

Treaty Establishing the European Community⁵⁹ to ensure a harmonious and balanced development of economic activities with respect for the environment. The principle of sustainable development, also laid down in the first paragraph of the preamble to the *WTO Agreement*, as well as the precautionary principle, play an important role in the implementation of all EC policies. The EC position is mirrored in public international law by statements of the International Court of Justice, stressing the significance of respect for the environment.⁶⁰

68. The European Communities is convinced that international cooperation is the most effective means to address global and transboundary environmental problems, rather than unilateral measures which may be less environmentally effective and more trade disruptive. Economic performance and environmental performance are not necessarily incompatible. The European Communities asserts that "[w]hile countries have the sovereign right to design and implement their own environmental policies through the measures they consider appropriate to protect their domestic environment -- including the life and health of humans, animals and plants -- all countries have a responsibility to contribute to the solution of international environmental problems." Thus, the European Communities considers that, "in general, the most effective means to attain the shared objectives relating to the conservation of global resources is by proceeding through the process of international co-operation."

69. To the European Communities, the approach to Article XX developed by previous panels and followed by the Appellate Body in *United States - Gasoline*⁶¹ -- that is, first examining whether a measure falls under one of the exceptions set out in paragraphs (a) to (j) of Article XX and, then, making an inquiry under the chapeau -- makes logical sense and could reasonably have been applied by the Panel in this case.

70. The European Communities agrees with the United States that it would be wrong for trade concerns to prevail over all other concerns in all situations under WTO rules. Article XX should not be construed so that trade concerns always prevail over the non-trade concerns reflected in that Article, including environmental concerns and those related to health and other legitimate policy objectives. It is up to panels and the Appellate Body to judge each case on its own merits, taking into account Members' rights and obligations.

⁵⁹Done at Rome, 25 March 1957, as amended.

⁶⁰The European Communities refers to: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996), *I.C.J. Rep.* pp. 241-242, para. 29; *Case Concerning the Gabčíkovo-Nagymoros Project*, (1998) 37 *International Legal Materials* 162, para. 140.

⁶¹Adopted 20 May 1996, WT/DS2/AB/R.

71. The European Communities also agrees with the United States that the adoption of the Panel's "test" -- namely, whether a measure is of a type that would threaten the security and predictability of the multilateral trading system -- would make trade concerns paramount to all other concerns and is thus inconsistent with the object and purpose of the *WTO Agreement*.

72. In the view of the European Communities, certain species, in particular migratory species, may require application of protective measures beyond usual territorial boundaries. Sea turtles should be considered a globally shared environmental resource because they are included in Annex I of CITES and are a species protected under the Convention on the Conservation of Migratory Species of Wild Animals.⁶² The appropriate way for Members concerned with the preservation of globally shared environmental resources to ensure such preservation is through internationally agreed solutions. Measures taken pursuant to such multilateral agreements would in general be allowed under the chapeau of Article XX.

73. However, the European Communities would not want to exclude the possibility, as a last resort, for a WTO Member, on its own, to take a "reasonable" measure with the aim of protecting and preserving a particular global environmental resource. However, such a measure would only be justified under exceptional circumstances and if consistent with general principles of public international law on "prescriptive jurisdiction". The Member would have to demonstrate that its environmentally protective measure was "reasonable", that is, no more trade restrictive than required to protect the globally shared environmental resource. Such a measure should be directly connected to the environmental objective and not go beyond what was required to limit the environmental damage. Finally, in such a case, the Member should have made genuine efforts to enter into cooperative environmental agreements with other Members. This is consistent with Principle 12 of the Rio Declaration on Environment and Development.

74. Given the Panel's factual finding that the United States did not enter into negotiations with the appellees before it imposed the import ban, the European Communities concludes that the United States has not demonstrated that a negotiated solution in respect of measures to protect sea turtles could not be found.

4. Hong Kong, China

75. Hong Kong, China states that it would be a "serious misunderstanding of the role of the WTO" if the multilateral trading system were viewed as impervious to environmental concerns. The

⁶²Done at Bonn, 23 June 1979, 19 International Legal Materials 15.

WTO system does not, and should not, impede the adoption of non-arbitrary and justifiable measures to protect the environment. Hong Kong, China fully shares the Panel's concern that the chapeau of Article XX should not be interpreted in a way that will threaten the security and predictability of trade relations under the *WTO Agreement*. With reference to the Appellate Body Report in *United States – Gasoline*⁶³, Hong Kong, China contends that an examination under the chapeau should focus on the manner in which the measure is applied, and answer the key question of whether the manner of application constitutes an abuse of the exceptions. Questions pertaining to the policy objective of the measure concerned should be set aside in examining the consistency of a measure with the chapeau.

76. Hong Kong, China argues that in line with the views of the Appellate Body in *United States – Gasoline*⁶⁴, Article XX should not be read to establish an unqualified deviation from the GATT principle of non-discrimination. Taken together, the three elements of the chapeau of Article XX impose an obligation not to discriminate based on the origin of the product. With respect to "non-discrimination", the standard of obligation imposed by the chapeau is different from that imposed by Articles I and III of the GATT 1994, which is based on a strict interpretation of the concept of "like products". The chapeau of Article XX requires governments that intervene in order to achieve one of the objectives laid down in the sub-paragraphs of Article XX to ensure that the competitive conditions resulting from their intervention do not *de jure* or *de facto* favour their domestic products, nor the products of a certain specific origin. There should be no ambiguity about the exact content of the level of protection and the competitive conditions established as a result of government intervention. In the view of Hong Kong, China, a legal finding of inconsistency of a measure with the chapeau of Article XX is predicated on a factual finding that a particular measure does not respect the principle of non-discrimination. If this requirement is satisfied, a panel then can proceed to examine whether the requirements laid down in a sub-paragraph of Article XX have been satisfied as well.

77. Hong Kong, China contends that Section 609 violates the chapeau of Article XX to the extent that, after the October 1996 ruling of the United States Court of International Trade, shrimp caught by fishermen in uncertified countries are subject to the import ban even if they were caught with nets that are equipped with TEDs. The resulting competitive conditions show that Section 609 does not meet the requirement of no arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In addition, the 1993 Guidelines removed the possibility available to foreign producers to use any form of fishing other than TEDs in shrimp harvesting to avoid the incidental taking of sea turtles. This would be consistent with the Article XX chapeau only if the use of TEDs is

⁶³Adopted 20 May 1996, WT/DS2/AB/R, page 22.

⁶⁴*Ibid.*

proven to be the sole means by which the stated objective can be achieved. Otherwise, it must be acknowledged that other means may exist whose effectiveness can be demonstrated to be comparable to TEDs, and the United States must give the same treatment to shrimp harvested with measures that exporters could demonstrate are comparable in effectiveness to TEDs. Failure to do so renders Section 609 a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail. If the Appellate Body finds it necessary to examine the measure in question under sub-paragraphs (b) and (g) of Article XX, Hong Kong, China invites the Appellate Body to consider its arguments submitted to the Panel and reflected in the Panel Report, in particular, at paragraphs 4.44 and 4.45.

5. Nigeria

78. Nigeria confirms its views expressed in paragraph 4.53 of the Panel Report and requests the Appellate Body to uphold the Panel's decision. Nigeria shares the concern about the conservation and protection of sea turtles but, however, objects to the methods and measures for doing so. Nigeria's position is defined by paragraphs 169 and 171 of the Report (1996) of the Committee on Trade and Environment.⁶⁵

⁶⁵Nigeria refers to WT/CTE/1, 12 November 1996. Paragraph 169 of the Report states: "WTO Member governments are committed not to introduce WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any real or perceived adverse domestic economic or competitiveness effects of applying environmental policies; not only would this undermine the open, equitable and non-discriminatory nature of the multilateral trading system, it would also prove counterproductive to meeting environmental objectives and promoting sustainable development. Equally, and bearing in mind the fact that governments have the right to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities, WTO Members note that it would be inappropriate for them to relax their existing national environmental standards or their enforcement in order to promote their trade. The CTE notes the statement in the 1995 Report on Trade and Environment to the OECD Council at Ministerial Level that there has been no evidence of a systematic relationship between existing environmental policies and competitiveness impacts, nor of countries deliberately resorting to low environmental standards to gain competitive advantages. The CTE welcomes similar policy statements made in other inter-governmental fora."

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."

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 organizations⁶⁶: 1. the Earth Island Institute; the Humane Society of the United States; and the Sierra Club; 2. the Center for International Environmental Law ("CIEL"); the Centre for Marine Conservation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia; and 3. the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development. On 3 August 1998, CIEL *et al.* submitted a slightly revised version of their brief.

80. In their joint appellees' submission, filed on 7 August 1998, Joint Appellees object to these briefs appended to the appellant's submission, and request that the Appellate Body not consider these briefs. Joint Appellees argue that the appellant's submission, including its three Exhibits, is not in conformity with the stipulation in Article 17.6 of the DSU that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel", nor with Rule 21(2) of the *Working Procedures for Appellate Review*. They ask the Appellate Body to reject as irrelevant the factual assertions made in certain paragraphs of the appellant's submission, as well as the factual information presented in the Exhibits. In their view, because of the incorporation of unauthorized material through the attachment of the Exhibits, the appellant's submission could no longer be considered a "precise statement" as required by Rule 21(2) of the *Working Procedures for Appellate Review*. Rather, a number of the factual and legal assertions contained in the Exhibits go beyond the position taken by the appellant, resulting in confusion concerning the exact nature and linkage between the appeal and the three Exhibits.

81. Joint Appellees state further that the submission of Exhibits that present the views of non-governmental organizations, as opposed to the views of the appellant Member, is not contemplated in, or authorized by, the DSU or the *Working Procedures for Appellate Review*. Such submissions were

⁶⁶In 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.

not in conformity with Article 17.4 of the DSU, nor with Rule 28(1) of the *Working Procedures for Appellate Review*, which vests the discretion to request additional submissions with the Appellate Body. According to Joint Appellees, the decision of the appellant to attach the Exhibits to its submission gives rise both to contradictions and internal inconsistencies, and raises serious procedural and systemic problems. Joint Appellees maintain that by virtue of their incorporation into the appellant's submission, these pleadings are no longer "*amicus curiae* briefs", but instead have become a portion of the appellant's submission, and thus have also become what would appear to be the official United States position.

82. In its appellee's submission, also filed on 7 August 1998, Malaysia similarly urges the Appellate Body to rule that the three Exhibits appended to the United States appellant's submission are inadmissible in this appeal. Malaysia refers to its argument before the Panel that briefs from non-governmental organizations do not fall within Article 13 of the DSU. In addition, according to Malaysia, admission of the Exhibits would not be consonant with Article 17.6 of the DSU, or with Rule 21(2) of the *Working Procedures for Appellate Review*, as the United States appellant's submission and Exhibit 2 contain statements of facts. Moreover, Article 17.4 of the DSU only grants the right to make written and oral submissions to third parties. Articles 11 and 17.12 of the DSU are significant and serve to safeguard the admissibility of evidence before the Appellate Body. In the alternative, in the event the Appellate Body ruled that Exhibits 1-3 of the appellant's submission should be admitted, Malaysia submits rebuttals to each of the Exhibits.

83. On 11 August 1998, we issued a ruling on this preliminary procedural matter addressed to the participants and third participants, as follows:

We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various non-governmental organizations in the three briefs attached as exhibits to the appellant's submission of the United States, as well as the revised version of the brief by the Center for International Environmental Law *et al.*, which was submitted to us on 3 August 1998. The reasons for our ruling will be given in the Appellate Body Report.

84. In the same ruling, we addressed the following questions to the appellant, the United States:

to what extent do you agree with or adopt any one or more of the legal arguments set out in the three briefs prepared by the non-governmental organizations and appended as exhibits to your appellant's submission? In particular, do you adopt the legal arguments stated therein relating to paragraphs (b) and (g) and the chapeau of Article XX of the GATT 1994?

85. We asked the United States to respond in writing to these questions by 13 August 1998, and offered an opportunity to the appellees and the third participants to respond, by 17 August 1998, to the answer filed by the United States concerning which aspects of these briefs it accepted and endorsed as part of its appeal as well as to the legal arguments made in the briefs by the non-governmental organizations. We noted at the time that Malaysia had already done the latter in Exhibits 1 through 3 attached to its appellee's submission.

86. On 13 August 1998, the United States replied as follows:

The main U.S. submission reflects the views of the United States on the legal issues in this appeal. As explained in our appellant's submission, the three submissions prepared by non-governmental organizations reflect the independent views of those organizations These non-governmental organizations have a great interest, and specialized expertise, in sea turtle conservation and related matters. It is appropriate therefore that the Appellate Body be informed of those organizations' views. The United States is not adopting these views as separate matters to which the Appellate Body must respond.

The United States agrees with the legal arguments in the submissions of the non-governmental organizations to the extent those arguments concur with the U.S. arguments set out in our main submission ...

87. On 17 August 1998, Joint Appellees filed a joint response, and Malaysia filed a separate one, to the matters raised in the reply of the United States, as well as in the Exhibits. Without prejudice to their view that the receipt and consideration by the Appellate Body of the briefs of non-governmental organizations attached to the appellant's submission is not authorized by the DSU or the *Working Procedures for Appellate Review*, Joint Appellees responded to certain legal arguments made in the briefs. Malaysia incorporated by reference its rebuttals to the briefs contained in its appellee's submission of 7 August 1998, and made certain additional comments in respect of each of the briefs. Also, on 17 August 1998, Hong Kong, China and Mexico filed statements in respect of the same matters. Hong Kong, China stated that the reply by the United States was unclear and that it was not possible, at that stage, to comment further on the legal arguments. For its part, Mexico stated that if the Appellate Body were to make use of arguments which are outside the terms of Article 17.6 of the DSU and which are not clearly and explicitly attributable to a Member that is a party to the dispute, the Appellate Body would exceed its powers under the DSU.

