trier of facts. As the initial trier of facts, a panel must provide "reasoned and adequate explanations and coherent reasoning", must base its finding on a sufficient evidentiary basis, and must treat evidence with "even-handedness". Moreover, a participant claiming that a panel disregarded certain evidence must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.

Both the United States and Indonesia relied on a series of surveys addressing smoking patterns in the United States in order to support their respective arguments. The Panel observed, however, that these surveys "do not share the same research parameters"; instead, they "examine[d] different age groups", "pose[d] different questions", and were "based on different methodological approaches". Consequently, in the Panel's view, the information contained in the different surveys was "not directly comparable". On this basis, the Panel reached the conclusion that it could not "rely on the information [that the surveys] provide on market shares for the purposes of analyzing the consumers' tastes and habits criterion", and that "the evidence on consumer preferences submitted by the parties may not provide clear guidance" as to whether clove and menthol cigarettes are substitutable from the perspective of young smokers and potential young smokers.

We acknowledge that extracting meaningful information from surveys that differ considerably in terms of research parameters might not be an easy task. Likewise, we do not suggest that panels must always be capable of engaging in sophisticated statistical exercises to solve data discrepancies that ultimately cannot be resolved. However, the fact that evidence relied on by the parties may be difficult to compare cannot excuse the panel from examining it. A panel has the obligation to "consider all the evidence presented to it" and it should at least attempt to extract potentially relevant information contained therein. It is only after such an examination that a panel might be able to provide "reasoned and adequate explanations" as to why it cannot or chooses not to rely on specific evidence submitted by the parties. In our view, a panel cannot determine a priori that some pieces of evidence are not reliable for the purposes of its analysis solely on the basis of a difference in the parameters and methodology used.

We recall, however, that not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. A participant claiming that a panel ignored certain evidence must explain why that evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment. In that respect, the United States submits that, because the Panel did not examine the evidence related to consumers' tastes and habits, the Panel's finding with respect to this criterion "was fatally flawed". In the United States' view, the survey data presented by the parties "show that consumers and potential consumers use and perceive..."
clove and menthol cigarettes differently—even though they are both cigarettes with characterizing flavors that appeal to youth".\(^{349}\)

153. We have considered above, in respect of the claim by the United States that the Panel erred in the application of the consumer tastes and habits criterion, that, although the Panel should not have limited its analysis to young and potential young consumers, to the exclusion of current adult consumers, this did not affect its finding that there is sufficient substitutability between clove and menthol cigarettes to support its overall finding that the products are like. The Panel’s findings show that, while clove and menthol cigarettes do not compete in the whole market, these products are substitutable for young and potential young consumers.

154. Therefore, in our view, the fact that the Panel did not rely on evidence demonstrating that clove cigarettes are disproportionately smoked by youth while menthol cigarettes are smoked by both youth and adults, does not have material consequences for the Panel’s finding on consumer tastes and habits. This is so because the Panel found that there is a sufficient degree of substitutability, at least in some segments of the market, between clove and menthol cigarettes, to support a finding of likeness under Article 2.1 of the TBT Agreement.

155. In sum, we are not persuaded that the reasons advanced by the Panel for not relying on the surveys submitted by the parties justify the cursory treatment given by the Panel to these surveys. Even if this evidence was not directly comparable or based on different methodological approaches, the Panel was required to consider this evidence and extract relevant information that it contained. The Panel did not provide an adequate explanation as to why this was not possible. Nevertheless, in our view, the Panel’s error does not amount to a violation of Article 11 of the DSU, considering that the evidence that the Panel did not engage with does not have material consequences for the Panel’s finding that consumer tastes and habits indicate that clove and menthol cigarettes are sufficiently substitutable in certain segments of the market, and does not, therefore, undermine the Panel’s finding that clove and menthol cigarettes are like products under Article 2.1 of the TBT Agreement.

4. Conclusion on "Like Products"

156. We have disagreed with the Panel’s interpretation of the concept of "like products" in Article 2.1 of the TBT Agreement, which focuses on the purposes of the technical regulation at issue, as separate from the competitive relationship between and among the products. In contrast, we have concluded that the context provided by Article 2.1 itself, by other provisions of the TBT Agreement, by the TBT Agreement as a whole, and by Article III:4 of the GATT 1994, as well as the object and purpose of the TBT Agreement, support an interpretation of the concept of "likeness" in Article 2.1 that is based on the competitive relationship between and among the products and that takes into account the regulatory concerns underlying a technical regulation, to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the products’ competitive relationship.

157. As a consequence of our interpretative approach to the concept of "like products" in Article 2.1 of the TBT Agreement, we have also disagreed with the Panel’s decision to examine the extent of substitutability of clove and menthol cigarettes from the perspective of a limited group of consumers, that is, young smokers and potential young smokers. We have, nevertheless, considered that the Panel’s error does not vitiate the conclusion that there is a sufficient degree of substitutability between clove and menthol cigarettes to support an overall finding of likeness under Article 2.1 of the TBT Agreement. We have also determined that the Panel’s decision that it could not rely on certain evidence submitted by the parties did not amount to an error under Article 11 of the DSU.

158. In respect of end-use, we have disagreed with the Panel’s conclusion that the end-use of clove and menthol cigarettes is simply "to be smoked". Nevertheless, we have considered, based on the Panel’s findings, that both clove and menthol cigarettes are capable of performing the more specific end-uses put forward by the United States, that is, "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".\(^{350}\) We have thus concluded that the different end-uses of clove and menthol cigarettes support the Panel’s overall finding of likeness.

159. Finally, we observe that the United States has not appealed the Panel’s findings regarding the physical characteristics and the tariff classification of clove and menthol cigarettes. The Panel found that clove and menthol cigarettes are physically similar as “they share their main traits as cigarettes, that is, having tobacco as a main ingredient, and an additive which imparts a characterizing flavour, taste and aroma, and reduces the harshness of tobacco”\(^{351}\); and that they are both classified under subheading 2402.20 of the Harmonized Commodity Description and Coding System.\(^{352}\)

160. In the light of all of the above, while we disagree with certain aspects of the Panel’s analysis, we agree with the Panel that the "likeness" criteria it examined support its overall conclusion that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the TBT Agreement. Therefore, we uphold, albeit for different reasons, the Panel’s finding, in

\(^{349}\)United States’ appellant’s submission, para. 69.

\(^{350}\)Panel Report, para. 7.231; United States’ response to Panel Question 37, para. 85.

\(^{351}\)Panel Report, para. 7.187.

\(^{352}\)Panel Report, para. 7.239.
paragraph 7.248 of the Panel Report, that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the TBT Agreement.

C. The Panel's Finding that Section 907(a)(1)(A) of the FFDCA Accords Imported Clove Cigarettes Less Favourable Treatment than That Accorded to Domestic Menthol Cigarettes, within the Meaning of Article 2.1 of the TBT Agreement

1. Introduction

161. In this section, we address the United States’ appeal of the Panel’s finding that the United States acted inconsistently with Article 2.1 of the TBT Agreement by according to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products.

162. Having concluded that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the TBT Agreement, the Panel undertook a four-step analysis to determine whether Section 907(a)(1)(A) of the FFDCA accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to like domestic products. First, the Panel sought to determine the products to be compared in its analysis.353 The Panel found that Article 2.1 called for a comparison between treatment accorded to, on the one hand, clove cigarettes imported from Indonesia, and, on the other hand, domestic menthol cigarettes.354 Second, the Panel determined that under Section 907(a)(1)(A) clove and menthol cigarettes are treated differently, in that clove cigarettes are banned while menthol cigarettes are excluded from the ban.355 Third, the Panel found that such difference in treatment modifies the conditions of competition to the detriment of the imported products, insofar as imported clove cigarettes are banned while domestic menthol cigarettes are allowed to remain in the market.356 Fourth and finally, the Panel rejected the United States’ argument that such detrimental impact could be “explained by factors or circumstances unrelated to the foreign origin of the products”357, because Section 907(a)(1)(A) imposes costs on foreign producers, notably producers in Indonesia, while at the same time imposing no costs on any US entity.358

163. On appeal, the United States claims that the Panel improperly narrowed the product scope of its analysis by focusing exclusively on treatment accorded to imported clove cigarettes and to domestic menthol cigarettes. The United States posits that the Panel should have compared the treatment accorded to the group of imported and to the group of domestic like products. The United States also claims that the Panel improperly narrowed the temporal scope of its analysis by focusing exclusively on the effects of Section 907(a)(1)(A) on domestic like products at the time the ban on flavoured cigarettes came into effect. The United States claims further that the Panel erred in finding that the less favourable treatment accorded to imported clove cigarettes was related to the origin of the products, because Section 907(a)(1)(A) imposes costs on foreign producers while at the same time imposing no costs on any US entity. Finally, the United States claims that the Panel acted inconsistently with Article 11 of the DSU in reaching these findings.

164. Indonesia responds that the Panel properly identified the products to be compared in its less favourable treatment analysis, and did not err in establishing the appropriate timeframe for its comparison. Indonesia also asserts that the Panel correctly found that the less favourable treatment accorded to imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the imported products. Finally, Indonesia claims that the Panel acted in accordance with Article 11 of the DSU in performing its analysis.

165. Before turning to the specific issues raised by the United States on appeal, we find it useful to interpret the “treatment no less favourable” requirement of Article 2.1 of the TBT Agreement in the light of the conflicting interpretations of this phrase offered by the participants on appeal.

2. "Treatment No Less Favourable" under Article 2.1 of the TBT Agreement

166. Referring to the Appellate Body’s interpretation of Article III:4 of the GATT 1994359, the United States and Indonesia agree that the "treatment no less favourable" standard of Article 2.1 of the TBT Agreement requires a panel to determine whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the imported products. However, Indonesia considers that the existence of any detrimental effect on competitive opportunities for imported products is sufficient to establish less favourable treatment under Article 2.1.360 In contrast, the United States argues that the existence of a detrimental effect on competitive opportunities for imports is necessary, but not sufficient, to establish a violation of Article 2.1. Referring to the Appellate Body report in Dominican Republic – Import and Sale of Cigarettes, the United States

353Panel Report, para. 7.270.
355Panel Report, paras. 7.279 and 7.280.
356Panel Report, para. 7.281.
357Panel Report, para. 7.283 (referring to United States’ second written submission to the Panel, para. 127, in turn referring to Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 96).
358Panel Report, para. 7.289.
359See Appellate Body Report, Korea – Various Measures on Beef, para. 137.
360Indonesia’s appellee’s submission, para. 172.
argues that Article 2.1 requires further inquiry into whether "the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product." 361

171. The context provided by Article 2.2 suggests that obstacles to international trade may be permitted insofar as they are not found to be "unnecessary", that is, "more trade-restrictive than necessary to fulfill a legitimate objective". 362 To us, this supports a reading that Article 2.1 does not operate to prohibit any obstacle to international trade. Indeed, if any obstacle to international trade would be sufficient to establish a violation of Article 2.1, Article 2.2 would be deprived of its "de jure" effect.