88. The admissibility of the briefs by certain non-governmental organizations which have been appended to the appellant's submission of the United States is a legal question raised by the appellees. This is a legal issue which does not relate to a finding of law made, or a legal interpretation developed, by the Panel in the Panel Report. For this reason, it has seemed appropriate to us to deal

with this issue separately from the issues raised by the appellant and addressed in the succeeding portions of this Appellate Body Report.

89. We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.

90. In the present appeal, the United States has made it clear that its views "on the legal issues in this appeal" are found in "the main U.S. submission." The United States has confirmed its agreement with the legal arguments in the attached submissions of the non-governmental organizations, to the extent that those arguments "concur with the U.S. arguments set out in [its] main submission."

91. We admit, therefore, the briefs attached to the appellant's submission of the United States as part of that appellant's submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission.

B. Sufficiency of the Notice of Appeal

92. In their joint appellee's submission, filed on 7 August 1998, Joint Appellees contend that the notice of appeal by the United States is defective in form and that the action is, therefore, not properly before the Appellate Body. They contend that the appellant's notice of appeal is both vague and cursory, and is, accordingly, not in compliance with the procedural requirements set forth in Rule 20(2)(d) of the *Working Procedures for Appellate Review*. It is also not a proper "submission" filed "within the required time periods" pursuant to Rule 29 of the *Working Procedures for Appellate Review*. As a result, it is argued, the United States' appeal should be dismissed by the Appellate Body on this ground alone. The appellant's notice of appeal does not identify any legal errors in a manner sufficient for the appellees to develop a defence, and this, in the appellees' view, made it impossible for them to discern the issues that were going to be the subject of the appeal until the appellant filed its written submission 10 days later. This reduced the time available for all appellees to draft their responsive submissions from 25 days to 15 days.

93. According to Joint Appellees, vague notices of appeal should not be tolerated for at least two reasons. First, considerations of fundamental fairness and good faith mandate that the appellant should not be permitted to gain a tactical advantage through its failure to fulfil the requirements of the *Working Procedures for Appellate Review*. Second, carefully considered and well-drafted submissions benefit the decision-making process of the Appellate Body.

94. The United States in turn submits that the notice of appeal provided just the type of "*brief*" statement of the nature of the appeal, including the allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel" (emphasis in the original) called for in Rule 20(2)(d) of the *Working Procedures for Appellate Review*. First, the notice of appeal explained that the United States was appealing from the findings on issues of law and related legal interpretations leading to the panel's conclusion that the United States measure was outside the scope of the Article XX chapeau. Second, the notice of appeal stated that the United States was appealing the Panel's procedural finding that the Panel lacked discretion to accept materials received from non-governmental sources. The appellees did not explain what additional information they believed should have been included in the notice of appeal. Furthermore, according to the United States, the appellees' allegation of prejudice was unfounded. The appellees well knew the basic argument that the United States would present to support its claim of legal error. Indeed, the appellees themselves had pointed out that the United States appeal rests solely on one leg, that is, that the Panel created a "threat to the multilateral trading system" test, and that the United States already raised this same issue at the interim review stage. In short, the appeal did not result in any unfair surprise to the appellees.

95. Rule 20(2) of the *Working Procedures for Appellate Review* provides, in relevant part:

(2) A Notice of Appeal shall include the following information:

...

(d) a *brief statement of the nature of the appeal, including the allegations of errors* in the issues of law covered in the panel report and legal interpretations developed by the panel.(emphasis added)

The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being

appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.

96. In this instance, the notice of appeal does communicate the decision by the United States to appeal certain legal issues covered and certain legal interpretations developed in the Panel Report. The notice then refers to the two allegedly erroneous findings of the Panel being appealed from -- the finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX; and the finding that accepting non-requested information from non-governmental sources is incompatible with the DSU. The notice did not cite the numbered paragraphs of the Panel Report containing the above findings, but Joint Appellees do not assert that that is necessary. The references in the notice of appeal to these two findings of the Panel are terse⁶⁷, but there is no mistaking which findings or interpretations of the Panel the Appellate Body is asked to review. We accordingly hold that the notice of appeal by the United States meets the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*, and deny the request of Joint Appellees to dismiss the entire appeal summarily on the sole ground of insufficiency of the notice of appeal.

97. It remains only to recall that the right of a party to appeal from legal findings and legal interpretations reached by a panel in a dispute settlement proceeding is an important new right established in the DSU resulting from the Uruguay Round. We believe that the provisions of Rule 20(2) and other Rules of the *Working Procedures for Appellate Review* are most appropriately read so as to give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation. It is scarcely necessary to add that an appellee is, of course, always entitled to its full measure of due process. In the present appeal, perhaps the best indication that that full measure of due process was not in any degree impaired by the notice of appeal filed by the United States, is the developed and substantial nature of the appellees' submissions.

⁶⁷The interpretation of the Panel concerning non-requested information, and its finding on the inconsistency of Section 609 with Article XX of the GATT 1994, are themselves cast in fairly terse language; Panel Report, paras. 7.8, fourth sentence, 7.49 and 7.62.

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:

⁶⁸Panel Report, para. 3.129

*We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.*⁶⁹(emphasis added)

100. We note that the Panel did two things. First, the Panel declared a legal interpretation of certain provisions of the DSU: i.e., that accepting non-requested information from non-governmental sources would be "incompatible with the provisions of the DSU as currently applied." Evidently as a result of this legal interpretation, the Panel announced that it would not take the briefs submitted by non-governmental organizations into consideration. Second, the Panel nevertheless allowed any party to the dispute to put forward the briefs, or any part thereof, as part of its own submissions to the Panel, giving the other party or parties, in such case, two additional weeks to respond to the additional material. The United States appeals from this legal interpretation of the Panel.

101. It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel.⁷⁰ Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those

⁶⁹Panel Report, para. 7.8.

⁷⁰See Articles 4, 6, 9 and 10 of the DSU.

submissions considered by, a panel.⁷¹ Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU.

102. Article 13 of the DSU reads as follows:

Article 13
Right to Seek Information

1. *Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.*

2. *Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.(emphasis added)*

103. In *EC Measures Affecting Meat and Meat Products (Hormones)*, we observed that Article 13 of the DSU⁷² "enable[s] panels to seek information and advice as they deem appropriate in a particular case."⁷³ Also, in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, we ruled that:

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 DSB of their substantial interest in the matter to make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

⁷²As well as Article 11.2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

⁷³Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 147.

Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. *This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision.* We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." *Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.*

...

In this case, we find that the *Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF.*⁷⁴ (emphasis added)

104. The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.

105. It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that "[p]anel procedures should provide *sufficient flexibility* so as to *ensure high-quality panel reports while not unduly delaying the panel process.*"(emphasis added)

⁷⁴Adopted 22 April 1998, WT/DS56/AB/R, paras. 84-86.

106. The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements ...* ." (emphasis added)

107. Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word "seek" is unnecessarily formal and technical in nature becomes clear should an "individual or body" first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without "unduly delaying the panel process", it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between "requested" and "non-requested" information vanishes.

108. In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.

109. Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. In the present case, the Panel did not reject the information outright. The Panel suggested instead, that, if any of the parties wanted "to put forward these documents, or parts of them, as part of their own submissions to

the Panel, they were free to do so."⁷⁵ In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word "seek" in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.

110. We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.

VI. Appraising Section 609 Under Article XX of the GATT 1994

111. We turn to the second issue raised by the appellant, the United States, which is whether the Panel erred in finding that the measure at issue⁷⁶ 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*:

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.

... [W]e are of the opinion that the *chapeau* [of] *Article XX*, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, *only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system*, thus also abusing the exceptions contained in Article XX. Such undermining and abuse would occur when a Member jeopardizes the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible. ... We are of the view that a *type of measure adopted by a Member* which, on its own, may appear to have a relatively minor impact on the multilateral trading system, *may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members*. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that when considering a measure under Article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether *such type of measure*, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.⁷⁷

In our view, if an interpretation of the *chapeau* of Article XX were to be followed which would allow a Member *to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies*, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened. This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. ... Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.⁷⁸

⁷⁷Panel Report, para. 7.44.

⁷⁸Panel Report, para. 7.45.

... Section 609, as applied, is a measure conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the United States considers to be comparable to its own in terms of regulatory programmes and incidental taking.⁷⁹

... it appears to us that, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement, *the US measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX.*⁸⁰

...

We therefore find that *the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX.*⁸¹ (emphasis added)

113. Article XX of the GATT 1994 reads, in its relevant parts:

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

...

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

...

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

114. The Panel did not follow all of the steps of applying the "customary rules of interpretation of public international law" as required by Article 3.2 of the DSU. As we have emphasized numerous

⁷⁹Panel Report, para. 7.48.

⁸⁰Panel Report, para. 7.49.

⁸¹Panel Report, para. 7.62.

times⁸², these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.⁸³

115. In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied". In *United States - Gasoline*, we pointed out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, *but rather the manner in which that measure is applied.*"⁸⁴(emphasis added) The Panel did not inquire specifically into how the *application* of Section 609 constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the *design of the measure itself*. For instance, the Panel stressed that it was addressing "a particular situation where a Member has taken unilateral measures which, *by their nature*, could put the multilateral trading system at risk."⁸⁵(emphasis added)

116. The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau. The Panel failed to scrutinize the *immediate*

⁸²See, for example, the Appellate Body Reports in: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 17; *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, paras. 45-46; *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted 13 February 1998, WT/DS56/AB/R, para. 47; and *European Communities - Customs Classification of Certain Computer Equipment*, adopted 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 85.

⁸³I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), pp. 130-131.

⁸⁴Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

⁸⁵Panel Report, para. 7.60. The Panel also stated, in paras. 7.33-7.34 of the Panel Report:
... Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an 'arbitrary' or 'unjustifiable' manner.

We therefore move to consider *whether the US measure conditioning market access on the adoption of certain conservation policies by the exporting Member could be considered as 'unjustifiable' discrimination ...* (emphasis added)

context of the chapeau: i.e., paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner. Thus, the Panel arrived at the very broad formulation that measures which "undermine the WTO multilateral trading system"⁸⁶ must be regarded as "not within the scope of measures permitted under the chapeau of Article XX."⁸⁷ Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX. In *United States - Gasoline*, we stated that it is "important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'."⁸⁸(emphasis added) The Panel did not attempt to inquire into how the measure at stake was being *applied in such a manner* as to constitute *abuse or misuse of a given kind of exception*.

117. The above flaws in the Panel's analysis and findings flow almost naturally from the fact that the Panel disregarded the sequence of steps essential for carrying out such an analysis. The Panel defined its approach as first "determin[ing] whether the measure at issue satisfies the conditions contained in the chapeau."⁸⁹ If the Panel found that to be the case, it said that it "shall then examine whether the US measure is covered by the terms of Article XX(b) or (g)."⁹⁰ The Panel attempted to justify its interpretative approach in the following manner:

As mentioned by the Appellate Body in its report in the *Gasoline* case, in order for the justification of Article XX to be extended to a given measure, it must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX. We note that panels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, *as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX.*⁹¹(emphasis added)

...

⁸⁶See, for example, Panel Report, para. 7.44.

⁸⁷Panel Report, para. 7.62.

⁸⁸Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

⁸⁹Panel Report, para. 7.29.

⁹⁰*Ibid.*

⁹¹Panel Report, para. 7.28.

118. In *United States - Gasoline*, we enunciated the appropriate method for applying Article XX of the GATT 1994:

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*⁹²(emphasis added)

119. The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States - Gasoline* "seems equally appropriate."⁹³ We do not agree.

120. The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure "in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail" or "a *disguised restriction* on international trade."(emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

121. The consequences of the interpretative approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione*

⁹²Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

⁹³Panel Report, para 7.28.

materiae, fall outside the justifying protection of Article XX's chapeau.⁹⁴ In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

122. We hold that the findings of the Panel quoted in paragraph 112 above, and the interpretative analysis embodied therein, constitute error in legal interpretation and accordingly reverse them.

123. Having reversed the Panel's legal conclusion that the United States measure at issue "is not within the scope of measures permitted under the chapeau of Article XX"⁹⁵, we believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX. In doing this, we are fully aware of our jurisdiction and mandate under Article 17 of the DSU. We have found ourselves in similar situations on a number of occasions. Most recently, in *European Communities - Measures Affecting the Importation of Certain Poultry Products*, we stated:

In certain appeals, ... the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel.⁹⁶

In that case, having reversed the panel's finding on Article 5.1(b) of the *Agreement on Agriculture*, we completed the legal analysis by making a finding on the consistency of the measure at issue with Article 5.5 of the *Agreement on Agriculture*. Similarly, in *Canada - Certain Measures Concerning*

⁹⁴See, for example, Panel Report, para. 7.50.

⁹⁵Panel Report, para. 7.62.

⁹⁶Adopted 23 July 1998, WT/DS69/AB/R, para. 156.