172. This interpretation of Article 2.1 is buttressed by the sixth recital of the preamble of the TBT Agreement, in which WTO Members recognize that:

- Members shall ensure that in respect of technical regulations, imports of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

173. The language of the sixth recital expressly acknowledges that Members may take measures that accord less favourable treatment within the meaning of Article 2.1. The context and object and purpose of the TBT Agreement weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both "de jure" and "de facto" discrimination between products from different origins.

174. Finally, as noted earlier, the objective of trade liberalization and, on the other hand, Members' right to regulate through technical regulations is to strike a balance. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact is intended to ensure the quality of exports, or for the protection of human, animal, or plant life or health, or for the prevention of deceptive practices, at the levels that are not found to be "unnecessary", that is, "more trade-restrictive than necessary to fulfill a legitimate objective". 363
de facto discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.

176. Like the participants, we also find it useful to consider the context provided by the other covered agreements. In particular, we note that the non-discrimination obligation of Article 2.1 of the TBT Agreement is expressed in the same terms as that of Article III:4 of the GATT 1994. In the context of Article III:4, the "treatment no less favourable" requirement has been widely interpreted by previous GATT and WTO panels and by the Appellate Body. Beginning with the GATT panel in US – Section 337 Tariff Act, the term "treatment no less favourable" in Article III:4 was interpreted as requiring "effective equality of opportunities for imported products". Subsequent GATT and WTO panels followed a similar approach, and found violations of Article III:4 in cases where regulatory distinctions in enforcement procedures, distribution channels, statutory content requirements, and allocation of import licenses resulted in alteration of the competitive opportunities in the market for the regulation of Member to the detriment of imported products vis-à-vis domestic products.

177. In Korea – Various Measures on Beef, the Appellate Body agreed that the analysis of less favourable treatment under Article III:4 focuses on the "conditions of competition" between imported and domestic like products. The Appellate Body further clarified that a formal difference in treatment between imported and like domestic products is:

... 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.

178. Subsequently, in EC – Asbestos, the Appellate Body explained that imports will be treated less favourably than domestic like products when regulatory distinctions disadvantage the group of imported products vis-à-vis the group of domestic like products. The Appellate Body reasoned that the "treatment no less favourable" clause of Article III:4:

... 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.

179. Thus, the "treatment no less favourable" standard of Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products.

180. Although we are mindful that the meaning of the term "treatment no less favourable" in Article 2.1 of the TBT Agreement is to be interpreted in the light of the specific context provided by the TBT Agreement, we nonetheless consider these previous findings by the Appellate Body in the context of Article III:4 of the GATT 1994 to be instructive in assessing the meaning of "treatment no less favourable", provided that the specific context in which the term appears in Article 2.1 of the TBT Agreement is taken into account. Similarly to Article III:4 of the GATT 1994, Article 2.1 of the TBT Agreement requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products. Article 2.1 prescribes such

363 Article III:4 of the GATT 1994 reads:

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.


365 GATT Panel Report, Canada – Provincial Liquor Boards (US), paras. 5.12-5.16.


372 We disagree with the United States to the extent that it suggests that Dominican Republic – Import and Sale of Cigarettes stands for the proposition that, under Article III:4, panels should inquire further whether "the detrimental effect is unrelated to the foreign origin of the product". (United States' appellant's submission, para. 101; (referring to Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 96)).

373 Although the statement referred to by the United States, when read in isolation, could be viewed as suggesting that further inquiry into the rationale for the detrimental impact is necessary, in that dispute the Appellate Body rejected Honduras' claim under Article III:4 because:

... the difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market).


Thus, in that dispute, the Appellate Body merely held that the higher per unit costs of the bond requirement for imported cigarettes did not conclusively demonstrate less favourable treatment, because it was not attributable to the specific measure at issue but, rather, was a function of sales volumes. In Thailand – Cigarettes (Philippines), the Appellate Body further clarified that for a finding of less favourable treatment under Article III:4 "there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably. (Appellate Body Report, Thailand – Cigarettes (Philippines), para. 134) The Appellate Body eschewed an additional inquiry as to whether such detrimental impact was related to the foreign origin of the products or explained by other factors or circumstances.
treatment specifically in respect of technical regulations. For this reason, a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products.

181. However, as noted earlier, the context and object and purpose of the TBT Agreement weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. Rather, for the aforementioned reasons\(^\text{373}\), the "treatment no less favourable" requirement of Article 2.1 only prohibits \textit{de jure} and \textit{de facto} discrimination against the group of imported products.

182. Accordingly, where the technical regulation at issue does not \textit{de jure} discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.

3. Product Scope of the "Treatment No Less Favourable" Comparison

183. We now turn to the specific issues raised by the United States on appeal. We begin with the United States' appeal of the scope of products considered by the Panel to determine whether imported clove cigarettes are treated less favourably than US domestic like products within the meaning of Article 2.1 of the TBT Agreement.

184. Before the Panel, Indonesia argued that the "treatment no less favourable" requirement of Article 2.1 calls for a comparison between, on the one hand, treatment accorded to imported clove cigarettes and, on the other hand, treatment accorded to any like domestic cigarettes that are not banned by Section 907(a)(1)(A) of the FFDCA (that is, menthol or regular cigarettes, but not other flavoured cigarettes, which are prohibited under Section 907(a)(1)(A)).\(^\text{374}\) The United States responded that the Panel should compare treatment accorded under Section 907(a)(1)(A) to all imported cigarettes (to the extent they are like) and not just clove cigarettes, with the treatment accorded to all domestically produced like cigarettes.\(^\text{375}\)

185. The Panel determined that the comparison should be between the treatment accorded to imported clove cigarettes and that accorded to the domestically produced cigarettes that it had earlier found to be like products, that is, menthol cigarettes. It reasoned that:

Article 2.1 of the TBT Agreement calls for a comparison of "products imported from the territory of any Member" with "like products of national origin".\(^\text{376}\) These provisions refer to the products imported from the territory of "any other Member", and not "Members" or "other Members" more generally. The imported products in this case are the products imported from the territory of Indonesia. And it appears to be common ground between the parties that the vast majority of cigarettes that were imported from Indonesia into the United States were clove cigarettes.\(^\text{377}\) (original emphasis; footnote omitted)

On the domestic side, we recall that we have found that menthol cigarettes are "like" clove cigarettes for the purpose of Article 2.1 of the TBT Agreement because, \textit{inter alia}, they both contain an additive that provides them with a characterizing flavour which makes them appealing to youth. We have not entered into an analysis of whether domestic regular cigarettes are "like" imported clove cigarettes as we consider that we would be exceeding our terms of reference.\(^\text{378}\)

186. On appeal, the United States claims that the Panel erred in \textit{a priori} limiting its less favourable treatment comparison to one imported product (Indonesian clove cigarettes) and one domestic like product (menthol cigarettes). Referring to the Appellate Body report in \textit{EC – Asbestos} and the panel report in \textit{US – Tuna II (Mexico)}, the United States argues that Article 2.1 required the Panel to compare the treatment accorded to all imported and domestic like products as a group.\(^\text{379}\) For the United States, a proper comparison would have demonstrated that Section 907(a)(1)(A) does not alter the conditions of competition between imported and domestic like products as a group.\(^\text{380}\)

187. With respect to the imported products, the United States argues that the Panel erred in failing to consider the treatment accorded to menthol cigarettes imported from other countries.\(^\text{381}\) According to the United States, the reference to imported products of "any other Member" in Article 2.1 does not justify the Panel's focus on Indonesian clove cigarettes, because Article 2.1 aims at discerning

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\(^{373}\)See \textit{supra}, paras. 97-101.

\(^{374}\)Panel Report, para. 7.271.

\(^{375}\)Panel Report, para. 7.272.

\(^{376}\)Panel Report, para. 7.275.

\(^{377}\)Panel Report, para. 7.277.


\(^{379}\)United States' appellant's submission, para. 81.

\(^{380}\)United States' appellant's submission, para. 79.
legitimate regulatory distinctions from those that serve as a proxy for singling out the like products of the complaining Member\(^{381}\) for less favourable treatment.

188. With respect to like domestic products, the United States argues that the Panel erred in failing to consider the treatment accorded to domestic flavoured cigarettes.\(^{382}\) To the extent that the Panel limited its analysis to domestic menthol cigarettes by virtue of the product scope of Indonesia’s panel request, the United States maintains that a panel’s terms of reference do not limit the scope of the products to be considered in a discrimination claim.\(^{383}\)

189. For its part, Indonesia responds that the Panel did not err in comparing the treatment accorded to imported clove cigarettes with the treatment accorded to domestic menthol cigarettes. Indonesia argues that the Panel correctly limited its less favourable treatment comparison to those imported and domestic products that it reviewed in its likeness analysis.\(^{384}\) Whereas the Appellate Body in EC – Asbestos and the panel in US – Tuna II (Mexico) engaged in a likeness analysis on the basis of groups of products, the Panel in this case correctly limited its analysis to the specific products at issue, namely, imported clove cigarettes and domestic menthol cigarettes.\(^{385}\) Indonesia further maintains that the Panel did not rely on its terms of reference to limit the product scope of its less favourable treatment comparison, but rather on its determination of the scope of its likeness analysis.\(^{386}\)

190. Article 2.1 provides that “products imported from the territory of any Member”\(^{387}\) shall be accorded treatment no less favourable than that accorded to “like products of national origin and like products originating in any other country”. The text of Article 2.1 thus calls for a comparison of treatment accorded to, on the one hand, products imported from any Member alleging a violation of Article 2.1, and treatment accorded to, on the other hand, like products of domestic and any other origin. Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin.

191. In determining what are the “like products of national origin and like products originating in any other country”, a panel must seek to establish, based on the nature and extent of the competitive relationship between the products in the market of the regulating Member, the products of domestic (and other) origin(s) that are like the products imported from the complaining Member. In determining what the like products at issue are, a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member in its panel request. Rather, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision.

192. To be clear, a panel’s duty under Article 2.1 to identify the products of domestic and other origins that are like the products imported from the complaining Member does not absolve the complainant from making a \textit{prima facie} case of violation of Article 2.1. Ordinarily, in discharging that burden, the complaining Member will identify the imported and domestic products that are allegedly like and whose treatment needs to be compared for purposes of establishing a violation of Article 2.1. The products identified by the complaining Member are the starting point in a panel’s likeness analysis. However, Article 2.1 requires panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member.\(^{388}\)

193. Once the imported and domestic like products have been properly identified, Article 2.1 requires a panel dealing with a national treatment claim to compare, on the one hand, the treatment accorded under the technical regulation at issue to all like products imported from the complaining Member with, on the other hand, that accorded to all like domestic products. However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the group of imported products is no less favourable than that accorded to the group of like domestic products. As noted by the Appellate Body in the context of Article III:4 of the GATT 1994:

\[
\text{[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.}^{389}\text{ (original emphasis)}
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194. In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, the group of products imported from the complaining Member and, on the other hand, the treatment accorded to the group of like domestic products. In determining what

\(^{381}\)United States’ appellant’s submission, para. 84.

\(^{382}\)United States’ appellant’s submission, para. 79.

\(^{383}\)United States’ appellant’s submission, para. 87.

\(^{384}\)Indonesia’s appellee’s submission, paras. 138 and 139.

\(^{385}\)Indonesia’s appellee’s submission, paras. 123-130.

\(^{386}\)Indonesia’s appellee’s submission, paras. 147 and 148.

\(^{387}\)Emphasis added.

\(^{388}\)See Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 1131.

\(^{389}\)Appellate Body Report, EC – Asbestos, para. 100.
the scope of like imported and domestic products is, a panel is not limited to those products specifically identified by the complaining Member. Rather, a panel must objectively assess, based on the nature and extent of their competitive relationship, what are the domestic products that are like the products imported from the complaining Member. Once the universe of imported and domestic like products has been identified, the treatment accorded to all like products imported from the complaining Member must be compared to that accorded to all like domestic products. The "treatment no less favourable" standard of Article 2.1 does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining Member is treated no less favourably than the group of domestic like products.

Against this analytical framework, we turn to the United States' specific allegations of error. The United States essentially claims that the Panel impermissibly narrowed the scope of products to be compared for the purpose of assessing Indonesia's claim that Section 907(a)(1)(A) violates the national treatment obligation of Article 2.1.

With respect to the group of imported products, the United States claims that the Panel erred in failing to include in its analysis treatment accorded to menthol cigarettes imported into the United States from all Members. We cannot agree. As noted earlier, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to the group of like products imported from the Member alleging a violation of Article 2.1, and treatment accorded to the group of like domestic products. It follows that the Panel did not err in finding that a determination of Indonesia's claims under Article 2.1 required an examination of whether Section 907(a)(1)(A) accords to the group of products imported from Indonesia less favourable treatment than that accorded to the group of like products of US origin.

In determining the group of products imported from Indonesia whose treatment needed to be compared with the treatment accorded to like domestic products, the Panel found that it was uncontested that the "vast majority" of cigarettes that were imported from Indonesia into the United States were clove cigarettes. The Panel also observed that only "a small percentage of non-clove cigarettes" was imported from Indonesia into the United States. Accordingly, the Panel did not err in finding that the group of products imported from Indonesia essentially consisted of clove cigarettes.

With respect to the group of like domestic products, the United States' challenge focuses on the Panel's exclusion of domestically produced flavoured cigarettes from its less favourable treatment analysis. The Panel felt bound by its terms of reference to limit its likeness analysis to two categories of products regulated under Section 907(a)(1)(A)—imported clove cigarettes and domestic menthol cigarettes—and accordingly limited its less favourable treatment analysis to a comparison of the treatment accorded to those two product groups. The Panel did not address domestic flavoured cigarettes at either the likeness or the less favourable treatment stage of its analysis.

We note, however, that the United States does not challenge on appeal the Panel's exclusion of domestically produced flavoured cigarettes from the likeness stage of its analysis. Rather, the United States' challenge focuses exclusively on the Panel's exclusion of domestically produced flavoured cigarettes from the less favourable treatment stage of its analysis. Because Article 2.1 expressly limits the scope of the less favourable treatment comparison to imported and domestic like products, in the absence of specific findings by the Panel that domestically produced flavoured cigarettes other than menthol are like clove cigarettes, we cannot determine whether the Panel erred in failing to include domestically produced flavoured cigarettes in its less favourable treatment comparison.

Even assuming, for the sake of argument, that the Panel had found that domestic flavoured cigarettes are like clove cigarettes imported from Indonesia, we are not persuaded that this would have changed the Panel's ultimate conclusion that Section 907(a)(1)(A) modifies the conditions of competition to the detriment of the group of imported products vis-à-vis like domestic products. Aside from the Panel's finding that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes" in the US market—which is challenged by the United States and addressed below—the Panel did not have evidence on the record that flavoured cigarettes other than menthol cigarettes had "any sizable market share in the United States prior to the implementation of the ban in 2009". To the contrary, in response to a Panel question, the United States confirmed that the non-clove-flavoured cigarettes banned under Section 907(a)(1)(A) "were on the market for a relatively short period of time and represented a relatively small market share". Therefore, we consider it safe to assume that, given their relatively low share in the US market, the inclusion of domestically produced flavoured cigarettes in the comparison would not have altered the Panel's ultimate conclusion that the group of like domestic products essentially consisted of domestic menthol cigarettes.

Panel Report, para. 7.275.
Panel Report, footnote 503 to para. 7.275 (referring to United States' response to Panel Question 81, in turn referring to World Trade Atlas, Indonesia Cigarette Exports to the United States, 1998-2009 (Panel Exhibit US-134)).
4. Temporal Scope of the "Treatment No Less Favourable" Comparison

201. To the extent that the Panel's exclusion of domestic flavoured cigarettes other than menthol cigarettes from its analysis stemmed from its finding that those products were not on the market at the time when the ban came into effect, the United States submits that this constitutes legal error. In particular, the United States claims that the Panel erred in \emph{a priori} excluding from its analysis evidence concerning the effects of Section 907(a)(1)(A) of the FFDCA on domestic like products prior to the entry into force of the ban on flavoured cigarettes. Moreover, the United States claims that the Panel acted inconsistently with Article 11 of the DSU in ignoring evidence demonstrating that there were domestic flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban.\footnote{United States' appellant's submission, paras. 97 and 98.}

(a) Application of Article 2.1 of the \textit{TBT Agreement}

202. The United States argues that Article 2.1 of the \textit{TBT Agreement} does not establish a rigid temporal limitation in relation to the evidence that a panel may consider in performing a less favourable treatment analysis. For this reason, the United States argues that the Panel should have taken into account evidence demonstrating that there were domestically produced flavoured cigarettes on the market "in the years closely preceding the effective date of the ban".\footnote{United States' appellant's submission, para. 92.} Section 907(a)(1)(A) was enacted specifically to respond to an "emerging trend of products", and closed off a "potential market" that US producers were actively exploring as recently as 2008.\footnote{United States' appellant's submission, para. 93.} Therefore, the fact that the ban on flavoured cigarettes went into effect before US producers were able to "saturate" the market with those products should not be construed as evidence that US producers were not affected by the ban.\footnote{United States' appellant's submission, para. 94.}

203. Indonesia responds that the United States' appeal of the relevant timeframe for the Panel's analysis is irrelevant, because the Panel properly compared only the treatment accorded to the products found to be like in this dispute—imported clove and domestic menthol cigarettes—both of which were on the market before the ban went into effect.\footnote{Indonesia's appellee's submission, para. 151.} Indonesia agrees with the United States that Article 2.1 establishes "no rigid temporal limitation" on the timeframe of the analysis, and affords panels discretion in selecting the appropriate period.\footnote{Indonesia's appellee's submission, para. 152 (quoting United States's appellant's submission, para. 92).}

204. The United States' challenge is directed at the Panel's statement that:

\textit{... at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for approximately 25 per cent of the market and for a very significant proportion of the cigarettes smoked by youth in the United States. (emphasis added; footnote omitted)}

205. In the present dispute, the Panel's mandate was established by its terms of reference, as defined in Indonesia's panel request. These terms of reference required the Panel to determine whether Section 907(a)(1)(A) was consistent with various provisions of the \textit{TBT Agreement} and of the GATT 1994 at the date of the Panel's establishment. Accordingly, the Panel was required to assess whether there existed a violation of those Agreements at that time and, if so, to make a recommendation that the United States bring its measure into compliance. It follows that, in relation to Indonesia's claim under Article 2.1 of the \textit{TBT Agreement}, the Panel was required to assess, as of the date of its establishment, whether Section 907(a)(1)(A) is a technical regulation that accords to products imported from Indonesia less favourable treatment than that accorded to like domestic products.

206. We agree with the participants that Article 2.1 does not establish a rigid temporal limitation on the evidence that the Panel could review in assessing Indonesia's claim under Article 2.1. Nothing in Article 2.1 enjoins panels from taking into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel's assessment of the consistency of the measure at that point in time. This is particularly so in the case of a \textit{de facto} discrimination claim, where a panel must base its determination on the totality of facts and circumstances before it, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue. Therefore, evidence that Section 907(a)(1)(A) had "chilling" regulatory effects on domestic producers of flavoured cigarettes prior to the entry into force of the ban on those cigarettes could be relevant in the Panel's assessment of Indonesia's claim under Article 2.1.

207. In the present dispute, it is not clear that the Panel considered Article 2.1 to prohibit review of evidence pre-dating the entry into force of Section 907(a)(1)(A). As noted earlier, the Panel did not explain why it did not include domestic flavoured cigarettes other than menthol cigarettes in the group of like domestic products. In any event, the Panel's statement that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol" on the US market, was not the basis for the Panel's exclusion of domestic flavoured cigarettes from the less favourable treatment analysis. Rather, it was the basis for its finding that Section 907(a)(1)(A) imposes "costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any
US entity. 404 This finding by the Panel is challenged by the United States on appeal, and addressed in subsection V.C.5 of this Report.

(b) Article 11 of the DSU

208. The United States claims that the Panel acted inconsistently with Article 11 of the DSU in disregarding evidence demonstrating that, at the time of the ban, domestic flavoured cigarettes other than menthol cigarettes were marketed in the United States. 405

209. Indonesia responds that the Panel did consider the evidence submitted by the United States in this regard but was ultimately not persuaded by it. 406 According to Indonesia, in weighing the evidence before it, the Panel did not act inconsistently with Article 11 of the DSU.