*Periodicals*⁹⁷, having reversed the panel's findings on the issue of "like products" under the first sentence of Article III:2 of the GATT 1994, we examined the consistency of the measure with the second sentence of Article III:2. And, in *United States – Gasoline*⁹⁸, having reversed the panel's findings on the first part of Article XX(g) of the GATT 1994, we completed the analysis of the terms of Article XX(g), and then examined the application of the measure at issue in that case under the chapeau of Article XX.

124. As in those previous cases, we believe it is our responsibility here to examine the claim by the United States for justification of Section 609 under Article XX in order properly to resolve this dispute between the parties. We do this, in part, recognizing that Article 3.7 of the DSU emphasizes that: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Fortunately, in the present case, as in the mentioned previous cases, we believe that the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute.

B. *Article XX(g): Provisional Justification of Section 609*

125. In claiming justification for its measure, the United States primarily invokes Article XX(g). Justification under Article XX(b) is claimed only in the alternative; that is, the United States suggests that we should look at Article XX(b) only if we find that Section 609 does not fall within the ambit of Article XX(g).⁹⁹ We proceed, therefore, to the first tier of the analysis of Section 609 and to our consideration of whether it may be characterized as provisionally justified under the terms of Article XX(g).

126. Paragraph (g) of Article XX covers measures:

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

1. "Exhaustible Natural Resources"

127. We begin with the threshold question of whether Section 609 is a measure concerned with the conservation of "exhaustible natural resources" within the meaning of Article XX(g). The Panel, of

⁹⁷Adopted 30 July 1997, WT/DS31/AB/R, pp. 23 and 24.

⁹⁸Adopted 20 May 1996, WT/DS2/AB/R, pp. 19 ff.

⁹⁹Additional submission of the United States, dated 17 August, 1998, para. 5.

course, with its "chapeau-down" approach, did not make a finding on whether the sea turtles that Section 609 is designed to conserve constitute "exhaustible natural resources" for purposes of Article XX(g). In the proceedings before the Panel, however, the parties to the dispute argued this issue vigorously and extensively. India, Pakistan and Thailand contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources."¹⁰⁰ In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed."¹⁰¹ Moreover, they argued, if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous.¹⁰² They also referred to the drafting history of Article XX(g), and, in particular, to the mention of minerals, such as manganese, in the context of arguments made by some delegations that "export restrictions" should be permitted for the preservation of scarce natural resources.¹⁰³ For its part, Malaysia added that sea turtles, being living creatures, could only be considered under Article XX(b), since Article XX(g) was meant for "nonliving exhaustible natural resources".¹⁰⁴ It followed, according to Malaysia, that the United States cannot invoke both the Article XX(b) and the Article XX(g) exceptions simultaneously.¹⁰⁵

128. We are not convinced by these arguments. Textually, Article XX(g) is *not* limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.¹⁰⁶

¹⁰⁰Panel Report, para. 3.237.

¹⁰¹*Ibid.*

¹⁰²*Ibid.*

¹⁰³Panel Report, para 3.238. India, Pakistan and Thailand referred, *inter alia*, to E/PC/T/C.II/QR/PV/5, 18 November 1946, p. 79.

¹⁰⁴Panel Report, para. 3.240.

¹⁰⁵*Ibid.*

¹⁰⁶We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet" World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

129. The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges "the objective of *sustainable development*"¹⁰⁷:

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development, ...¹⁰⁸ (emphasis added)

130. From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".¹⁰⁹ It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. For instance, the 1982 United Nations Convention on the Law of the

¹⁰⁷This concept has been generally accepted as integrating economic and social development and environmental protection. See e.g., G. Handl, "Sustainable Development: General Rules versus Specific Obligations", in *Sustainable Development and International Law* (ed. W. Lang, 1995), p. 35; World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 43.

¹⁰⁸Preamble of the *WTO Agreement*.

¹⁰⁹See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978-I) 159 *Recueil des Cours* 1, p. 49.

Sea¹¹⁰ ("UNCLOS"), in defining the jurisdictional rights of coastal states in their exclusive economic zones, provides:

Article 56
Rights, jurisdiction and duties of the coastal State in the
exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the *natural resources, whether living or non-living*, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, ... (emphasis added)

The UNCLOS also repeatedly refers in Articles 61 and 62 to "living resources" in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity¹¹¹ uses the concept of "biological resources". Agenda 21¹¹² speaks most broadly of "natural resources" and goes into detailed statements about "marine living resources". In addition, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, recites:

Conscious that an important element of development lies in the conservation and management of *living natural resources* and that migratory species constitute a significant part of these resources; ...¹¹³ (emphasis added)

¹¹⁰Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261. We note that India, Malaysia and Pakistan have ratified the UNCLOS. Thailand has signed, but not ratified the Convention, and the United States has not signed the Convention. In the oral hearing, the United States stated: "... we have not ratified this Convention although, with respect to fisheries law, for the most part we do believe that UNCLOS reflects international customary law." Also see, for example, W. Burke, *The New International Law of Fisheries* (Clarendon Press, 1994), p. 40:

[the] coastal state sovereign rights over fisheries in a 200-mile zone are now considered part of customary international law. The evidence of state practice supporting this derives not only from the large number of coastal states claiming an EEZ [exclusive economic zone] in which such rights are advanced, but also from the fact that many of those states not claiming an EEZ assert rights not appreciably different than those in an EEZ. The provision for sovereign rights of the coastal state in [Article 56.1(a) of] the 1982 Convention is also a part of this evidence, but has particular weight because of the uniformity of state practice outside the Convention.

¹¹¹Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 International Legal Materials 818. We note that India, Malaysia and Pakistan have ratified the Convention on Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.

¹¹²Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/26/Rev.1. See, for example, para. 17.70, ff.

¹¹³Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15. We note that India and Pakistan have ratified the Convention on the Conservation of Migratory Species of Wild Animals, but that Malaysia, Thailand and the United States are not parties to the Convention.

131. Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.¹¹⁴ Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g).¹¹⁵ We hold that, in line with the principle of effectiveness in treaty interpretation¹¹⁶, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).

132. We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes "all species *threatened with extinction* which are or may be affected by trade."¹¹⁷(emphasis added)

133. Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. In the Panel Report, the Panel said:

¹¹⁴Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 to exclude "living" natural resources from the scope of application of Article XX(g).

¹¹⁵*United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, para. 4.9; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98, para. 4.4.

¹¹⁶See the following Appellate Body Reports: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23; *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12; and *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 16. See also Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), pp. 1280-1281; M.S. McDougal, H.D. Lasswell and J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven/Martinus Nijhoff, 1994), p. 184; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 118; D. Carreau, *Droit International* (Editions A. Pedone, 1994), para. 369; P. Daillier and A. Pellet, *Droit International Public*, 5th ed. (L.G.D.J., 1994), para. 172; L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público* (Tipografica Editora Argentina, 1985), pp. 109-110 and M. Diez de Velasco, *Instituciones de Derecho Internacional Público*, 11th ed. (Tecnos, 1997), p. 169.

¹¹⁷CITES, Article II.1.

... Information brought to the attention of the Panel, including documented statements from the experts, tends to *confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea.* ...¹¹⁸(emphasis added)

The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.¹¹⁹ Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

134. For all the foregoing reasons, we find that the sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994.

2. "Relating to the Conservation of [Exhaustible Natural Resources]"

135. Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources. It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.¹²⁰ None of the parties to this dispute question the genuineness of the commitment of the others to that policy.¹²¹

136. In *United States - Gasoline*, we inquired into the relationship between the baseline establishment rules of the United States Environmental Protection Agency (the "EPA") and the

¹¹⁸Panel Report, para. 7.53.

¹¹⁹See Panel Report, para. 2.6. The 1987 Regulations, 52 Fed. Reg. 24244, 29 June 1987, identified five species of sea turtles as occurring within the areas concerned and thus falling under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*). Section 609 refers to "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on 29 June, 1987."

¹²⁰There are currently 144 states parties to CITES.

¹²¹We note that all of the participants in this appeal are parties to CITES.

conservation of natural resources for the purposes of Article XX(g). There, we answered in the affirmative the question posed before the panel of whether the baseline establishment rules were "primarily aimed at" the conservation of clean air.¹²² We held that:

... The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. ... We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).¹²³

The substantial relationship we found there between the EPA baseline establishment rules and the conservation of clean air in the United States was a close and genuine relationship of ends and means.

137. In the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles.

138. Section 609(b)(1) imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused. There are two basic exemptions from the import ban, both of which relate clearly and directly to the policy goal of conserving sea turtles. First, Section 609, as elaborated in the 1996 Guidelines, excludes from the import ban shrimp harvested "under conditions that do not adversely affect sea turtles". Thus, the measure, by its terms, excludes from the import ban: aquaculture shrimp; shrimp species (such as *pandalid* shrimp) harvested in water areas where sea turtles do not normally occur; and shrimp harvested exclusively by artisanal methods, even from non-certified countries.¹²⁴ The harvesting of such shrimp clearly does not affect sea turtles. Second, under Section 609(b)(2), the measure exempts from the import ban shrimp caught in waters subject to the jurisdiction of certified countries.

¹²²Adopted 20 May 1996, WT/DS2/AB/R, p. 19.

¹²³*Ibid.*

¹²⁴See the 1996 Guidelines, p. 17343.

139. There are two types of certification for countries under Section 609(b)(2). First, under Section 609(b)(2)(C), a country may be certified as having a fishing environment that does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. There is no risk, or only a negligible risk, that sea turtles will be harmed by shrimp trawling in such an environment.

140. The second type of certification is provided by Section 609(b)(2)(A) and (B). Under these provisions, as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States is required to adopt a regulatory program that is comparable to that of the United States program and to have a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels. This is, essentially, a requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles.¹²⁵ This requirement is, in our view, directly connected with the policy of conservation of sea turtles. It is undisputed among the participants, and recognized by the experts consulted by the Panel¹²⁶, that the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant cause of sea turtle mortality. Moreover, the Panel did "not question ... the fact generally acknowledged by the experts that TEDs, when properly installed and adapted to the local area, would be an effective tool for the preservation of sea turtles."¹²⁷

141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake¹²⁸, 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.

¹²⁵See the 1996 Guidelines, p. 17343.

¹²⁶For example, Panel Report, paras. 5.91-5.118.

¹²⁷Panel Report, para. 7.60, footnote 674.

¹²⁸We focus on the *application* of the measure below, in Section VI.C of this Report.

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.

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

¹²⁹Adopted 20 May 1996, WT/DS2/AB/R, pp. 20-21.

¹³⁰52 Fed. Reg. 24244, 29 June 1987.

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.

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:

¹³⁵Statement by the United States at the oral hearing.

In context, *an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.* If, for example, a measure is adopted for the purpose of conserving an exhaustible natural resource under Article XX(g), it is relevant whether the conservation goal justifies the discrimination. In this way, the Article XX chapeau guards against the misuse of the Article XX exceptions for the purpose of achieving indirect protection.¹³⁶

...

[A]n evaluation of whether a measure constitutes "unjustifiable discrimination [between countries] where the same conditions prevail" should take account of *whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception, rather than for protectionist reasons, the measure does not amount to an abuse of the applicable Article XX exception.*¹³⁷ (emphasis added)

149. We believe this argument must be rejected. The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure 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

¹³⁶United States appellant's submission, para. 28.

¹³⁷United States appellant's submission, para. 53.

be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.¹³⁸ Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.¹³⁹ Thus, the standards embodied in the language of the chapeau are not only different from the requirements of Article XX(g); they are also different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994.

151. In *United States – Gasoline*, we stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'. "¹⁴⁰ We went on to say that:

... The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.¹⁴¹

152. At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new *WTO Agreement*, which strengthened the multilateral trading system by establishing an international organization, *inter alia*, to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round.¹⁴² In recognition of the importance of continuity with the previous GATT system, negotiators used the

¹³⁸In *United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

¹³⁹*Ibid.*, pp. 23-24.

¹⁴⁰*Ibid.*, p. 22.

¹⁴¹*Ibid.*

¹⁴²*WTO Agreement*, Article III:1.

preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*. Those negotiators evidently believed, however, that the objective of "full use of the resources of the world" set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ...¹⁴³

153. We note once more¹⁴⁴ that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.¹⁴⁵

154. We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the "CTE"). In their Decision on Trade and Environment, Ministers expressed their intentions, in part, as follows:

... *Considering* that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, ...¹⁴⁶

¹⁴³Preamble of the *WTO Agreement*, first paragraph.

¹⁴⁴*Supra*, para. 129.

¹⁴⁵*Supra*, para. 131.

¹⁴⁶Preamble of the Decision on Trade and Environment.

In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development¹⁴⁷, Agenda 21¹⁴⁸, 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 ..."¹⁴⁹ We further note that this Decision also set out the following terms of reference for the CTE:

- (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
- (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
 - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
 - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
 - surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade affects, and of effective implementation of the multilateral disciplines governing those measures.¹⁵⁰

155. With these instructions, the General Council of the WTO established the CTE in 1995, and the CTE began its important work. Pending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the *WTO Agreement* generally, we must fulfill our responsibility in this specific case, which is to interpret

¹⁴⁷We note that Principle 3 of the Rio Declaration on Environment and Development states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 of the Rio Declaration on Environment and Development states that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

¹⁴⁸Agenda 21 is replete with references to the shared view that economic development and the preservation and protection should be mutually supportive. For example, paragraph 2.3(b) of Agenda 21 states: "The international economy should provide a supportive international climate for achieving environment and development goals by ... [m]aking trade and environment mutually supportive" Similarly, paragraph 2.9(d) states that an "objective" of governments should be: "To promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive."

¹⁴⁹Preamble of the Decision on Trade and Environment.

¹⁵⁰Decision on Trade and Environment.

the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular.

156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

157. In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.¹⁵¹ This interpretation of the chapeau is confirmed by its negotiating

¹⁵¹This view is consistent with the approach taken by the panel in *United States – Section 337 of the United States Tariff Act of 1930*, which stated:

Article XX is entitled "General Exceptions" and ... the central phrase in the introductory clause reads: "nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures...". Article XX(d) thus provides a *limited and conditional exception from obligations under other provisions*.¹⁵¹ (emphasis added) Adopted 7 November 1989, BISD 365/345, para. 5.9.

history.¹⁵² The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.¹⁵³ Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.¹⁵⁴ In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]", the chapeau of this provision should be qualified.¹⁵⁵ This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.

158. The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be

¹⁵²Article 32 of the Vienna Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

¹⁵³The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization, which formed the basis for discussions at the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in late 1946, read, in relevant part:

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: ...

¹⁵⁴For example, the Netherlands, Belgium and Luxembourg stated that the exceptions should be qualified in some way:

Indirect protection is an undesirable and dangerous phenomenon. ... Many times, the stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results, which are irreconcilable [*sic*] with the aim of chapters IV, V and VI. E/PC/T/C.II/32, 30 October 1946

¹⁵⁵The United Kingdom's proposed text for the chapeau read:

The undertaking in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any member of measures for the following purposes, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. E/PC/T/C.II/50, pp. 7 and 9; E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 36.

exercised bona fide, that is to say, reasonably."¹⁵⁶ An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.¹⁵⁷

159. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

160. With these general considerations in mind, we address now the issue of whether the *application* of the United States measure, although the measure itself falls within the terms of Article XX(g), nevertheless constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade". We address, in other words, whether the application of this measure constitutes an abuse or misuse of the provisional justification made available by Article XX(g). We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an

¹⁵⁶B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

... A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. ... (emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407-410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

¹⁵⁷Vienna Convention, Article 31(3)(c).

arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.

2. "Unjustifiable Discrimination"

161. We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail". Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers. As enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries.¹⁵⁸ However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.

162. According to the 1996 Guidelines, certification "shall be made" under Section 609(b)(2)(A) and (B) if an exporting country's program includes a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use, at all times, TEDs comparable in effectiveness to those used in the United States.¹⁵⁹ Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States

¹⁵⁸Pursuant to Section 609(b)(2), a harvesting nation may be certified, and thus exempted from the import ban, if:

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting...

¹⁵⁹1996 Guidelines, p. 17344.

program.¹⁶⁰ Furthermore, the harvesting country must have in place a "credible enforcement effort".¹⁶¹ The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an *exclusive* manner. That is, the 1996 Guidelines specify the *only* way that a harvesting country's regulatory program can be deemed "comparable" to the United States' program, and, therefore, they define the *only* way that a harvesting nation can be certified under Section 609(b)(2)(A) and (B). Although the 1996 Guidelines state that, in making a comparability determination, the Department of State "shall also take into account other measures the harvesting nation undertakes to protect sea turtles"¹⁶², in practice, the competent government officials only look to see whether there is a regulatory program requiring the use of TEDs or one that comes within one of the extremely limited exceptions available to United States shrimp trawl vessels.¹⁶³

163. The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.¹⁶⁴

164. We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a

¹⁶⁰As already noted, these exceptions are extremely limited and currently include only: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Services determines that the use of TEDs would be impracticable because of special environmental conditions, vessels are permitted to restrict tow-times instead of using TEDs. See the 1996 Guidelines, p. 17343. In the oral hearing, the United States informed us that the exception for restricted tow-times is no longer available.

¹⁶¹1996 Guidelines, p. 17344.

¹⁶²*Ibid.*

¹⁶³Statements by the United States at the oral hearing.

¹⁶⁴Statement by the United States at the oral hearing.

government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

165. Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

166. Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members. The relevant factual finding of the Panel reads:

... However, *we have no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques which would have included the complainants before the imposition of the import ban as a result of the CIT judgement.* From the replies of the parties to our question on this subject, in particular that of the United States, we understand that the United States did not propose the negotiation of an agreement to any of the complainants until after the conclusion of negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, in September 1996, i.e. well after the deadline for the imposition of the import ban of 1 May 1996. Even then, it seems that the efforts made merely consisted of an exchange of documents. We therefore conclude that, in spite of the possibility offered by its legislation, the United States did not enter into negotiations before it imposed the import ban. As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures.¹⁶⁵ (emphasis added)

167. *A propos* this failure to have prior consistent recourse to diplomacy as an instrument of environmental protection policy, which produces discriminatory impacts on countries exporting shrimp to the United States with which no international agreements are reached or even seriously attempted, a number of points must be made. First, the Congress of the United States expressly recognized the importance of securing international agreements for the protection and conservation of the sea turtle species in enacting this law. Section 609(a) *directs* the Secretary of State to:

- (1) *initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations* for the protection and conservation of such species of sea turtles;
- (2) *initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles;*
- (3) *encourage such other agreements to promote the purposes of this section with other nations* for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
- (4) *initiate the amendment of any existing international treaty for the protection and conservation of such species of sea turtles to which the United States is a party in order to make such treaty consistent with the purposes and policies of this section; and*

¹⁶⁵Panel Report, para. 7.56.

(5) provide to the Congress by not later than one year after the date of enactment of this section: ...

(C) a full report on:

(i) the results of his efforts under this section; ...
(emphasis added)

Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles¹⁶⁶ (the "Inter-American Convention") which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.¹⁶⁷

168. Second, the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. As stated earlier, the Decision on Trade and Environment, which provided for the establishment of the CTE and set out its terms of reference, refers to both the Rio Declaration on Environment and Development and Agenda 21.¹⁶⁸ Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development, which states, in part:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*(emphasis added)

In almost identical language, paragraph 2.22(i) of Agenda 21 provides:

Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: ...

(i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. *Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus.*(emphasis added)

¹⁶⁶First written submission of the United States to the Panel, Exhibit AA.

¹⁶⁷Panel Report, para. 7.56.

¹⁶⁸See Decision on Trade and Environment, preamble and para. 2(b). See *Supra*, para. 154.

Moreover, we note that Article 5 of the Convention on Biological Diversity states:

... each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

The Convention on the Conservation of Migratory Species of Wild Animals, which classifies the relevant species of sea turtles in its Annex I as "Endangered Migratory Species", states:

The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle.

Furthermore, we note that WTO Members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference, endorsed and supported:

*... multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both.*¹⁶⁹ (emphasis added)

169. Third, the United States did negotiate and conclude one regional international agreement for the protection and conservation of sea turtles: The Inter-American Convention. This Convention was opened for signature on 1 December 1996 and has been signed by five countries¹⁷⁰, in addition to the United States, and four of these countries are currently certified under Section 609.¹⁷¹ This Convention has not yet been ratified by any of its signatories. The Inter-American Convention provides that each party shall take "appropriate and necessary measures" for the protection,

¹⁶⁹Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996.

¹⁷⁰Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

¹⁷¹As of 1 January 1998, Brazil was among those countries certified as having adopted programs to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the United States' program. See Panel Report, para. 2.16. However, according to information provided by the United States at the oral hearing, Brazil is not currently certified under Section 609.

conservation and recovery of sea turtle populations and their habitats within such party's land territory and in maritime areas with respect to which it exercises sovereign rights or jurisdiction.¹⁷² Such measures include, notably,

[t]he reduction, to the greatest extent practicable, of the incidental capture, retention, harm or mortality of sea turtles in the course of fishing activities, through the appropriate regulation of such activities, as well as the development, improvement and use of appropriate gear, devices or techniques, including the use of turtle excluder devices (TEDs) pursuant to the provisions of Annex III [of the Convention].¹⁷³

Article XV of the Inter-American Convention also provides, in part:

Article XV
Trade Measures

1. *In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organization (WTO), as adopted at Marrakesh in 1994, including its annexes.*

2. *In particular, and with respect to the subject-matter of this Convention, the Parties shall act in accordance with the provisions of the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as Article XI of the General Agreement on Tariffs and Trade of 1994. ... (emphasis added)*

170. The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention together marked out the equilibrium line to which we referred earlier. The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles. Moreover, the Inter-American Convention emphasizes the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the *WTO Agreement* generally, in maintaining the balance of rights and obligations under the *WTO Agreement* among the signatories of that Convention.

¹⁷²Inter-American Convention, Article IV.1.

¹⁷³Inter-American Convention, Article IV.2(h).

171. The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles¹⁷⁴ before imposing the import ban.

172. Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.¹⁷⁵ The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.

173. The application of Section 609, through the implementing guidelines together with administrative practice, also resulted in other differential treatment among various countries desiring certification. Under the 1991 and 1993 Guidelines, to be certifiable, fourteen countries in the wider

¹⁷⁴While the United States is a party to CITES, it did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states. In this context, we note that the United States, for example, has not signed the Convention on the Conservation of Migratory Species of Wild Animals or UNCLOS, and has not ratified the Convention on Biological Diversity.

¹⁷⁵Section 609(a).

Caribbean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries had a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs. With respect to all other countries exporting shrimp to the United States (including the appellees, India, Malaysia, Pakistan and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State to apply the import ban on a world-wide basis not later than 1 May 1996.¹⁷⁶ On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foreign countries within the scope of Section 609, effective 1 May 1996. Thus, all countries that were not among the fourteen in the wider Caribbean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs. We acknowledge that the greatly differing periods for putting into operation the requirement for use of TEDs resulted from decisions of the Court of International Trade. Even so, this does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.¹⁷⁷

174. The length of the "phase-in" period is not inconsequential for exporting countries desiring certification. That period relates directly to the onerousness of the burdens of complying with the requisites of certification and the practical feasibility of locating and developing alternative export markets for shrimp. The shorter that period, the heavier the burdens of compliance, particularly where an applicant has a large number of trawler vessels, and the greater the difficulties of re-orienting the harvesting country's shrimp exports. The shorter that period, in net effect, the heavier the influence of the import ban. The United States sought to explain the marked difference between "phase-in" periods granted to the fourteen wider Caribbean/western Atlantic countries and those allowed the rest of the shrimp exporting countries. The United States asserted that the longer time-period was justified by the then undeveloped character of TED technology, while the shorter period was later made possible by the improvements in that technology. This explanation is less than persuasive, for it does not address the administrative and financial costs and the difficulties of governments in putting together and enacting the necessary regulatory programs and "credible

¹⁷⁶*Earth Island Institute v. Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

¹⁷⁷See *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 28. Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.

enforcement effort", and in implementing the compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels.¹⁷⁸

175. Differing treatment of different countries desiring certification is also observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries. Far greater efforts to transfer that technology successfully were made to certain exporting countries -- basically the fourteen wider Caribbean/western Atlantic countries cited earlier -- than to other exporting countries, including the appellees.¹⁷⁹ The level of these efforts is probably related to the length of the "phase-in" periods granted -- the longer the "phase-in" period, the higher the possible level of efforts at technology transfer. Because compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements under Section 609, within the very limited "phase-in" periods allowed them.

176. When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting countries desiring certification in order to gain access to the United States shrimp market within the meaning of the chapeau of Article XX.

3. "Arbitrary Discrimination"

177. We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries.¹⁸⁰ Furthermore, there is little or no flexibility in how officials make the determination for certification

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.

¹⁸⁰*Supra*, paras. 161-164.

pursuant to these provisions.¹⁸¹ In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.

178. Moreover, the description of the administration of Section 609 provided by the United States in the course of these proceedings highlights certain problematic aspects of the certification processes applied under Section 609(b). With respect to the first type of certification, under Section 609(b)(2)(A) and (B), the 1996 Guidelines set out certain elements of the procedures for acquiring certification, including the requirement to submit documentary evidence of the regulatory program adopted by the applicant country. This certification process also generally includes a visit by United States officials to the applicant country.¹⁸²

179. With respect to certifications under Section 609(b)(2)(C), the 1996 Guidelines state that the Department of State "shall certify" any harvesting nation under Section 609(b)(2)(C) if it meets the criteria in the 1996 Guidelines "without the need for action on the part of the government of the harvesting nation ...".¹⁸³ Nevertheless, the United States informed us that, in all cases where a country has not previously been certified under Section 609, it waits for an application to be made before making a determination on certification.¹⁸⁴ In the case of certifications under Section 609(b)(2)(C), there appear to be certain opportunities for the submission of written evidence, such as scientific documentation, in the course of the certification process.¹⁸⁵

180. However, with respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service.¹⁸⁶ With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision,

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 excluder devices on all shrimp trawler boats that operate in areas where there is a likelihood of intercepting sea turtles" and that "when it comes to shrimp trawling, we know of only one way of effectively protecting sea turtles, and that is through TEDs."

¹⁸²Statement by the United States at the oral hearing.

¹⁸³1996 Guidelines, p. 17343.

¹⁸⁴Statement by the United States at the oral hearing.

¹⁸⁵Statement by the United States at the oral hearing.

¹⁸⁶Statement by the United States at the oral hearing.

whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C).¹⁸⁷ Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied¹⁸⁸ also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial.¹⁸⁹ No procedure for review of, or appeal from, a denial of an application is provided.¹⁹⁰

181. The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification.

182. The provisions of Article X:3¹⁹¹ of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

¹⁸⁷Statement by the United States at the oral hearing.