210. We recall that Article 11 of the DSU requires a panel to “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”. 407 Within these parameters, “it is generally within the discretion of the [panel to decide] which evidence it chooses to utilize in making findings” 408, and panels “are not required to accord to factual evidence of the parties the same meaning and weight as do the parties”. 409

211. We observe that, in finding that “at the time of the ban there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for 25 per cent of the market” 410, the Panel noted:

The United States argues that there is evidence showing that U.S.-produced cigarettes with characterizing flavours were on the market in 2008 and 2009 (United States’ second written submission, para. 132). In this regard, the United States points to exhibits US-52 and US-62. In our view, none of the exhibits submitted demonstrate that U.S.-produced flavour cigarettes were being sold on the market as of the entry into force of Section 907(a)(1)(A). Exhibit US-52 only contains the “known and possible flavoured cigarette brands sold in the United States” as of 2008. Thus, it does not shed light upon the brands of cigarettes present in the U.S. market at the time Section 907(a)(1)(A) entered into force. Exhibit US-62 lists the flavoured cigarette brands that were certified as “fire-safe” brands in the States of New York and Maine as of 2009. Although this exhibit extends until the entry into force of Section 907(a)(1)(A), it does not demonstrate which brands and types of cigarettes were actually being sold on the U.S. market on that date. Rather, it merely lists the brands cigarettes certified as “fire-safe”. We therefore stand by our conclusion. 411

212. Thus, it appears that the Panel did not disregard the evidence that, according to the United States, demonstrated the presence of domestically produced flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban. Rather, the Panel reviewed that evidence but was ultimately not persuaded by it. In determining the weight to be attributed to the evidence before it, the Panel did not act inconsistently with Article 11 of the DSU. In particular, the Panel did not exceed its authority under Article 11 of DSU merely by attributing to the evidence a weight and significance different from that attributed to it by the United States.

5. Detrimental Impact on Imported Products

213. Finally, the United States claims that, even if the Appellate Body were to agree with the comparison undertaken by the Panel in its less favourable treatment analysis, the Panel nonetheless erred in finding that the detrimental effect on competitive opportunities for imported clove cigarettes was not “explained by factors unrelated to the foreign origin of those products”. 412

214. The United States does not challenge on appeal the Panel’s findings that Section 907(a)(1)(A) of the FFDCA accords different treatment to imported clove cigarettes and to domestic menthol cigarettes, and that such differential treatment is to the detriment of the imported product, insofar as clove cigarettes are banned while menthol cigarettes are permitted. 413 Accordingly, the Panel’s conclusion that Section 907(a)(1)(A) modifies the conditions of competition in the US market to the detriment of imported clove cigarettes stands.

215. However, as noted earlier 414, the existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of domestic like products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the TBT Agreement. Where the technical regulation at issue does not de jure discriminate against imports, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in

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404 Panel Report, para. 7.289.
405 United States’ appellant’s submission, paras. 97 and 98.
406 Indonesia’s appellee’s submission, paras. 158 and 162.
410 Panel Report, para. 7.289.
411 Panel Report, footnote 524 to para. 7.289.
412 United States’ appellant’s submission, para. 99 (referring to Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 96).
413 Panel Report, paras. 7.279-7.281.
414 See supra, paras. 174 and 175.
order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.

216. Before the Panel, the United States argued that the exemption of menthol cigarettes from the ban on flavoured cigarettes is unrelated to the origin of the products, because it addresses two distinct objectives: one relates to the potential impact on the US health care system associated with the need to treat “millions” of menthol cigarette addicts with withdrawal symptoms; and the other relates to the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers.\(^{415}\)

217. The Panel considered that “the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes” did not constitute legitimate objectives, because:

> These reasons which the United States has presented as constituting a legitimate objective by themselves, appear to us as relating in one way or another to the costs that might be incurred by the United States were it to ban menthol cigarettes. Indeed, the United States is not banning menthol cigarettes because it is not a type of cigarette with a characterizing flavour that appeals to youth, but rather because of the costs that might be incurred as a result of such a ban. We recall that at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for approximately 25 per cent of the market and for a very significant proportion of the cigarettes smoked by youth in the United States. It seems to us that the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any U.S. entity.\(^{416}\)

218. On appeal, the United States claims that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products.\(^{420}\) The United States argues that, “even where a technical regulation adversely affects the competitive situation of imported products compared to like domestic products, this does not constitute less favourable treatment when the detrimental effect is unrelated to the foreign origin of the product.”\(^{421}\) According to the United States, many factors affect the costs associated with a technical regulation, such as transportation costs, production methods, the age of the producer’s facility, size, efficiency, productivity, and marketing strategy. As a result, Article 2.1 does not prohibit the imposition of costs on imported products as compared to domestic products, where those costs are not related to the origin of the product.\(^{422}\) The Panel did not examine the “architecture, structure and design” of Section 907(a)(1)(A), including the fact that it allows Indonesia to import and sell regular and menthol cigarettes in the United States.\(^{423}\) For the United States, reference to unspecified “costs” on foreign producers does not establish that the effects of Section 907(a)(1)(A) on competitive opportunities for imported products are related to their origin.\(^{424}\) The United States underscores that the costs that Section 907(a)(1)(A) allegedly avoids would be incurred by the US regulatory enforcement and health care systems (and not by domestic menthol cigarette producers), even if all menthol cigarettes were imported.\(^{425}\)

219. We begin with the United States’ claim that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products.\(^{420}\) The United States argues that, “even where a technical regulation adversely affects the competitive situation of imported products compared to like domestic products, this does not constitute less favourable treatment when the detrimental effect is unrelated to the foreign origin of the product.”\(^{421}\) According to the United States, many factors affect the costs associated with a technical regulation, such as transportation costs, production methods, the age of the producer’s facility, size, efficiency, productivity, and marketing strategy. As a result, Article 2.1 does not prohibit the imposition of costs on imported products as compared to domestic products, where those costs are not related to the origin of the product.\(^{422}\) The Panel did not examine the “architecture, structure and design” of Section 907(a)(1)(A), including the fact that it allows Indonesia to import and sell regular and menthol cigarettes in the United States.\(^{423}\) For the United States, reference to unspecified “costs” on foreign producers does not establish that the effects of Section 907(a)(1)(A) on competitive opportunities for imported products are related to their origin.\(^{424}\) The United States underscores that the costs that Section 907(a)(1)(A) allegedly avoids would be incurred by the US regulatory enforcement and health care systems (and not by domestic menthol cigarette producers), even if all menthol cigarettes were imported.\(^{425}\)

220. For Indonesia, the Panel’s finding that Section 907(a)(1)(A) modifies the conditions of competition in the United States to the detriment of imported clove cigarettes vis-à-vis domestic menthol cigarettes was sufficient to establish a violation of Article 2.1.\(^{426}\) Although Indonesia maintains that an additional “national origin” test was not required, Indonesia argues that, nevertheless, the Panel was correct in concluding that Section 907(a)(1)(A) had a “discriminatory intent”, because menthol cigarettes accounted for 25 per cent of the market, and for a significant proportion of the cigarettes smoked by youth in the United States.\(^{427}\) The Panel correctly rejected the potential costs on the US health care and enforcement systems as "legitimate reasons" for exempting menthol cigarettes from the ban on flavoured cigarettes. The Panel also appropriately found that the

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415Panel Report, para. 7.289 and footnote 522 thereto.  
416Panel Report, para. 7.289.  
417Panel Report, para. 7.289.  
418United States' appellant's submission, para. 99.  
419United States' appellant's submission, para. 109.  
420United States' appellant's submission, para. 99.  
421United States' appellant's submission, para. 101.  
422United States' appellant's submission, para. 101.  
423United States' appellant's submission, para. 103.  
424United States' appellant's submission, para. 106.  
425United States' appellant's submission, para. 107.  
426Indonesia's appellee's submission, para. 172.  
427Indonesia's appellee's submission, para. 183.
disproportionate allocation of costs between Indonesian and US entities evidenced de facto discrimination against imports.\(^{228}\)

221. At the outset, we agree with the United States that the Panel did not clearly articulate its reasons for concluding that "the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any US entity."\(^{229}\) To the extent that actual or potential costs are relevant to the analysis of less favourable treatment under Article 2.1, the Panel did not elaborate on why, in its view, Section 907(a)(1)(A) does not impose costs "on any US entity" beyond observing that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes"\(^{230}\) on the US market.\(^{231}\)

222. Nonetheless, we are not persuaded that the Panel erred in ultimately finding that Section 907(a)(1)(A) is inconsistent with Article 2.1. By design, Section 907(a)(1)(A) prohibits all cigarettes with characterizing flavours other than tobacco or menthol. In relation to the cigarettes that are banned under Section 907(a)(1)(A), the Panel made a factual finding that "virtually all clove cigarettes" that were imported into the United States in the three years prior to the ban came from Indonesia.\(^{232}\) The Panel also noted that the "vast majority" of clove cigarettes consumed in the United States came from Indonesia.\(^{233}\) Although the United States stated that it was "unable to attain market share data for all non-clove products banned under Section 907(a)(1)(A)"\(^{234}\), the Panel did not find evidence that these products had "any sizeable market share in the United States prior to the implementation of the ban in 2009."\(^{235}\) In response to a Panel question, the United States confirmed that non-clove-flavoured cigarettes banned under Section 907(a)(1)(A) "were on the market for a relatively short period of time and represented a relatively small market share."\(^{236}\)

\(^{228}\)Indonesia's appellee's submission, paras. 184-185.

\(^{229}\)Panel Report, para. 7.289.

\(^{230}\)Panel Report, para. 7.289.

\(^{231}\)Moreover, to the extent that the Panel's finding could be read as suggesting that reducing potential costs of regulation per se constitutes an illegitimate regulatory objective, we disagree. Nothing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not overtly or covertly discriminate against imports.

\(^{232}\)Panel Report, para. 2.26 (referring to Indonesia's first written submission to the Panel, para. 18; United States' first written submission to the Panel, para. 35; World Trade Atlas, United States - Imports, Clove Cigarette Market Share Data (Panel Exhibit US-100); and World Trade Atlas, Indonesia Cigarette Exports to the United States, 1998-2009 (Panel Exhibit US-134)).

\(^{233}\)Panel Report, para. 2.27. The Panel nonetheless was able to identify at least one US company that manufactured clove cigarettes prior to the entry into force of the FSPTCA. (Ibid (referring to United States' first written submission to the Panel, para. 35))

\(^{234}\)Panel Report, footnote 38 to para. 2.28.

\(^{235}\)Panel Report, para. 2.28.

\(^{236}\)United States' response to Panel Question 17, para. 43.