¹⁸⁸We were advised at the oral hearing by the United States that these include: Australia, Pakistan and Tunisia.

¹⁸⁹Statement by the United States at the oral hearing.

¹⁹⁰Statement by the United States at the oral hearing.

¹⁹¹Article X:3 states, in part:

(a) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters

...

183. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

184. We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX. The measure, therefore, is not entitled to the justifying protection of Article XX of the GATT 1994. Having made this finding, it is not necessary for us to examine also whether the United States measure is applied in a manner that constitutes a "disguised restriction on international trade" under the chapeau of Article XX.

185. In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

186. What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on

international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.¹⁹²

VII. Findings and Conclusions

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

- (a) reverses the Panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU;
- (b) reverses the Panel's finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994, and
- (c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

188. The Appellate Body *recommends* that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

¹⁹²Adopted 20 May 1996, WT/DS2/AB/R, p. 30.

Signed in the original at Geneva this 8th day of October 1998 by:

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

European Communities, *Appellant*
India, *Appellee*

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

AB-2004-1

Present:

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

I. Introduction

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

¹WT/DS246/R, 1 December 2003.

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

2. The Regulation provides for five preferential tariff "arrangements"³, namely:
- (a) general arrangements described in Article 7 of the Regulation (the "General Arrangements");
 - (b) special incentive arrangements for the protection of labour rights;
 - (c) special incentive arrangements for the protection of the environment;
 - (d) special arrangements for least-developed countries; and
 - (e) special arrangements to combat drug production and trafficking (the "Drug Arrangements").⁴

3. All the countries listed in Annex I to the Regulation are eligible to receive tariff preferences under the General Arrangements⁵, which provide, broadly, for suspension of Common Customs Tariff duties on products listed as "non-sensitive" and for reduction of Common Customs Tariff *ad valorem* duties on products listed as "sensitive".⁶ The General Arrangements are described in further detail in paragraphs 2.4 and 2.5 of the Panel Report. The four other arrangements in the Regulation provide tariff preferences *in addition* to those granted under the General Arrangements.⁷ However, only some of the country beneficiaries of the General Arrangements are also beneficiaries of the other arrangements. Specifically, preferences under the special incentive arrangements for the protection of labour rights and the special incentive arrangements for the protection of the environment are restricted to those countries that "are determined by the European Communities to comply with certain labour [or] environmental policy standards"⁸, respectively. Preferences under the special arrangements for least-developed countries are restricted to certain specified countries.⁹ Finally, preferences under the Drug Arrangements are provided only to 12 predetermined countries, namely Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela.¹⁰

³Regulation, Art. 1.2.

⁴*Ibid.*

⁵Panel Report, para. 2.4.

⁶Regulation, Arts. 7.1-7.2.

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

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

⁹Regulation, Annex I (Column H).

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

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

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

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

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

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

¹²Panel Report, para. 1.5.

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

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

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

- (a) India has the burden of demonstrating that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
- (b) India has demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
- (c) the European Communities has the burden of demonstrating that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause; [and]
- (d) the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause[.]¹⁶

The Panel also concluded that the European Communities had "failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994".¹⁷ Finally, the Panel concluded, pursuant to Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that "because the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the Enabling Clause or Article XX(b) of GATT 1994, the European Communities has nullified or impaired benefits accruing to India under GATT 1994."¹⁸

7. On 8 January 2004, the European Communities notified the Dispute Settlement Body of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal¹⁹ pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").²⁰ On 19 January 2004, the European Communities filed its appellant's submission.²¹ On 30 January 2004, Pakistan notified its intention to appear at the oral hearing as a third participant.²² On 2 February 2004, India filed its appellee's submission.²³ On the same day, Costa Rica, Panama, Paraguay, and the United States each filed a third participant's submission, and Bolivia, Colombia, Ecuador, Peru, and Venezuela filed a joint third participant's submission as the Andean Community.²⁴ Also on 2 February 2004, Brazil notified its intention to make a statement at the oral

¹⁶Panel Report, para. 8.1(a)-(d).

¹⁷*Ibid.*, para. 8.1(e).

¹⁸*Ibid.*, para. 8.1(f).

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

²⁰WT/AB/WP/7, 1 May 2003.

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

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

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

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

hearing as a third participant, and Mauritius notified its intention to appear at the oral hearing as a third participant.²⁵ Finally, on 2 February 2004, El Salvador, Guatemala, Honduras, and Nicaragua jointly notified their intention to make a statement at the oral hearing as third participants.²⁶ On 4 February 2004, Cuba notified its intention to appear at the oral hearing as a third participant.²⁷ By letter dated 16 February 2004, Pakistan submitted a request to make a statement at the oral hearing.²⁸ No participant objected to Pakistan's request, which was authorized by the Division hearing the appeal on 18 February 2004.²⁹

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

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

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

²⁶*Ibid.*

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

²⁸*Ibid.*

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

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

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

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

³¹*Ibid.*, para. 34.

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

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

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

the Enabling Clause and Article I:1. Instead, the European Communities observes, the Panel simply "assumed"³⁵ that the Enabling Clause is an exception to Article I:1.

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

13. The European Communities relies in support of its argument on the position of the Enabling Clause within the GATT 1994 and the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"). Thus, the European Communities contends that if paragraph 2(a) of the Enabling Clause were an exception to Article I:1, it would typically be found in Article I, or immediately after that Article. This is not the case, however. The Enabling Clause is a separate decision complementing Part IV of the GATT 1994, which is entitled "Trade and Development". In the view of the European Communities, Part IV of the GATT 1994 and the Enabling Clause cannot be "mere 'exception[s]'" to the GATT 1994.³⁸ Rather, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.³⁹

14. The European Communities submits that its understanding of the relationship between Article I:1 and the Enabling Clause is supported by the object and purpose of the Enabling Clause, in

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

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

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

³⁸*Ibid.*, para. 51.

³⁹*Ibid.*

accordance with the rules of treaty interpretation. The European Communities emphasizes that the Enabling Clause is "the most concrete, comprehensive and important application"⁴⁰ of the principle of special and differential treatment. In the view of the European Communities, special and differential treatment is "the most basic principle of the international law of development"⁴¹, and it constitutes *lex specialis* that applies to the exclusion of more general WTO rules on the same subject matter. In concluding that the Enabling Clause is an "exception" to Article I:1, the Panel chose to "disregard"⁴² this principle. Moreover, the European Communities argues, characterizing special and differential treatment as an "exception" suggests that this principle "is *discriminatory* against the developed country Members".⁴³ In fact, special and differential treatment is designed to achieve effective equality among Members. Therefore, the European Communities contends that the Panel's reasoning undermines the principle of special and differential treatment and challenges its "legitimacy".⁴⁴ The European Communities also asserts that the Panel was "oblivious"⁴⁵ to certain elements of the drafting history of the Enabling Clause, which indicate that the Contracting Parties intended to strengthen the legal status of GSP schemes in the GATT by replacing the Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision")⁴⁶ with the Enabling Clause.

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

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

⁴¹*Ibid.*, para. 21.

⁴²*Ibid.*, para. 23.

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

⁴⁴*Ibid.*

⁴⁵*Ibid.*, para. 25.

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

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

⁴⁸*Ibid.*, para. 52.

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

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

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

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

19. According to the European Communities, this finding of the Panel was based on two erroneous legal interpretations. The first alleged error relates to the Panel's interpretation of the term

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

⁵⁰*Ibid.*, para. 39.

⁵¹*Ibid.*, para. 67.

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

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

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

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

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

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

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

⁵⁵*Ibid.*, para. 80.

⁵⁶*Ibid.*, para. 87.

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

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

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

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

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

⁵⁸*Ibid.*, para. 120.

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

last of these differences, the European Communities argues, the Panel's reasoning was "manifestly flawed".⁶⁰

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

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

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

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

⁶¹*Ibid.*, para. 135.

29. The European Communities contends that, although tariff preferences may not be an "adequate" or "appropriate" response to other development problems, drug production and trafficking form major economic activities in the relevant countries, which activities cannot be eliminated without the provision of "alternative licit activities".⁶² Therefore, the European Communities claims that tariff preferences are an appropriate response to the drug problem, as recognized by the Members of the WTO—through the Preamble to the *Agreement on Agriculture* and the waiver for the United States' Andean Trade Preference Act⁶³—and the United Nations—through other instruments. Furthermore, the European Communities argues that the Drug Arrangements are non-discriminatory because the drug problem affects individual developing countries in different ways, and because beneficiaries under the Drug Arrangements are designated according to the impact of the drug problem in those countries.

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

31. The European Communities contends that the Panel relied selectively and incorrectly on certain UNCTAD texts to support its findings. According to the European Communities, some of these documents do not assist in interpreting footnote 3 of the Enabling Clause.⁶⁴ In several cases, this is because they relate not to the issue of non-discrimination, but to the exclusion of certain

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

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

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

developing countries *ab initio* from GSP schemes.⁶⁵ The European Communities contends that several other documents that the Panel relied on contain merely "expectations"⁶⁶ or "aim[s]"⁶⁷ of particular parties, rather than agreed statements of "legally binding" obligations.⁶⁸ Finally, the European Communities argues, the Agreed Conclusions do not purport to be an exhaustive regulation of GSP schemes. Therefore, in the European Communities' view, the allowance under the Agreed Conclusions for differentiation in favour of least-developed countries does not mean that the Agreed Conclusions prohibit all other forms of differentiation between developing countries.

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

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

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

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

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

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

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

B. *Arguments of India – Appellee*

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

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

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

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

38. India argues, with reference to the *Vienna Convention*, that "subsequent practice"⁷² supports its interpretation. First, India maintains that all waivers for preferential tariff treatment for products from developing countries have permitted derogations from Article I without mentioning the Enabling

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

⁷⁰*Ibid.*, para. 36.

⁷¹*Ibid.*, para. 39.

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

Clause. Indeed, according to India, the fact that the European Communities requested a waiver⁷³ 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 decisions⁷⁵, that the "*maxim lex specialis derogat legi generali*"⁷⁶ means not that a special rule necessarily excludes the application of a related general rule, but that the two rules apply cumulatively, and the special rule prevails over the general rule only to the extent of any conflict between the two rules. Thus, India maintains, developing-country Members have not waived their rights under Article I:1, which applies "cumulatively" with the Enabling Clause, except to the extent that these provisions are in conflict with each other.⁷⁷

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

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

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

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

⁷⁶*Ibid.*, para. 76.

⁷⁷*Ibid.*, heading II.C.1.

⁷⁸*Ibid.*, para. 51.

41. India claims that, even if the Appellate Body were to find that the Enabling Clause is not an exception to Article I:1, the Appellate Body should assess the consistency of the Drug Arrangements with the Enabling Clause because India did make a claim under the Enabling Clause. The European Communities' argument to the contrary, according to India, is "factually baseless".⁷⁹ India highlights that it originally requested the establishment of a panel "to examine whether [the Drug Arrangements] are consistent with Article I:1 ... and ... the Enabling Clause".⁸⁰ In addition, India maintains that, in its first and second written submissions to the Panel, it requested the Panel to find that the Drug Arrangements "are not justified [by] the Enabling Clause".⁸¹ Moreover, India states that the European Communities acknowledged in its first written submission to the Panel that the Enabling Clause forms part of India's claim⁸², 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 proof—that India made no "substantive" claims under the Enabling Clause.⁸³ India maintains that, in response to questioning by the Panel, it "merely stated that the Enabling Clause is not a *material element* of India's claim under Article I:1 of the GATT."⁸⁴ Furthermore, India reiterated its request for the Panel to examine the consistency of the Drug Arrangements with the Enabling Clause at the second substantive meeting of the Panel and at the interim review stage. In addition, India maintains that the Panel would have had "competence"⁸⁵ to assess the Drug Arrangements under the Enabling Clause even if the Panel had found that the Enabling Clause is not an exception to Article I:1.⁸⁶ In India's view, requiring India to resubmit its claims under the Enabling Clause to a new panel would be contrary to the "fundamental principle of good faith"⁸⁷ and the objectives of the dispute settlement

⁷⁹India'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).

⁸³*Ibid.*, para. 70.

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

⁸⁵*Ibid.*, heading II.B.3.

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

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

system.⁸⁸ India asserts that the question of which party bears the burden of proof "does not affect the outcome of this dispute".⁸⁹

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

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

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

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

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

47. India argues that its interpretation is reinforced by the nature of the MFN principle embodied in Article I:1 as "a fundamental norm of the rules-based multilateral trading system of the WTO".⁹⁰ India points to Appellate Body decisions as support for its view that "derogations" from Article I:1 exist only where provided for explicitly.⁹¹ India emphasizes that paragraph 2(a) of the Enabling Clause does *not* specifically state that developing countries waive their rights to MFN treatment. Moreover, the object and purpose of the Enabling Clause, as well as its drafting history, indicate that

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

⁸⁹*Ibid.*, para. 73.

⁹⁰*Ibid.*, para. 1.

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

the developing countries did not agree to relinquish their MFN rights as between themselves in agreeing to paragraph 2(a) of the Enabling Clause.

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

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

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

⁹³*Ibid.*, para. 115.

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

⁹⁵*Ibid.*, para. 148.

⁹⁶*Ibid.*, para. 153.

50. India contends that paragraph 2(a) of the Enabling Clause and Article I:1 of the GATT 1994 must be interpreted in a harmonious manner so as to give effect to both provisions.⁹⁷ With this in mind, India submits that the Enabling Clause should be interpreted to authorize only those deviations from the MFN principle that are necessary in order for GSP schemes to operate. Thus, the Enabling Clause authorizes developed-country Members to exclude other developed countries from their GSP schemes, because Members could not grant any tariff preferences under these schemes if such exclusion was not authorized. However, in India's view, the Enabling Clause does not authorize tariff preferences that differentiate between developing countries, as tariff preferences under GSP schemes can be and are granted to developing countries without differentiation of this kind. According to India, a contrary interpretation would be inconsistent with the need to interpret paragraph 2(a) and Article I:1 so as to avoid conflict between the two provisions.

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

52. The opening words of paragraph 3(c) demonstrate, according to India, that paragraph 3(c) of the Enabling Clause does not provide for derogations from obligations imposed under paragraph 2(a), (b), or (d). Further, unlike paragraphs 5 and 6, paragraph 3(c) does not refer to

⁹⁷India'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).

⁹⁸*Ibid.*, paras. 3 and 5.

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

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

"individual" or "particular" needs of developing countries. India argues that this shows that the "needs" intended by the drafters under paragraph 3(c) are the needs of "developing countries as a whole".¹⁰¹

53. India draws support for its reading of paragraph 2(a) from the object and purpose of the Enabling Clause. According to India, the purpose includes: facilitating "mutually acceptable arrangements"¹⁰² that were "unanimous[ly] agree[d]"¹⁰³ in UNCTAD; replacing "special preferences"¹⁰⁴ granted only to some developing countries with generalized preferences that do not differentiate between developing countries; and, promoting the trade of developing countries without raising barriers to or creating undue difficulties for the trade of other Members, as confirmed in paragraph 3(a). India points to several UNCTAD texts to confirm these purposes¹⁰⁵, 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"¹⁰⁶ from one country to another. In addition, India contends that linking GSP benefits to "the situation or policies"¹⁰⁷ of beneficiaries reduces the certainty and value of such benefits.

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

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

¹⁰² *Ibid.*, paras. 95 and 190.

¹⁰³ *Ibid.*, para. 165.

¹⁰⁴ *Ibid.*, paras. 147 and 190.

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

¹⁰⁶ *Ibid.*, para. 192.

¹⁰⁷ *Ibid.*, para. 21.

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

¹⁰⁹ *Ibid.*, para. 15.

the rule that treaty interpretation should be based on the text and not on policy considerations that are not reflected in the text.

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

C. *Arguments of the Third Participants*

1. Andean Community

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

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

58. The Andean Community submits further that, even if the Enabling Clause is an exception to Article I:1, this characterization is not determinative of which party bears the burden of proof. The Andean Community asserts that the Panel erred in assigning the burden. According to the Andean

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

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

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

¹¹³*Ibid.*, para. 13.

¹¹⁴*Ibid.*, para. 21.

Community, under the Panel's allocation of the burden of proof, every GSP scheme would be open to challenge, with the burden falling on each preference-granting country to establish the consistency of its GSP scheme with the Enabling Clause. The Andean Community claims that the assigning of the burden of proof is "a fundamental initial decision upon which every further consideration is based", such that the Appellate Body "should reverse on this element alone".¹¹⁵

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

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

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.

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".¹²² Costa Rica maintains that this led to the Panel's incorrect finding that "non-discriminatory" treatment under footnote 3 of the Enabling Clause is synonymous with identical or unconditional treatment. Costa Rica asserts that had the Panel interpreted the Enabling Clause in accordance with Article 31 of the *Vienna Convention*—in the light of the object and purpose of the Enabling Clause and the 1971 Waiver Decision—it would have found that "the 'non-discriminatory' standard prohibits developed countries from according tariff preferences that make an unjust or prejudicial distinction between different categories of developing countries."¹²³

63. In addition, according to Costa Rica, the Panel erred in concluding that the term "developing countries" in paragraph 2(a) of the Enabling 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"¹²⁴ that permits the granting of more favourable treatment to developing countries. Panama also contests the Panel's finding that the Drug Arrangements are incompatible with the Enabling Clause.

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

¹²³*Ibid.*, para. 15.

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

In particular, Panama argues that the Panel erred in interpreting the term "non-discriminatory" in footnote 3 of the Enabling Clause as requiring preference-granting countries to accord identical treatment to all developing countries. Panama therefore states that it is "completely in agreement with the arguments by the European Communities".¹²⁵

65. Panama is of the view that, if the Enabling Clause were an exception to Article I of the GATT 1994, it would be included as a waiver decision in the GATT 1994.¹²⁶ Because the Enabling Clause is not so included, Panama contends, it is an "independent" and "special" rule governing the differential and more favourable treatment accorded to developing countries under the schemes set out in paragraph 2 of the Enabling Clause.¹²⁷ Panama submits that "the Enabling Clause creates a standalone mechanism that is linked to the general principle contained in GATT Article I:1"¹²⁸ and, as such, constitutes an "autonomous right"¹²⁹ of WTO Members.

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

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

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

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

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

¹²⁸*Ibid.*, para. 10.

¹²⁹*Ibid.*, para. 8.

¹³⁰*Ibid.*, para. 17.

¹³¹*Ibid.*, para. 23.

¹³²*Ibid.*, para. 13.

4. Paraguay

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

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

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

71. Paraguay emphasizes that developing countries did not renounce their right to MFN treatment under Article I:1 of the GATT 1994 in agreeing to the Enabling Clause. According to Paraguay, the Enabling Clause was adopted to replace the "special preferences"¹³⁶ provided by developed countries to certain developing countries, with a generalized system under which all developing countries would benefit. Paraguay argues that the only distinction that the WTO draws within the category of developing countries is in recognizing the category of least-developed countries, as explicitly stated in paragraph 2(d) of the Enabling Clause. As such, in Paraguay's view, the "condition"¹³⁷ of non-discrimination in footnote 3 means that benefits granted to some developing countries must be granted

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

¹³⁴*Ibid.*, para. 12.

¹³⁵*Ibid.*, para. 11.

¹³⁶*Ibid.*, para. 14.

¹³⁷*Ibid.*, para. 27.

to all such countries. Therefore, Paraguay submits that tariff preferences pursuant to the Enabling Clause must apply to all developing countries.

5. United States

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

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

74. The United States submits that the Enabling Clause is part of the overall balance of rights and obligations in the covered agreements and, as such, is a "separate provision authorizing the types of treatment provided therein", "in spite of" the MFN obligation in Article I:1.¹⁴⁰ In other words, the United States maintains that, contrary to the finding of the Panel, the Enabling Clause *is* a "positive rule establishing obligations in itself".¹⁴¹ The United States emphasizes that several aspects of the Enabling Clause are unrelated to Article I:1 and that the Enabling Clause is incorporated into the

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

¹³⁹*Ibid.*, para. 5.

¹⁴⁰*Ibid.*, paras. 3 and 10.

¹⁴¹*Ibid.*, para. 4.

GATT 1994. The United States also argues that, unlike Article XX of the GATT 1994, the Enabling Clause "*encourages*"¹⁴² developed-country Members to grant preferences to developing-country Members. In the view of the United States, "[p]lacing the burden on developed countries to defend actions they take to benefit developing countries ... would create a *disincentive* for developed countries" to take such action.¹⁴³

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

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

77. Finally, the United States contends that the Panel's interpretation of "developing countries" in paragraph 2(a) as referring to *all* developing countries is "completely dependent"¹⁴⁹ on its erroneous interpretation of "non-discriminatory". Moreover, the United States argues, the Enabling Clause

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

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

¹⁴⁴*Ibid.*, para. 11.

¹⁴⁵*Ibid.*

¹⁴⁶*Ibid.*

¹⁴⁷*Ibid.*, para. 22.

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

¹⁴⁹*Ibid.*, para. 23.

refers only to "developing countries" or "the developing countries", and not to "all developing countries".¹⁵⁰

III. Issues Raised in This Appeal

78. The following issues are raised in this appeal:

- (a) Whether the Panel erred in concluding that the "special arrangements to combat drug production and trafficking" (the "Drug Arrangements"), which are part of Council Regulation (EC) No. 2501/2001 (the "Regulation")¹⁵¹, are inconsistent with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")¹⁵², based on the Panel's findings that:
 - (i) the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause")¹⁵³ is an "exception"¹⁵⁴ to Article I:1 of the GATT 1994;
 - (ii) the Enabling Clause "does not exclude the applicability"¹⁵⁵ of Article I:1 of the GATT 1994; and
 - (iii) the European Communities bears the burden of invoking the Enabling Clause and proving that the Drug Arrangements are consistent with that Clause¹⁵⁶; and
- (b) Whether the Panel erred in concluding that the European Communities failed to prove that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause¹⁵⁷, based on the Panel's findings that:

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

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

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

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

¹⁵⁴Panel Report, para. 7.53.

¹⁵⁵*Ibid.*

¹⁵⁶*Ibid.*

¹⁵⁷*Ibid.*, para. 8.1(d).

- (i) the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause requires that, pursuant to schemes under the Generalized System of Preferences ("GSP"), "identical tariff preferences"¹⁵⁸ be provided to all developing countries without differentiation, except as regards the implementation of *a priori* limitations; and
- (ii) the term "developing countries" in paragraph 2(a) of the Enabling Clause means "all"¹⁵⁹ developing countries, except as regards the implementation of *a priori* limitations.

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

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

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

80. The Panel observed that the participants disagree on whether the Enabling Clause constitutes a "positive rule setting out obligations", or an "exception" authorizing derogation from one or more such positive rules.¹⁶⁰ Based on its understanding of the Appellate Body's decision in *US – Wool Shirts and Blouses*, the Panel determined that the Enabling Clause, in and of itself, does not establish legal obligations but, instead, contains requirements that are "only subsidiary obligations, dependent on the decision of the Member to take [particular] measures".¹⁶¹ The Panel further concluded that the legal function of the Enabling Clause is to permit Members to derogate from Article I:1 "so as to enable developed countries, *inter alia*, to provide GSP to developing countries".¹⁶² As a result, the Panel found that the Enabling Clause is "in the nature of an exception" to Article I:1.¹⁶³

81. The Panel noted that the GATT 1994 includes several provisions in the nature of exceptions that serve to justify a measure's inconsistency with Article I:1, including Articles XX, XXI, and XXIV, and the Enabling Clause. According to the Panel, these exceptions reflect "legitimate

¹⁵⁸Panel Report, para. 7.161.

¹⁵⁹*Ibid.*, para. 7.176.

¹⁶⁰*Ibid.*, para. 7.32.

¹⁶¹*Ibid.*, para. 7.37.

¹⁶²*Ibid.*, para. 7.38.

¹⁶³*Ibid.*, para. 7.39.

objectives" that may be pursued by Members.¹⁶⁴ The Panel reasoned that, because a complaining party may not be able to discern the objectives of a given measure, particularly as they may not be apparent from the text of the measure itself, it is "sufficient" for a complaining party to demonstrate an inconsistency with Article I:1, without also establishing "violations" of any of the possible exception provisions.¹⁶⁵

82. With respect to the present dispute, the Panel found that India could make its case against the European Communities solely by establishing the inconsistency of the Drug Arrangements with Article I:1.¹⁶⁶ Having done so, according to the Panel, it would then be incumbent upon the European Communities to invoke the Enabling Clause as a defence and to demonstrate the consistency of the Drug Arrangements with the requirements contained in that Clause.¹⁶⁷

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

¹⁶⁴Panel Report, para. 7.40.

¹⁶⁵*Ibid.*

¹⁶⁶*Ibid.*

¹⁶⁷*Ibid.*, para. 7.42.

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

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

¹⁶⁹Panel Report, para. 7.44.

¹⁷⁰*Ibid.*, para. 7.45.

¹⁷¹*Ibid.*

84. Finally, the Panel referred to the European Communities' reliance on the Appellate Body's decisions in *Brazil – Aircraft* and *EC – Hormones* and distinguished those cases from the present dispute. The Panel stated that the relationship between the provisions at issue in those cases was "different" from the relationship it had found between Article I:1 and the Enabling Clause.¹⁷² In particular, the Panel determined that, in the two earlier disputes, one provision "clearly exclude[d]" the application of the other.¹⁷³ In contrast, the Panel had already found that the Enabling Clause does not exclude the applicability of Article I:1. In these circumstances, the Panel suggested that the Enabling Clause constitutes an "affirmative defence", in relation to which the responding party bears the burden of proof if that party invokes the Enabling Clause to justify its challenged measure.¹⁷⁴

85. On appeal, the European Communities challenges the Panel's finding that the Enabling Clause is an "exception" ¹⁷⁵ to Article I:1 of the GATT 1994 and that, therefore, the European Communities must invoke the Enabling Clause as an "affirmative defence" ¹⁷⁶ to India's claim that the Drug Arrangements are inconsistent with Article I:1. The European Communities submits that the Enabling Clause is part of a "special regime for developing countries" ¹⁷⁷, which "encourages" ¹⁷⁸, *inter alia*, the granting of tariff preferences by developed-country Members to developing countries. As a result, the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and applies to the *exclusion* thereof, rather than as an exception thereto.¹⁷⁹ The European Communities argues, therefore, that India is required to bring a claim under the Enabling Clause if it considers that the European Communities' GSP scheme has nullified or impaired India's rights.¹⁸⁰ The European Communities requests us to refrain from examining the consistency of the Drug Arrangements with the requirements of the Enabling Clause because, according to the European Communities and as

¹⁷²Panel Report, paras. 7.48-7.50.