223. With respect to the cigarettes that are not banned under Section 907(a)(1)(A), the record demonstrates that, in the years 2000 to 2009, between 94.3 and 97.4 per cent of all cigarettes sold in the United States were domestically produced\(^{237}\), and that menthol cigarettes accounted for about 26 per cent of the total US cigarette market.\(^{238}\) Information on the record also shows that three domestic brands dominate the US market for menthol cigarettes: Kool, Salem (Reynolds American), and Newport (Lorillard), with Marlboro having a smaller market share.\(^{239}\)

224. Given the above, the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia. The products that are prohibited under Section 907(a)(1)(A) consist primarily of clove cigarettes imported from Indonesia, while thelike products that are actually permitted under this measure consist primarily of domestically produced menthol cigarettes.

225. Moreover, we are not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. We recall that the stated objective of Section 907(a)(1)(A) is to reduce youth smoking. One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes.\(^{240}\) To the extent that this particular characteristic is present in both clove and menthol cigarettes,\(^{41}\) menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A)), justified the prohibition of clove cigarettes. Furthermore, the reasons presented by the United States for the exemption of menthol cigarettes from the ban on flavoured cigarettes do not, in our view, demonstrate that the detrimental impact on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. The United States argues that the exemption of menthol cigarettes from the ban on flavoured cigarettes aims at minimizing: (i) the impact on the US health care system associated with treating "millions" of menthol cigarette smokers affected by withdrawal symptoms;
and (ii) the risk of development of a black market and smuggling of menthol cigarettes to supply the needs of menthol cigarette smokers. Thus, according to the United States, the exemption of menthol cigarettes from the ban on flavoured cigarettes is justified in order to avoid risks arising from withdrawal symptoms that would afflict menthol cigarette smokers in case those cigarettes were banned. We note, however, that the addictive ingredient in menthol cigarettes is nicotine, not peppermint or any other ingredient that is exclusively present in menthol cigarettes, and that this ingredient is also present in a group of products that is likewise permitted under Section 907(a)(1)(A), namely, regular cigarettes. Therefore, it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market.

226. Therefore, even though Section 907(a)(1)(A) does not expressly distinguish between treatment accorded to the imported and domestic like products, it operates in a manner that reflects discrimination against the group of like products imported from Indonesia. Accordingly, despite our reservations on the brevity of the Panel's analysis, we agree with the Panel that, by exempting menthol cigarettes from the ban on flavoured cigarettes, Section 907(a)(1)(A) accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products, within the meaning of Article 2.1 of the TBT Agreement.

(b) Article 11 of the DSU

227. Finally, the United States argues that the Panel acted inconsistently with Article 11 of the DSU because it found that Section 907(a)(1)(A) avoids costs on any US entity, in the absence of any basis in the Panel record that would have allowed it to reach such conclusion.\footnote{United States' appellant's submission, para. 110.} The United States argues that the measure imposed enforcement costs on the United States Food and Drug Administration (the "FDA"), and on domestic producers of cigarettes with characterizing flavours whose potential market was closed off. By reducing youth smoking, Section 907(a)(1)(A) also reduces subsequent demand for cigarettes. Therefore, it also shrinks the "adult" cigarette market, which is comprised almost entirely of domestic producers.\footnote{United States' appellant's submission, para. 111.}

228. Indonesia responds that the Panel did not act inconsistently with Article 11 of the DSU in reaching its finding, which is supported by evidence showing that the exemption of menthol cigarettes from the ban was the result of a political compromise with the US tobacco industry.\footnote{Indonesia's appellee's submission, para. 189.}

229. We recall that, in EC – Fasteners (China), the Appellate Body considered that "[i]t is unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim" and that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."\footnote{Appellate Body Report, EC – Fasteners (China), para. 442. See also Appellate Body Report, US – Steel Safeguards, para. 498; and Appellate Body Report, Chile – Price Band System (Article 21.5 – Argentina), para. 238.} With these considerations in mind, we turn to review the United States' appeal that the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) imposed no costs on any US entity.

230. As noted above, we believe that the Panel did not fully explain the basis for the statement that Section 907(a)(1)(A), while imposing "costs" on foreign producers, imposed "no costs on any US entity". However, the Panel's statement should be read in the light of the fact that, in paragraph 7.289 of its Report, the Panel considered the costs imposed on producers "at the time of the ban" and that it equated the concept of "entity" with that of "producer", thus comparing the costs imposed on producers in Indonesia with the costs imposed on US producers, to the exclusion of government entities such as the FDA.

231. It seems to us that the United States' claim is concerned with the Panel's less favourable treatment consideration, rather than with the alleged absence of evidence in the Panel record justifying the lack of costs on any US entity. We note that the United States argues that the Panel erred, under Article 2.1 of the TBT Agreement, in limiting the scope of its less favourable treatment analysis to the effects of Section 907(a)(1)(A) on all domestic cigarettes at the time the measure entered into force, to the exclusion of flavoured cigarettes that were produced in the United States before the ban came into force.\footnote{United States' appellant's submission, para. 111.} In our view, the United States' argument that the Panel erred in not considering the impact of Section 907(a)(1)(A) on US producers before the entry into force of the ban also implies that the Panel was wrong in stating that the measure imposed no costs on any US producers. We thus consider that the claim by the United States that the Panel violated Article 11 of the DSU because it found that Section 907(a)(1)(A) imposed "no costs on any US entity" is subsidiary to its claim that the Panel erred in concluding that Section 907(a)(1)(A) accords less favourable treatment to imported clove cigarettes than to like menthol cigarettes of national origin within the meaning of Article 2.1 of the TBT Agreement.

232. In the light of the above, we do not consider that the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) accords imported clove cigarettes less
favourable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2.1 of the TBT Agreement.

6. Conclusion on "Treatment No Less Favourable"

233. Given the above, we uphold, albeit for different reasons, the Panel's finding, in paragraph 7.292 of the Panel Report, that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) of the FFDCA accords imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2.1 of the TBT Agreement.

D. Conclusions under Article 2.1 of the TBT Agreement

234. In the light of the foregoing considerations with regard to the Panel's findings on likeness and less favourable treatment, we therefore uphold, albeit for different reasons, the Panel's finding, in paragraphs 7.293 and 8.1(b) of the Panel Report, that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the TBT Agreement because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.

235. In reaching this conclusion, we wish to clarify the implications of our decision. We do not consider that the TBT Agreement or any of the covered agreements is to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular, through the regulation of the content of tobacco products, including the prohibition or restriction on the use of ingredients that increase the attractiveness and palatability of cigarettes for young and potential smokers. Moreover, we recognize the importance of Members' efforts in the World Health Organization on tobacco control.

236. While we have upheld the Panel's finding that the specific measure at issue in this dispute is inconsistent with Article 2.1 of the TBT Agreement, we are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking. In particular, we are not saying that the United States cannot ban clove cigarettes: however, if it chooses to do so, this has to be done consistently with the TBT Agreement. Although Section 907(a)(1)(A) pursues the legitimate objective of reducing youth smoking by banning cigarettes containing flavours and ingredients that increase the attractiveness of tobacco to youth, it does so in a manner that is inconsistent with the national treatment obligation in Article 2.1 of the TBT Agreement as a result of the exemption of menthol cigarettes, which similarly contain flavours and ingredients that increase the attractiveness of tobacco to youth, from the ban on flavoured cigarettes.

VI. Article 2.12 of the TBT Agreement

A. Introduction

237. We turn now to the United States' appeal of the Panel's finding that, by failing to allow a period of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the TBT Agreement.

238. The FSPTCA was enacted on 22 June 2009. The measure at issue, Section 907(a)(1)(A), entered into force three months thereafter. Before the Panel, Indonesia argued that paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns ("the Doha Ministerial Decision")—which defined the term "reasonable interval" in Article 2.12 of the TBT Agreement as at least six months—constitutes a legally binding interpretation pursuant to Article IX:2 of the WTO Agreement. Thus, according to Indonesia, by not allowing a reasonable interval of at least six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with its obligations under Article 2.12 of the TBT Agreement. The Panel framed the question before it as whether the United States acted inconsistently with its obligations under Article 2.12 by allowing an interval of three months between the enactment of the FSPTCA and the entry into force of Section 907(a)(1)(A). In particular, the Panel considered whether, as Indonesia claimed, Article 2.12 "obliged the United States to allow as a minimum a period of six months between the publication and the entry into force of Section 907(a)(1)(A)."

239. In its analysis of Indonesia's claim under Article 2.12 of the TBT Agreement, the Panel considered the interpretative value of paragraph 5.2 of the Doha Ministerial Decision. The Panel took the view that, although the United States and Indonesia disagreed on the categorization of paragraph 5.2 as an authoritative interpretation under Article IX:2 of the WTO Agreement, it would be guided by [the Doha Ministerial Decision] in its interpretation of the phrase 'reasonable interval' as [the Doha Ministerial Decision] was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO. Moreover, the Panel stated that, in its view, "paragraph 5.2 of the Doha Ministerial Decision could be considered as a subsequent agreement..."
of the parties", within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement.450

240. The United States claims on appeal that: (i) the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision in its interpretation of Article 2.12 of the TBT Agreement; and (ii) the Panel erred in finding that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement, that the United States failed to rebut.

B. The Interpretative Value of Paragraph 5.2 of the Doha Ministerial Decision

241. We recall that, with regard to the interpretative value of paragraph 5.2 of the Doha Ministerial Decision, the Panel stated that it "must be guided by [paragraph 5.2] in its interpretation of the phrase 'reasonable interval', as [paragraph 5.2] was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO".451

242. According to the United States, the Panel "declined to formally determine" whether paragraph 5.2 constitutes an authoritative interpretation of Article 2.12, "only saying that it 'must be guided' by paragraph 5.2" because it was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO.452 The United States submits that, despite not having found that paragraph 5.2 has the legal status of an authoritative interpretation adopted pursuant to Article IX:2 of the WTO Agreement, the Panel erred by applying paragraph 5.2 as a "rule" that amended the text of Article 2.12 of the TBT Agreement.453 The United States claims that the legal value of paragraph 5.2 is at most a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention.454

243. Indonesia responds that "the Panel did establish that paragraph 5.2 of the Doha Ministerial Decision is a binding interpretation as per Article IX:2 of the WTO Agreement", and that it may also be considered a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement.455

244. In paragraph 7.575 of its Report, the Panel stated that the wording of paragraph 5.2 of the Doha Ministerial Decision "appears to suggest that the intention of the Ministerial Conference, and thus the highest level organ of the WTO where all Members meet, was that paragraph 5.2 is binding".456 On appeal, Indonesia relies on this latter statement made by the Panel and argues that the Panel found that paragraph 5.2 of the Doha Ministerial Decision is a binding interpretation "as per" Article IX:2 of the WTO Agreement.457

245. In paragraph 7.576 of its Report, the Panel stated that, although the United States and Indonesia disagreed on the categorization of paragraph 5.2 of the Doha Ministerial Decision as an authoritative interpretation under Article IX:2 of the WTO Agreement, it would be "guided by [paragraph 5.2] in its interpretation of the phrase 'reasonable interval', as it was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO". On appeal, the United States relies on this statement of the Panel and argues that the Panel did not find that paragraph 5.2 constitutes an authoritative interpretation adopted by the Ministerial Conference pursuant to Article IX:2 of the WTO Agreement.458

246. As we see it, in paragraph 7.575 of its Report, the Panel identified certain features of the Doha Ministerial Decision that suggest that Members intended to adopt a "binding" interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement. The Panel's statement in paragraph 7.575 was, by its own terms, tentative. Moreover, the Panel's statement was not followed by any "finding" that paragraph 5.2 constitutes an interpretation adopted pursuant to Article IX:2 of the WTO Agreement. Thus, we do not agree with Indonesia that the Panel found that paragraph 5.2 of the Doha Ministerial Decision "is a binding interpretation as per Article IX:2 of the WTO Agreement".459

247. Despite our conclusion that the Panel did not formally determine whether paragraph 5.2 of the Doha Ministerial Decision constitutes a multilateral interpretation under Article IX:2 of the WTO Agreement, we will consider, nevertheless, whether paragraph 5.2, in fact, has that legal status. Before doing so, we set forth some general considerations on the role and function of multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement.

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450Panel Report, para. 7.576.
452United States' appellant's submission, para. 124 (referring to Panel Report, para. 7.576).
453United States' appellant's submission, para. 129.
454United States' appellant's submission, para. 126.
455Indonesia's appellee's submission, para. 222 (original emphasis)
456Emphasis added.
457Indonesia's appellee's submission, para. 222.
458Indonesia's appellee's submission, para. 124.
459Indonesia's appellee's submission, para. 222.
248. 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. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

249. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body opined that multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* are "meant to clarify the meaning of existing obligations, not to modify their content".\(^{460}\) Article IX:2 establishes that a decision to adopt a multilateral interpretation can only be taken by Members sitting in the form of the Ministerial Conference or the General Council, and that such decisions must be taken by a three-fourths majority of Members. With regard to decisions adopting multilateral interpretations of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement*, Article IX:2 requires the Ministerial Conference or the General Council to exercise its authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. Thus, while Article IX:2 confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the *WTO Agreement*, the exercise of this authority is situated within defined parameters established by Article IX:2.

250. Multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* have a pervasive legal effect. Such interpretations are binding on all Members. As we see it, the broad legal effect of these interpretations is precisely the reason why Article IX:2 subjects the adoption of such interpretations to clearly articulated and strict decision-making procedures.

251. Turning to the question of whether paragraph 5.2 of the Doha Ministerial Decision can be characterized as a multilateral interpretation of Article 2.12 of the *TBT Agreement*, we recall that Article IX:2 of the *WTO Agreement* establishes two specific requirements that apply to the adoption of multilateral interpretations of the Multilateral Trade Agreements contained in Annex 1 to the *WTO Agreement*: (i) a decision by the Ministerial Conference or the General Council to adopt such interpretations shall be taken by a three-fourths majority of Members; and (ii) such interpretations shall be taken on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement. Thus, we will consider whether the decision to adopt paragraph 5.2 conforms with these specific decision-making procedures.

252. With regard to the first requirement, the Panel observed that the Ministerial Conference decided on the matters addressed in the Doha Ministerial Decision by consensus. The issue of whether the first requirement was met has not been raised in this appeal. With regard to the second requirement, the Panel noted that, "it appears that when adopting the Doha Ministerial Decision, the Ministerial Conference did not comply with the preliminary requirement under Article IX:2 of the *WTO Agreement* to exercise its authority on the basis of a recommendation from the Council for Trade in Goods."\(^{461}\) The Panel stated, further, that "it could be argued" that the absence of this "formal requirement" is insufficient to conclude that paragraph 5.2 of the Doha Ministerial Decision is not an authoritative interpretation under Article IX:2 of the *WTO Agreement*.\(^{462}\) On appeal, the United States argues that "[a] panel is not authorized to waive the requirements of Article IX:2 or to impose on Members an interpretation that is not adopted in the manner required."\(^{463}\)

253. We do not agree with the Panel to the extent that it suggested that the absence of a recommendation from the Council for Trade in Goods "is insufficient to conclude that paragraph 5.2 of the Doha Ministerial Decision is not an authoritative interpretation under Article IX:2 of the *WTO Agreement*."\(^{464}\) While Article IX:2 of the *WTO Agreement* confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the *WTO Agreement*, this authority must be exercised within the defined parameters of Article IX:2. It seems to us that the view expressed by the Panel does not respect a specific decision-making procedure established by Article IX:2 of the *WTO Agreement*. In our view, to characterize the requirement to act on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement as a "formal requirement" neither permits a panel to read that requirement out of a treaty provision, nor to dilute its effectiveness.

254. Although the Panel's reasoning may be read as suggesting that the Ministerial Conference could dispense with a specific requirement established by Article IX:2 of the *WTO Agreement*, the terms of Article IX:2 do not suggest that compliance with this requirement is dispensable. In this connection, we recall that, pursuant to Article IX:2 of the *WTO Agreement*, the Ministerial Conference or the General Council "shall" exercise their authority to adopt an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement* "on the basis of a

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\(^{461}\)Panel Report, para. 7.574 (referring to United States' response to Panel Question 6, para. 5).

\(^{462}\)Panel Report, para. 7.575.

\(^{463}\)United States' appellant's submission, para. 125.

\(^{464}\)Panel Report, para. 7.575.
recommendation" by the Council overseeing the functioning of that Agreement. We consider that the recommendation from the relevant Council is an essential element of Article IX:2, which constitutes the legal basis upon which the Ministerial Conference or the General Council exercise their authority to adopt interpretations of the WTO Agreement. Thus, an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the WTO Agreement must be adopted on the basis of a recommendation from the relevant Council overseeing the functioning of that Agreement.

255. We note that, before the Panel, Indonesia relied on paragraph 12 of the Doha Ministerial Declaration465 and on the preamble of the Doha Ministerial Decision, and argued that the interpretation of Article 2.12 of the TBT Agreement was reached on the basis of discussions carried out within the General Council and the WTO subsidiary bodies.466 Whereas the content of paragraph 5.2 of the Doha Ministerial Decision might very well have been based on discussions within the Committee on Technical Barriers to Trade, we are not persuaded that this is sufficient to establish that the Ministerial Conference exercised its authority to adopt an interpretation of the TBT Agreement on the basis of a recommendation from the Council for Trade in Goods. Accordingly, we find that, in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement, paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement.467

256. In the light of our finding that paragraph 5.2 of the Doha Ministerial Decision does not qualify as a multilateral interpretation within the meaning of Article IX:2 of the WTO Agreement, we address whether, as the Panel found, paragraph 5.2 "could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the [Vienna Convention], on the interpretation of 'reasonable interval' [in] Article 2.12 of the TBT Agreement".468

257. We note that, in response to questioning at the oral hearing, the United States argued that a decision by the Ministerial Conference that does not conform with the specific decision-making procedures established by Article IX:2 of the WTO Agreement cannot constitute a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention. We observe that multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement, on the one hand, and subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the Vienna Convention, on the other hand, serve different functions and have different legal effects under WTO law. Multilateral interpretations under Article IX:2 of the WTO Agreement provide a means by which Members—acting through the highest organs of the WTO—may adopt binding interpretations that clarify WTO law for all Members. Such interpretations are binding on all Members, including in respect of all disputes in which these interpretations are relevant.

258. On the other hand, Article 31(3)(a) of the Vienna Convention is a rule of treaty interpretation, pursuant to which a treaty interpreter uses a subsequent agreement between the parties on the interpretation of a treaty provision as an interpretative tool to determine the meaning of that treaty provision. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are required to apply the customary rules of interpretation of public international law—including the rule embodied in Article 31(3)(a) of the Vienna Convention—to clarify the existing provisions of the covered agreements. Interpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute.469 Article IX:2 of the WTO Agreement does not preclude panels and the Appellate Body from having recourse to a customary rule of interpretation of public international law that, pursuant to Article 3.2 of the DSU, they are required to apply.

259. We also recall that, in EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US), the Appellate Body stated that "multilateral interpretations are meant to clarify the meaning of existing obligations"470, and that "multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31(3)(a) of the Vienna Convention".471 Thus, given the specific function of multilateral interpretations adopted pursuant to Article IX:2, and the fact that these interpretations are adopted by

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465Adopted on 14 November 2001, WT/MIN(01)/DEC/1.
466Panel Report, para. 7.574 (referring to Indonesia’s response to Panel Question 6, para. 27).
467In reaching this finding, we are not saying that the Ministerial Conference failed to comply with a specific decision-making procedure established by Article IX:2 of the WTO Agreement. Rather, we are saying that the absence of a recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement supports a conclusion that paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement.
468Panel Report, para. 7.576. (footnote omitted)
469In US – Stainless Steel (Mexico), the Appellate Body stated:
   It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports that have been adopted by the DSU.
   ...
   Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.
   (Appellate Body Report, US – Stainless Steel (Mexico), paras. 158 and 160 (footnotes omitted))
Members sitting in the form of the highest organs of the WTO, such interpretations are most akin to, but not exhaustive of, subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the Vienna Convention.

260. We consider, therefore, that a decision adopted by Members, other than a decision adopted pursuant to Article IX.2 of the WTO Agreement, may constitute a "subsequent agreement" on the interpretation of a provision of a covered agreement under Article 31(3)(a) of the Vienna Convention. Accordingly, we turn to the issue of whether paragraph 5.2 of the Doha Ministerial Decision can be considered to be a subsequent agreement, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement.

261. Article 31(3)(a) of the Vienna Convention provides:

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.

262. Based on the text of Article 31(3)(a) of the Vienna Convention, we consider that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law.

263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. Thus, it is beyond dispute that paragraph 5.2 of the Doha Ministerial Decision was adopted subsequent to the relevant WTO agreement at issue, the TBT Agreement. With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the TBT Agreement.

264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:

Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the TBT Agreement, we find useful guidance in the Appellate Body reports in EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US). The Appellate Body observed that the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention as "a further authentic element of interpretation to be taken into account together with the context". According to the Appellate Body, "by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to agreements bearing specifically upon the interpretation of the treaty."472 Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the TBT Agreement.