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

¹⁷⁴Panel Report, para. 7.49.

¹⁷⁵*Ibid.*, para. 7.39.

¹⁷⁶*Ibid.*, para. 7.42.

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

¹⁷⁸*Ibid.*, para. 53.

¹⁷⁹*Ibid.*, para. 22.

¹⁸⁰*Ibid.*, para. 15(2).

allegedly acknowledged by India before the Panel, India did not bring a claim under the Enabling Clause.¹⁸¹

86. India, by contrast, supports the Panel's understanding of the relationship between Article I:1 and the Enabling Clause. India argues that paragraph 2(a) of the Enabling Clause qualifies as an "exception" because the conditions therein must be complied with only by Members adopting a measure pursuant to the authorization granted by that provision. This differs from the most-favoured nation ("MFN") obligation in Article I:1.¹⁸² Moreover, according to India, we are not precluded from addressing the consistency of the Drug Arrangements with the Enabling Clause because, contrary to the assertion of the European Communities, India did make a claim under that Clause before the Panel.¹⁸³ India submits that denying the Panel the "competence"¹⁸⁴ to evaluate this claim, even if the Enabling Clause is not regarded as an exception, would be inconsistent with the objectives of WTO dispute settlement, "namely to secure a 'prompt' and 'positive solution to a dispute', and 'achieve a satisfactory settlement of the matter' in accordance with rights and obligations under the covered agreements."¹⁸⁵ According to India, this is particularly so because the European Communities had been on notice throughout the Panel proceedings of India's position that the Drug Arrangements are not justified by the Enabling Clause.¹⁸⁶

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

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

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

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

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

¹⁸³*Ibid.*, paras. 54-57.

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

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

¹⁸⁶*Ibid.*, para. 73.

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

It is thus for the *complaining* party to raise a claim with respect to a particular obligation and to *prove* that the responding party is acting inconsistently with that obligation. It is for the *responding* party, if it so chooses, to raise a defence in response to an allegation of inconsistency and to *prove* that its challenged measure satisfies the conditions of that defence. Therefore, the question before us is whether India must raise a "claim" and prove that the Drug Arrangements are inconsistent with the Enabling Clause, or whether the European Communities must raise and prove, in "defence", that the Drug Arrangements are consistent with the Enabling Clause, in order to justify the alleged inconsistency of the Drug Arrangements with Article I:1.¹⁸⁸

88. We recall that the Appellate Body has addressed the allocation of the burden of proof in similar situations. In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure.¹⁸⁹ Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party.¹⁹⁰ However, this distinction may not always be evident or readily applicable.

C. *Characterization of the Enabling Clause*

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

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

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.

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

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

Article I

General Most-Favoured-Nation Treatment

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

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

90. We turn now to the Enabling Clause, which has become an integral part of the GATT 1994.¹⁹² Paragraph 1 of the Enabling Clause, which applies to all measures authorized by that Clause, provides:

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

The ordinary meaning of the term "notwithstanding" is, as the Panel noted¹⁹³, "[i]n spite of, without regard to or prevention by".¹⁹⁴ By using the word "notwithstanding", paragraph 1 of the Enabling

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

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

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

¹⁹³See Panel Report, para. 7.44.

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

Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally".¹⁹⁵ Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1.

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

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

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

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

The Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision")¹⁹⁷, which provided the initial authorization under the GATT for developed countries' GSP schemes and is explicitly referred to in footnote 3 of the Enabling Clause¹⁹⁸, 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:

¹⁹⁵GATT 1994, Art. I:1.

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.

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

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).

... 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;

[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 Panel²⁰⁴, 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

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

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

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

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

²⁰²*Ibid.*, para. 52.

²⁰³*Ibid.*, para. 53.

²⁰⁴See Panel Report, para. 7.52.

justified under the "General Exceptions" of Article XX. For instance, one such objective is reflected in the recognition by Members that the expansion of trade must be accompanied by:

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

95. As the Appellate Body observed in *US – Shrimp*, WTO Members retained Article XX(g) from the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947") without alteration after the conclusion of the Uruguay Round, being "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy".²⁰⁶ Article XX(g) of the GATT 1994 permits Members, subject to certain conditions, to take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". It is well-established that Article XX(g) is an *exception* in relation to which the responding party bears the burden of proof.²⁰⁷ Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the *WTO Agreement*, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defence to otherwise WTO-inconsistent measures. Likewise, characterizing the Enabling Clause as an exception, in our view, does not undermine the importance of the Enabling Clause within the overall framework of the covered agreements and as a "positive effort" to enhance economic development of developing-country Members. Nor does it "discourag[e]"²⁰⁸ developed countries from adopting measures in favour of developing countries under the Enabling Clause.

96. The European Communities acknowledges that requiring Members to pursue environmental measures through Article XX(g), an exception provision, may be logical because "the WTO Agreement is not an environmental agreement and ... it contains no positive regulation of environmental matters."²⁰⁹ Because the *WTO Agreement* "regulate[s] positively the use of trade

²⁰⁵ *WTO Agreement*, Preamble, first recital.

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

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

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

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

measures"²¹⁰, however, and the Enabling Clause "promotes" the use of trade measures to further the development of developing countries, the European Communities argues that Members should not be required to prove the consistency of their measures with the Enabling Clause.

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

98. In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive "differential and more favourable treatment". The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the "customary rules of interpretation of public international law", as required by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").²¹² Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception

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

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

²¹²In this regard, we recall the Appellate Body's statement in *EC – Hormones* that:

... merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

(Appellate Body Report, para. 104)

detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO.

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

100. We examine now the European Communities' appeal regarding the Panel's finding that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994.²¹³ The European Communities argues that the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and thus applies to the exclusion of that provision.²¹⁴ In our view, the European Communities misconstrues the relationship between the two provisions.

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

²¹³Panel Report, para. 7.53.

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

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

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

102. In other words, the Enabling Clause "does not exclude the applicability"²¹⁶ of Article I:1 in the sense that, as a matter of procedure (or "order of examination", as the Panel stated²¹⁷), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination—or *application* rather than *applicability*—it is clear that only one provision applies at a time. This is what the Panel itself found when, after stating that "as an exception provision, the Enabling Clause applies concurrently with Article I:1", it added "and *takes precedence* to the extent of the conflict between the two provisions."²¹⁸

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

D. *Burden of Proof*

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

105. We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*²²⁰, it is not the responsibility of the European Communities to provide us with the

²¹⁶Panel Report, para. 7.53.

²¹⁷*Ibid.*, para. 7.45.

²¹⁸*Ibid.* (emphasis added)

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

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

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

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

legal interpretation to be given to a particular provision in the Enabling Clause²²¹; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.

1. Responsibility for Raising the Enabling Clause

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

107. A brief review of the history of the Enabling Clause confirms its special status in the covered agreements. When the GATT 1947 entered into force, the Contracting Parties stated that one of its objectives was to "rais[e] standards of living".²²² However, this objective was to be achieved in countries at all stages of economic development through the *universally-applied* commitments embodied in the GATT provisions. In 1965, the Contracting Parties added Articles XXXVI, XXXVII, and XXXVIII to form Part IV of the GATT 1947, entitled "Trade and Development".²²³ Article XXXVI expressly recognized the "need for positive efforts" and "individual and joint action" so that developing countries would be able to share in the growth in international trade and further their economic development.²²⁴ Some of these "positive efforts" resulted in the Agreed Conclusions

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

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

²²²GATT 1947, Preamble, first recital.

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

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

of the United Nations Conference on Trade and Development ("UNCTAD") Special Committee on Preferences (the "Agreed Conclusions")²²⁵, which recognized that preferential tariff treatment accorded under a generalized scheme of preferences was key for developing countries "(a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth."²²⁶ The Agreed Conclusions also made clear that the achievement of these objectives through the adoption of preferences by developed countries required a GATT waiver, in particular, with respect to the MFN obligation in Article I:1.²²⁷ Accordingly, the Contracting Parties adopted the 1971 Waiver Decision in order to waive the obligations of Article I of the GATT 1947 and thereby authorize the granting of tariff preferences to developing countries for a period of ten years.²²⁸

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

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

Members reaffirmed the significance of the Enabling Clause in 1994 with the incorporation of the Enabling Clause into the GATT 1994.²³⁰ The relationship between trade and development, and in particular the role of the Enabling Clause, remain prominent on the agenda of the WTO, as recognized by the Doha Ministerial Conference in 2001.²³¹

109. We thus understand that, between the entry into force of the GATT and the adoption of the Enabling Clause, the Contracting Parties determined that the MFN obligation failed to secure

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

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

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

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

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

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

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

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

110. In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, "notwithstanding" the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an "advantage" to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the "legal basis of the complaint sufficient to present the problem clearly".²³³ In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.²³⁴

111. Furthermore, the history and objective of the Enabling Clause lead us to agree with the European Communities²³⁵ 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

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

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

²³⁴*Infra*, paras. 116-117.

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

Clause, requirements that we find to be more extensive than more typical defences such as those found in Article XX.

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

- (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³
- (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
- (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another
- (d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

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

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

²³⁶ *Infra*, paras. 142-174.

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

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

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

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

²³⁸DSU, Art. 6.2, which provides:

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

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

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

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

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

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 above²⁴³, remains on the responding party invoking the Enabling Clause as a defence.

116. We observe, moreover, that the measure challenged in this dispute is unmistakably a preferential tariff scheme, granted by a developed-country Member in favour of developing countries, and proclaiming to be in accordance with the GSP. The Drug Arrangements are found in Council Regulation (EC) No. 2501/2001, the title of which indicates the Regulation to be "applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004". The first recital in the Preamble to the Regulation provides:

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

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

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

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

Since the *GSP drug regime* was extended to the countries of the Andean Community and to those of the Central American Common Market, it provided an important incentive to allow for the substitution of illicit crops, enhance exports in order to create jobs not linked to drug production and trafficking and foster diversification.

²⁴³*Supra*, para. 105.

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

The problems which Pakistan is facing today, are similar. The *GSP drug regime* is therefore likely to stabilise its economic and social structures and thus consolidate the institutions that uphold the rule of law.²⁴⁵ (emphasis added)

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

²⁴⁵Explanatory 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).

²⁴⁶See, 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."

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)

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

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)

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

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)

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

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

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

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

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

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,

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.

²⁵⁵*Ibid.*, para. 95.

²⁵⁶*Ibid.*, paras. 119-128.

the European Communities could be expected to defend its challenged measure under the Enabling Clause, in relation to which the European Communities ultimately bears the burden of justification.

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

124. Finally, we observe that the European Communities' appeal of the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 is "based on" the European Communities' claim that the Panel erroneously found that (i) the Enabling Clause is an "exception" to Article I:1; (ii) the Enabling Clause "does not exclude the applicability" of Article I:1; and (iii) the European Communities had the burden of proving the consistency of the Drug Arrangements with that Clause.²⁵⁷ As we have not reversed any of these findings of the Panel²⁵⁸, we do not need to review further and we *do not rule* on the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994.²⁵⁹

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

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

... seek[] review of the Panel's legal conclusion that [the Drug Arrangements] are inconsistent with Article I:1 ... This conclusion is based on the following erroneous legal findings:

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

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

²⁵⁸*Supra*, paras. 99, 103, and 123.

²⁵⁹Panel 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.

European Communities bore the burden of *proving* that the Drug Arrangements satisfy the conditions of the Enabling Clause, in order to justify those Arrangements under that Clause. We *find*, further, that India sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1 before the Panel. We turn now to examine whether the European Communities met its burden of justifying the Drug Arrangements under that provision.

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

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

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

- (a) "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations"²⁶¹;
- (b) "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries"²⁶²; and, ultimately, that
- (c) the European Communities failed "to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".²⁶³

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

²⁶¹Panel Report, paras. 7.161 and 7.176.

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

²⁶³*Ibid.*, para. 8.1(d).

128. Before addressing these specific issues, we will identify the precise scope of the appeal before us. In doing so, we note that both the European Communities and India agree that, in addressing paragraph 2(a) of the Enabling Clause, the Panel implicitly made findings on issues that were not before it. Thus, India submits that "[t]he issue before the Panel was not whether the EC could exclude from its GSP scheme countries claiming developing country status."²⁶⁴ In India's view, that issue did not arise "because India and all the countries enjoying tariff preferences under the Drug Arrangements are beneficiaries under the EC's GSP scheme."²⁶⁵ Also not before the Panel, according to India, was "whether the EC's mechanisms for the graduation of developing countries meet the requirements of the Enabling Clause."²⁶⁶ India emphasizes that it "did not submit any claims on these issues to the Panel because they are not relevant to the resolution of this dispute."²⁶⁷ In other words, according to India, the legal issues raised in this dispute "relate exclusively"²⁶⁸ to the treatment of those countries that a preference-granting country has included in its GSP scheme as beneficiaries. The European Communities echoes India's concern that the Panel read obligations into the Enabling Clause "in respect of issues which had not been raised by any of the parties and which [the Panel] did not have to address in order to resolve the dispute".²⁶⁹

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

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

²⁶⁵*Ibid.*

²⁶⁶India'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.

²⁶⁷India's opening statement at the oral hearing.

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

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

²⁷⁰See *supra*, paras. 120-122.