266. Paragraph 5.2 of the Doha Ministerial Decision refers explicitly to the term "reasonable interval" in Article 2.12 of the TBT Agreement and defines this interval as "normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued" by a technical regulation. In the light of the terms and content of paragraph 5.2, we are unable to discern a function of paragraph 5.2 other than to interpret the term "reasonable interval" in Article 2.12 of the TBT Agreement. We consider, therefore, that paragraph 5.2 bears specifically upon the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement. We turn now to consider whether paragraph 5.2 of the Doha Ministerial Decision reflects an "agreement" among Members—within the meaning of Article 31(3)(a) of the Vienna Convention—on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement.

267. We note that the text of Article 31(3)(a) of the Vienna Convention does not establish a requirement as to the form which a "subsequent agreement between the parties" should take. We consider, therefore, that the term "agreement" in Article 31(3)(a) of the Vienna Convention refers, fundamentally, to substance rather than to form. Thus, in our view, paragraph 5.2 of the Doha Ministerial Decision can be characterized as a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the TBT Agreement. In determining whether this is so, we find the terms and content of paragraph 5.2 to be dispositive. In this connection, we note that the understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the TBT Agreement is expressed by terms—"shall be understood to mean"—that cannot be considered as merely hortatory.

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268. For the foregoing reasons, we uphold the Panel's finding, in paragraph 7.576 of the Panel Report, that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement.

269. In the light of our characterization of paragraph 5.2 of the Doha Ministerial Decision as a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the Vienna Convention, we turn now to consider the meaning of Article 2.12 of the TBT Agreement in the light of the clarification of the term "reasonable interval" provided by paragraph 5.2. We observe that, in its commentaries on the Draft articles on the Law of Treaties, the ILC states that a subsequent agreement between the parties within the meaning of Article 31(3)(a) "must be read into the treaty for purposes of its interpretation".473 As we see it, while the terms of paragraph 5.2 must be "read into" Article 2.12 for the purpose of interpreting that provision, this does not mean that the terms of paragraph 5.2 replace or override the terms contained in Article 2.12. Rather, the terms of paragraph 5.2 of the Doha Ministerial Decision constitute an interpretative clarification to be taken into account in the interpretation of Article 2.12 of the TBT Agreement.

270. Article 2.12 of the TBT Agreement provides:

Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

271. Paragraph 5.2 of the Doha Ministerial Decision provides:

Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

272. We note, as did the Panel, that Article 2.12 of the TBT Agreement explains that "the reason for allowing an interval between the publication and the entry into force of a technical regulation is to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production" to the requirements of the importing Member's technical regulation.474 In our view, the term "normally" in paragraph 5.2 relates to the rationale of the obligation articulated in Article 2.12 of the TBT Agreement. Seen in this light, the term "normally" provides the interpretative link between Article 2.12, on the one hand, and paragraph 5.2, on the other hand. Thus, we consider that, taking into account the interpretative clarification provided by paragraph 5.2 of the Doha Ministerial Decision, Article 2.12 of the TBT Agreement establishes a rule that "normally" producers in exporting Members require a period of "not less than 6 months" to adapt their products or production methods to the requirements of an importing Member's technical regulation.

273. On appeal, the United States argues that the use of the term "normally" in paragraph 5.2 of the Doha Ministerial Decision does not support the conclusion that paragraph 5.2 represents a rule.475 We observe that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule".476 In our view, the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule". Rather, we consider that the use of the term "normally" in paragraph 5.2 indicates that the rule establishing that foreign producers require a minimum of "not less than 6 months" to adapt to the requirements of a technical regulation admits of derogation under certain circumstances.

274. The obligation imposed on Members by Article 2.12 to provide a "reasonable interval" between the publication and the entry into force of their technical regulations carefully balances the interests of, on the one hand, the exporting Member whose producers might be affected by a technical regulation and, on the other hand, the importing Member that wishes to pursue a legitimate objective through a technical regulation. With regard to the former, Article 2.12 of the TBT Agreement, as clarified by paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, "normally", producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Thus, Article 2.12 presumes that foreign producers in exporting Members, and particularly in developing country Members, require a minimum of at least six months to adapt to the requirements of an importing Member's technical regulation.

275. With regard to the interests of the importing Member, we recall that paragraph 5.2 of the Doha Ministerial Decision tempers the obligation to provide a "reasonable interval" of not less than six months between the publication and the entry into force of a technical regulation by stipulating...
that this obligation applies "except when this would be ineffective in fulfilling the legitimate objectives pursued" by the technical regulation. Thus, while Article 2.12 of the TBT Agreement imposes an obligation on importing Members to provide a "reasonable interval" of not less than six months between the publication and entry into force of a technical regulation, an importing Member may depart from this obligation if this interval "would be ineffective to fulfil the legitimate objectives pursued" by the technical regulation.

C. The Panel's Finding that the United States Acted Inconsistently with Article 2.12 of the TBT Agreement

276. We turn now to consider the United States' claim that the Panel erred in finding that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement that the United States failed to rebut. The United States advances, essentially, two arguments in support of its claim that the Panel incorrectly found that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement. First, the United States argues that the Panel erred in finding that Indonesia had established a prima facie case because Indonesia did not establish that the three-month interval between the publication and entry into force of Section 907(a)(1)(A) of the FFDCA was unreasonable in the light of its impact on the ability of Indonesian producers to adapt to the requirements of that measure.\(^\text{477}\) Second, the United States argues that, even assuming arguendo that the Panel was correct in deciding that the elements of a prima facie case may be drawn exclusively from paragraph 5.2 of the Doha Ministerial Decision, the Panel erred in finding that Indonesia had "succeeded in making such a case."\(^\text{478}\)

277. According to the United States, in view of the elements contained in paragraph 5.2 of the Doha Ministerial Decision, Indonesia "would have to establish with evidence and argument" a prima facie case that: (i) "urgent circumstances" did not exist; (ii) the interval period was less than six months; (iii) "this is a 'normal' situation"; and (iv) allowing an interval of at least six months would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) of the FFDCA unreasonable in the light of its impact on the ability of Indonesian producers to adapt to the requirements of that measure.\(^\text{477}\) Second, the United States argues that, even assuming arguendo that the Panel was correct in deciding that the elements of a prima facie case may be drawn exclusively from paragraph 5.2 of the Doha Ministerial Decision, the Panel erred in finding that Indonesia had "succeeded in making such a case."\(^\text{478}\)

278. The United States and Indonesia do not agree on the elements of a prima facie case that a complaining Member is required to establish under Article 2.12 of the TBT Agreement. Moreover, it appears that the divergence stems from the fact that the United States and Indonesia attribute a different interpretative value to paragraph 5.2 of the Doha Ministerial Decision. In this connection, we note that the United States argues that the elements of a prima facie case of inconsistency with Article 2.12 are to be drawn from the text of Article 2.12, but that, "[e]ven assuming arguendo that the Panel" could draw the elements of a prima facie case from paragraph 5.2, the Panel erred in finding that Indonesia had made such a case.\(^\text{481}\)

279. We do not consider that the elements of a prima facie case of inconsistency with Article 2.12 of the TBT Agreement are to be drawn exclusively from either the terms of Article 2.12, on the one hand, or of paragraph 5.2 of the Doha Ministerial Decision, on the other hand. Article 2.12 imposes an obligation on importing Members to allow a "reasonable interval" between the publication and the entry into force of their technical regulations. We recall our finding above that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement. Thus, it seems to us that the elements of a prima facie case of inconsistency with Article 2.12 of the TBT Agreement are to be drawn from a proper interpretation of Article 2.12, taking into account—pursuant to Article 31(3)(a) of the Vienna Convention—the interpretative clarification provided by the terms of paragraph 5.2 of the Doha Ministerial Decision.

280. We further recall our finding above that Article 2.12 of the TBT Agreement, properly interpreted in the light of paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, "normally", producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Based on our interpretation of Article 2.12 of the TBT Agreement, we consider that a prima facie case of inconsistency with Article 2.12 is established where it is shown that an importing Member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue.

281. In accordance with the general rules on burden of proof reflected in US – Wool Shirts and Blouses, we consider that, under Article 2.12 of the TBT Agreement, it is for the complaining Member to establish that the responding Member has not allowed an interval of not less than six months

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\(^{477}\) United States' appellant's submission, paras. 132-134.

\(^{478}\) United States' appellant's submission, para. 135.

\(^{479}\) United States' appellant's submission, para. 136.

\(^{480}\) Indonesia's appellee's submission, para. 237.

\(^{481}\) United States' appellant's submission, para. 135.
between the publication and the entry into force of the technical regulation at issue. If the complaining Member establishes this prima facie case of inconsistency, it is for the responding Member to rebut the prima facie case of inconsistency with Article 2.12. We recall that, in US – Wool Shirts and Blouses, the Appellate Body stated that "precisely how much and precisely what kind of evidence" will be required to establish a prima facie case "will necessarily vary from measure to measure, provision to provision, and case to case." We consider that, similarly, this reasoning applies with regard to the quantity and nature of evidence required to rebut a prima facie case of inconsistency.

283. Thus, in the light of the above, we consider that, in order to rebut a prima facie case of inconsistency with Article 2.12 of the TBT Agreement, a responding Member that has allowed an interval of less than six months between the publication and entry into force of its technical regulation must submit evidence and argument sufficient to establish either: (i) that the "urgent circumstances" referred to in Article 2.10 of the TBT Agreement surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; or (iii) that a period of "not less than" six months would be ineffective to fulfil the legitimate objectives of its technical regulation.

284. The Panel found that Indonesia had made a prima facie case that "allowing at least six months between the date of publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."484 Thus, in the Panel's view, the burden was on Indonesia to establish a prima facie case of inconsistency with Article 2.12 of the TBT Agreement that included establishing that a period of at least six months between the publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. The United States argues that Indonesia failed to establish such a prima facie case. Relying on the Appellate Body's ruling on the burden of proof under Article 2.4 of the TBT Agreement in EC – Sardines, the United States argues on appeal that the burden rests with the complaining Member to adduce sufficient evidence and argument to establish that an interval of not less than six months would be effective in fulfilling the objectives of the technical regulation at issue.

285. In EC – Sardines, the Appellate Body was considering the allocation of the burden of proof in the context of a claim of inconsistency with Article 2.4 of the TBT Agreement. As we see it, the fact that two provisions manifest a degree of structural similarity does not, necessarily, support a conclusion that the allocation of the burden of proof in respect of each provision must be identical.486 Rather, we are saying that the conceptual or structural similarity between two provisions does not, by itself, necessitate a conclusion that the burden of proof in respect of both provisions must be allocated in an identical manner.

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482 In US – Wool Shirts and Blouses, the Appellate Body outlined the general rules on burden of proof by stating that:

... the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.


484 Panel Report, para. 7.592.


486 We are not saying that the fact that the burden of proof is allocated in a particular manner with respect to a particular provision of the covered agreements is not a relevant consideration in discerning how the burden of proof is allocated under a similar provision of the covered agreements. Rather, we are saying that the conceptual or structural similarity between two provisions does not, by itself, necessitate a conclusion that the burden of proof in respect of both provisions must be allocated in an identical manner.
same way, the manner in which the burden of proof is allocated under Article 2.12 of the TBT Agreement must be informed by an interpretation that properly canvasses the text, context, and object and purpose of Article 2.12. In our view, the burden of proof in respect of a particular provision of the covered agreements cannot be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve. On the contrary, it is by having regard for the function and rationale of a particular provision that an adjudicator can, adequately, assess the manner in which the burden of proof should be allocated under that provision.

287. We recall that Article 2.12 of the TBT Agreement explains that the reason for allowing an interval between the publication and the entry into force of a technical regulation is "to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member's technical regulation. By its own terms, Article 2.12 singles out producers in exporting Members, and particularly in developing country Members, as the beneficiaries of a "reasonable interval" between the publication and the entry into force of an importing Member's technical regulation. Thus, the concept of a "reasonable interval" within the meaning of Article 2.12 is meant to provide a degree of certainty to producers in exporting Members, and particularly in developing country Members, with regard to the time within which an importing Member's technical regulation can reasonably be expected to enter into force.

288. Paragraph 5.2 of the Doha Ministerial Decision provides interpretative clarification of the concept of a "reasonable interval" within the meaning of Article 2.12 by establishing a rule that producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Thus, paragraph 5.2 enhances the degree of certainty that the concept of a "reasonable interval" is meant to provide to producers in exporting Members, and particularly in developing country Members, with regard to the time within which an importing Member's technical regulation can reasonably be expected to enter into force.

289. The rule in Article 2.12, as clarified by paragraph 5.2 of the Doha Ministerial Decision, is expressly designed to allow producers in the complaining Member, and in particular in a complaining developing country Member, sufficient time to adapt their products or production methods to the requirements of the responding Member's technical regulation. Thus, it seems to us that, where a responding Member seeks to deviate from this rule, which, by its own terms, singles out producers in the complaining Member as the beneficiaries of a "reasonable interval" between the publication and the entry into force of a technical regulation, the responding Member must shoulder the burden of establishing a prima facie case that the conditions under which derogations from the rule are permitted are extant. Thus, we disagree with the Panel that it was for Indonesia to establish a prima facie case that a period of at least six months between the publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. Instead, we consider that, under Article 2.12 of the TBT Agreement, as clarified by paragraph 5.2 of the Doha Ministerial Decision, the burden rests upon the responding Member to make a prima facie case that an interval of not less than six months "would be ineffective to fulfil the legitimate objectives pursued" by its technical regulation.

290. In sum, under Article 2.12 of the TBT Agreement, as clarified by paragraph 5.2 of the Doha Ministerial Decision, a complaining Member is required to establish a prima facie case that the responding Member has failed to allow for a period of at least six months between the publication and the entry into force of the technical regulation at issue. If the complaining Member establishes such a prima facie case, the burden rests on the responding Member that has allowed for an interval of less than six months between the publication and the entry into force of its technical regulation to establish either (i) that the "urgent circumstances" referred to in Article 2.10 of the TBT Agreement surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; or (iii) that a period of "not less than" six months would be ineffective to fulfill the legitimate objectives of its technical regulation.

291. In order to establish a prima facie case of inconsistency with Article 2.12 of the TBT Agreement, Indonesia was required to establish that the United States did not allow an interval of at least six months between the publication and the entry into force of the technical regulation at issue. In this connection, we note the Panel's finding that the actual interval allowed by the United States between the publication and the entry into force of Section 907(a)(1)(A) was a "90-day period or a three-month period." Thus, we agree with the Panel that Indonesia established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement.

292. In order to rebut the prima facie case of inconsistency with Article 2.12 of the TBT Agreement made by Indonesia, the United States was required to submit evidence and argument sufficient to establish either (i) that the "urgent circumstances" referred to in Article 2.10 of the TBT Agreement surrounded the adoption of Section 907(a)(1)(A); (ii) that producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) within a three-month interval; or (iii) that a period of "not less than" six months would be ineffective to fulfil the legitimate objectives of Section 907(a)(1)(A).

40 Panel Report, para. 7.567.
With regard to whether the "urgent circumstances" referred to in Article 2.10 of the FSPTCA "directly addresses a serious problem — youth smoking" and that "Congress intended to limit this behaviour as much as practicable." While the arguments advanced by the United States before the Panel identify the legitimate objective of Section 907(a)(1)(A) would not render the fulfillment of the objective pursued by the Panel ineffective in fulfilling the legitimate objective pursued by the United States pursuant to Article 2.12 of the TBT Agreement.

296. Thus, while we disagree with the Panel that it was for Indonesia to establish a prima facie case that an interval of at least six months between the publication of the FSPTCA and the entry into force of Section 907(a)(1)(A) would have been ineffective to fulfill the legitimate objective of Section 907(a)(1)(A), it could not be said that the Panel erred by concluding that "[i]n the absence of any evidence or argument that such urgent problems of safety, health, environmental protection or national security arose or threatened to arise upon adoption of Section 907(a)(1)(A), it could only conclude that these urgent circumstances were not present." Thus, the United States did not contend that the "urgent circumstances" referred to in Article 2.10 of the TBT Agreement, the Panel identified the legitimate objective of Section 907(a)(1)(A), and that the United States failed to establish that an interval of at least six months between the publication and entry into force of Section 907(a)(1)(A) would be ineffective to fulfill the legitimate objective pursued by the United States.

297. In the light of the foregoing reasons, we uphold, albeit for different reasons, the Panel's finding in paragraphs 7.59 and 8.1(h) of the Panel Report that, by failing to allow an interval of at least six months between the publication and entry into force of Section 907(a)(1)(A) of the FSPTCA, the United States acted inconsistently with Article 2.12 of the TBT Agreement.

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

(a) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.29 of the Panel Report, that there is inconsistent with Article 11 of the DSU, within the meaning of Article 2.1 of the TBT Agreement.

(b) finds that the Panel did not act inconsistently with Article 2.1 of the TBT Agreement, in its analysis of consumer tastes and habits, contrary to what the United States argues, the fact that Indonesian producers had not adjusted to the requirements of Section 907(a)(1)(A) six months after its entry into force is evidence that points in the direction of Indonesian producers requiring a significantly longer period than the three months period.

(c) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.29 of the Panel Report, that by allowing a 90 day/three month interval between the publication and entry into force of Section 907(a)(1)(A) was not effective in fulfilling the legitimate objective pursued by the United States pursuant to Article 2.12 of the TBT Agreement.

While a six month period would have been ineffective to fulfill the legitimate objective pursued by the United States pursuant to Article 2.12 of the TBT Agreement.
domestic menthol cigarettes, within the meaning of Article 2.1 of the TBT Agreement;

(iv) finds that the Panel did not act inconsistently with Article 11 of the DSU in its less favourable treatment analysis; and, therefore,

(v) upholds, albeit for different reasons, the Panel's finding, in paragraphs 7.293 and 8.1(b) of the Panel Report, that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the TBT Agreement because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin; and

(b) With respect to Article 2.12 of the TBT Agreement:

(i) upholds the Panel's finding, in paragraph 7.576 of the Panel Report, that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement; and

(ii) upholds, albeit for different reasons, the Panel's finding, in paragraphs 7.595 and 8.1(h) of the Panel Report, that, by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the TBT Agreement.

299. The Appellate Body recommends that the DSB request the United States to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TBT Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 22nd day of March 2012 by:

Shotaro Oshima
Presiding Member

Ricardo Ramirez-Hernandez
Member

Peter Van den Bossche
Member
In developing this faulty legal interpretation, the Panel also acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts in the case by refusing to consider certain evidence related consumer tastes and habits.6

3. The United States also seeks review of the Panel's finding that Section 907(a)(1)(A) accords less favorable treatment to imported clove cigarettes.7 In making this finding, the Panel erred in its legal interpretations that the only products to be compared are imported clove cigarettes and domestic menthol cigarettes,8 and that the effect of Section 907(a)(1)(A) on U.S. production can be assessed by looking only at what products were on the market at the time the measure went into effect.9 The Panel also erred by applying an incorrect legal framework to assess whether the alleged detriment to the competitive conditions for clove cigarettes could be explained by factors or circumstances unrelated to the foreign origin of the products.10 In developing these faulty legal interpretations, the Panel also acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts of the case in finding that at the time of the ban, there were no domestic cigarettes with characterizing flavors other than menthol cigarettes,11 and that Section 907(a)(1)(A) imposes no costs on any U.S. entity.12

4. The United States seeks review by the Appellate Body of the Panel's conclusion and related findings that by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement.13 This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations with respect to Article 2.12 of the TBT Agreement.14

5. Finally, the United States also makes a conditional appeal regarding the Panel's legal analysis with respect to Indonesia's claims under Article 2.2 of the TBT Agreement. Should Indonesia seek review by the Appellate Body of the Panel's findings with respect to Indonesia's claims under Article 2.2, the United States seeks review by the Appellate Body of the Panel's finding that it could draw upon jurisprudence developed under Article XX(b) of the General Agreement on Tariffs and Trade 1994 when assessing the consistency of Section 907(a)(1)(A) with the requirement that technical regulations "not be more trade-restrictive than necessary to fulfill a legitimate objective ...".15 While the United States agrees with the ultimate conclusion in the Panel Report regarding Indonesia's claims under Article 2.2 of the TBT Agreement, the United States considers the Panel's analysis on this particular aspect to be based on erroneous findings on issues of law and related legal interpretations with respect to Article 2.2 of the TBT Agreement.

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8See, e.g., Panel Report, para. 7.292.
9See, e.g., Panel Report, paras. 7.274, 7.277.
10See, e.g., Panel Report, para. 7.289.
12See, e.g., Panel Report, para. 7.289.
13See, e.g., Panel Report, para. 7.289.
14See, e.g., Panel Report, paras. 7.595, 8.1(b).
15See, e.g., Panel Report, paras. 7.561-7.595.