130. We note, moreover, that the European Communities has *not* appealed the Panel's interpretation of paragraph 3(c) of the Enabling Clause.²⁷¹ Instead, the European Communities has invoked that provision solely as "contextual support" for its interpretation of "non-discriminatory" in footnote 3.²⁷² We also note that the Panel made no findings in this case as to whether the Drug Arrangements are inconsistent with paragraph 3(a) or 3(c) of the Enabling Clause. Our mandate, pursuant to Article 17.6 of the DSU, is limited to "issues of law covered in the panel report and legal interpretations developed by the panel". Therefore, in this appeal, we are not required to, and we shall not address, the issue of whether the Drug Arrangements are consistent with paragraphs 3(a) and 3(c) of the Enabling Clause. This does not prevent us, of course, from examining those paragraphs as context for our interpretation of "non-discriminatory" in footnote 3.

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

A. *Panel Findings*

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

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

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

³ As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24). (footnote 2 omitted)

²⁷¹The 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)

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

²⁷³Panel Report, para. 7.65.

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

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

...

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

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

134. Having found that the text of paragraph 3(c) "does not reveal whether the 'needs of developing countries' refers to the needs of *all* developing countries or to the needs of *individual* developing countries" ²⁷⁵, the Panel proceeded to examine "the drafting history in UNCTAD ... to identify the intention of the drafters on issues relating to the GSP arrangements." ²⁷⁶ The Panel concluded that paragraph 3(c) allows for differentiation among beneficiaries for the purposes of granting preferential treatment to least-developed countries and setting *a priori* import limitations for products originating in particularly competitive developing countries. The Panel asserted that "[n]o other differentiation among developing countries is permitted by paragraph 3(c)." ²⁷⁷

135. Having made these findings based on its review of what it considered the "context" and "preparatory work" ²⁷⁸ of paragraph 3(c) of the Enabling Clause, the Panel turned to examine paragraph 2(a) and footnote 3 thereto. The Panel observed that the word "discriminate ... can have either a *neutral* meaning of making a distinction or a *negative* meaning carrying the connotation of a distinction that is unjust or prejudicial." ²⁷⁹ In order to determine the appropriate meaning of the

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

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

²⁷⁶*Ibid.*, para. 7.80.

²⁷⁷*Ibid.*, para. 7.116.

²⁷⁸*Ibid.*, para. 7.88.

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

term "non-discriminatory" as used in footnote 3, the Panel turned to the context of that term. According to the Panel, this context includes paragraphs 2(a), 2(d), and 3(c) of the Enabling Clause, with the "most relevant elements of context" being Resolution 21(II) of the Second Session of UNCTAD ("Resolution 21(II)")²⁸⁰ and the Agreed Conclusions.²⁸¹ Based on its review of these documents, the Panel found that:

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

136. The Panel concluded:

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

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

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

...

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

The Panel stated that the term "non-discriminatory" cannot be interpreted "to permit preferential treatment to less than all developing countries without an explicit authorization".²⁸⁵ According to the Panel, "[s]uch explicit authorization is only provided for the benefit of the least-developed countries

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

²⁸¹Panel Report, para. 7.128.

²⁸²*Ibid.*, para. 7.144.

²⁸³*Ibid.*

²⁸⁴*Ibid.*, paras. 7.148-7.149.

²⁸⁵*Ibid.*, para. 7.151.

in paragraph 2(d) of the Enabling Clause and for the implementation of a priori limitations, as set out in the Agreed Conclusions."²⁸⁶

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

139. The Panel found further support for its interpretation in an examination of the "overall practice" of preference-granting countries²⁸⁹, which, according to the Panel, "suggests that there was a common understanding of 'equal' treatment to all developing countries except for a priori measures, and that it was on this basis that the 1971 Waiver Decision was adopted."²⁹⁰

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

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

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

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

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

²⁸⁶Panel Report, para. 7.151.

²⁸⁷*Ibid.*, para. 7.158.

²⁸⁸*Ibid.*

²⁸⁹*Ibid.*, para. 7.159.

²⁹⁰*Ibid.*

²⁹¹*Ibid.*, para. 7.161.

²⁹²*Ibid.*, para. 7.177.

²⁹³*Ibid.*, para. 8.1(d).

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

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

143. We recall first that the Enabling Clause has become a part of the GATT 1994.²⁹⁴ Paragraph 1 of the Enabling Clause authorizes WTO Members to provide "differential and more favourable treatment to developing countries, without according such treatment to other WTO Members". As explained above, such differential treatment is permitted "notwithstanding" the provisions of Article I of the GATT 1994. Paragraph 2(a) and footnote 3 thereto clarify that paragraph 1 applies to "[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences"²⁹⁵, "[a]s described in the [1971 Waiver Decision], relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries'".²⁹⁶

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

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries[.]²⁹⁷ (original italics; underlining added)

145. Paragraph 2(a) of the Enabling Clause provides, therefore, that, to be justified under that provision, preferential tariff treatment must be "in accordance" with the GSP "as described" in the *Preamble* to the 1971 Waiver Decision. "Accordance" being defined in the dictionary as

²⁹⁴See *supra*, footnote 192.

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

²⁹⁶*Ibid.*, footnote 3 to para. 2(a).

²⁹⁷1971 Waiver Decision, third and fourth recitals.

"conformity"²⁹⁸, only preferential tariff treatment that is in conformity with the description "generalized, non-reciprocal and non-discriminatory" treatment can be justified under paragraph 2(a).

146. In the light of the above, we do not agree with European Communities' assertion²⁹⁹ 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 "assum[ing]" that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries, and that, instead, footnote 3 "is simply a cross-reference to where the Generalized System of Preferences is described."³⁰⁰

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

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

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

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

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

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

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

149. The European Communities maintains that "'non-discrimination' is not synonymous with formally equal treatment"³⁰³ and that "[t]reating differently situations which are objectively different is not discriminatory."³⁰⁴ The European Communities asserts that "[t]he objective of the Enabling Clause is different from that of Article I:1 of the GATT."³⁰⁵ In its view, the latter is concerned with "providing equal conditions of competition for imports of like products originating in all Members", whereas "the Enabling Clause is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries."³⁰⁶ The European Communities derives contextual support from paragraph 3(c), which states that the treatment provided under the Enabling Clause "shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." The European Communities concludes that the term "non-discriminatory" in footnote 3 "does not prevent the preference-giving countries from differentiating between developing countries which have different development needs, where tariff differentiation constitutes an adequate response to such differences."³⁰⁷

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

³⁰²Panel Report, para. 7.161.

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

³⁰⁴*Ibid.*

³⁰⁵*Ibid.*, para. 152.

³⁰⁶*Ibid.*

³⁰⁷*Ibid.*, para. 188.

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

³⁰⁹*Ibid.*, para. 106.

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

"relinquish[] their MFN rights [under Article I of the GATT 1994] as between themselves, thus permitting developed countries to discriminate between them."³¹¹

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

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

153. Nevertheless, at this stage of our analysis, we are able to discern some of the content of the "non-discrimination" obligation based on the ordinary meanings of that term. Whether the drawing of

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

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

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

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

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

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

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

155. We continue our interpretive analysis by turning to the immediate context of the term "non-discriminatory". We note first that footnote 3 to paragraph 2(a) stipulates that, in addition to being "non-discriminatory", tariff preferences provided under GSP schemes must be "generalized".

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

³¹⁷*Ibid.*, para. 188.

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

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

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

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

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

According to the ordinary meaning of that term, tariff preferences provided under GSP schemes must be "generalized" in the sense that they "apply more generally; [or] become extended in application".³¹⁹ However, this ordinary meaning alone may not reflect the entire significance of the word "generalized" in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel's finding that, by requiring tariff preferences under the GSP to be "generalized", developed and developing countries together sought to eliminate existing "special" preferences that were granted only to certain designated developing countries.³²⁰ Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences³²¹ that were, in general, based on historical and political ties between developed countries and their former colonies.

156. It does not necessarily follow, however, that "non-discriminatory" should be interpreted to require that preference-granting countries provide "identical" tariff preferences under GSP schemes to "all" developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily "result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries".³²² To us, this conclusion is unwarranted. We observe that the term "generalized" requires that the GSP schemes of preference-granting countries remain generally applicable.³²³ Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. As we discuss below³²⁴, provisions such as paragraphs 3(a) and 3(c)

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

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

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

³²²Panel Report, para. 7.102.

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

³²⁴*Infra*, paras. 157-168.

of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries.

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

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

158. At the outset, we note that the use of the word "shall" in paragraph 3(c) suggests that paragraph 3(c) sets out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to "respond positively" to the "needs of developing countries".³²⁵ Having said this, we turn to consider whether the "development, financial and trade needs of developing countries" to which preference-granting countries are required to respond when granting preferences must be understood to cover the "needs" of developing countries *collectively*.

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

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

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

³²⁷*Ibid.*, para. 7.78.

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

the needs of "each and every"³²⁹ developing country, suggests to us that, in fact, that provision imposes no such obligation.³³⁰

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

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

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

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

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

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

³³³*WTO Agreement*, Preamble, second recital.

that Members' "respective needs and concerns at different levels of economic development"³³⁴ may vary according to the different stages of development of different Members.

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

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

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

³³⁴*WTO Agreement*, Preamble, first recital.

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

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

widely-recognized "development, financial [or] trade need", can such action satisfy the requirements of paragraph 3(c).

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

166. India submits that developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT 1994 *vis-à-vis* other developing countries³³⁷, and we make no such presumption. In fact, we note that the Enabling Clause *specifically* allows developed countries to provide differential and more favourable treatment to developing countries "notwithstanding" the provisions of Article I.³³⁸ With this in mind, and given that paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.

167. Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any "differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties." This requirement applies, *a fortiori*, to any preferential treatment granted to one GSP beneficiary that is not granted to another.³³⁹ Thus, although paragraph 2(a) does not prohibit *per se* the granting of different tariff preferences to different GSP beneficiaries³⁴⁰, and paragraph 3(c) even contemplates such differentiation under certain circumstances³⁴¹, paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.

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

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

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

³⁴⁰*Supra*, paras. 153-154.

³⁴¹*Supra*, paras. 162-165.

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

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

170. The Panel took the view, however, that the objective of "elimination of discriminatory treatment in international commerce"³⁴⁵, found in the Preamble to the GATT 1994, "contributes more

³⁴²*WTO Agreement*, Preamble, second recital.

³⁴³1971 Waiver Decision, Preamble, first recital.

³⁴⁴Panel Report, para. 7.161.

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

to guiding the interpretation of 'non-discriminatory'"³⁴⁶ than does the objective of ensuring that developing countries "secure ... a share in the growth in international trade commensurate with their development needs."³⁴⁷ We fail to see on what basis the Panel drew this conclusion.

171. We next examine the relevance of paragraph 2(d) of the Enabling Clause³⁴⁸ for the interpretation of "non-discriminatory" in footnote 3. The Panel characterized paragraph 2(d) as an "exception" to paragraph 2(a)³⁴⁹ and relied on paragraph 2(d) to support its view that paragraph 2(a) requires "formally identical treatment".³⁵⁰ In the Panel's view, if developed-country Members were entitled under paragraph 2(a) to differentiate between developing-country Members, then they would have been entitled under that paragraph alone to differentiate between developing and least-developed countries. Accordingly, "there would have been no need to include paragraph 2(d) in the Enabling Clause."³⁵¹

172. We do not agree with the Panel that paragraph 2(d) is an "exception" to paragraph 2(a), or that it is rendered redundant if paragraph 2(a) is interpreted as allowing developed countries to differentiate in their GSP schemes between developing countries. To begin with, we note that the terms of paragraph 2 do not expressly indicate that each of the four sub-paragraphs thereunder is mutually exclusive, or that any one is an exception to any other. Moreover, in our view, it is clear from several provisions of the Enabling Clause that the drafters wished to emphasize that least-developed countries form an identifiable sub-category of developing countries with "special economic difficulties and ... particular development, financial and trade needs".³⁵² When a developed-country Member grants tariff preferences in favour of developing countries under paragraph 2(a), as we have already found³⁵³, footnote 3 imposes a requirement that such preferences be "non-discriminatory". In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not "discriminate" against other developing countries contrary to footnote 3. The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to

³⁴⁶Panel Report, paras. 7.157-7.158.

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

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

³⁴⁹Panel Report, para. 7.147.

³⁵⁰*Ibid.*, para. 7.145.

³⁵¹*Ibid.*, para. 7.145.

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

³⁵³*Supra*, paras. 145-148.

least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is "non-discriminatory". This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term "non-discriminatory" does not require the granting of "identical tariff preferences"³⁵⁴ to all GSP beneficiaries.

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

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

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

175. In addition to the Panel's interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause, the European Communities appeals the Panel's finding that "the term 'developing countries' in paragraph 2(a) should be interpreted to mean *all* developing countries, [except as regards] *a priori* limitations".³⁵⁶ The Panel's interpretation of paragraph 2(a) is premised on its findings that (i) footnote 3 permits the granting of different tariff preferences to different GSP beneficiaries *only* for the purpose of *a priori* limitations³⁵⁷, and (ii) paragraph 3(c) permits the granting of different tariff preferences to different GSP beneficiaries *only* for the purposes of

³⁵⁴Panel Report, para. 7.161.

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

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

³⁵⁷Panel Report, para. 7.170.

a priori limitations and preferential treatment in favour of least-developed countries.³⁵⁸ We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term "developing countries" in paragraph 2(a) should not be read to mean "all" developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries.

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

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

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

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

179. Although paragraph 3(c) informs the interpretation of the term "non-discriminatory" in footnote 3 to paragraph 2(a), as detailed above³⁶², paragraph 3(c) imposes requirements that are

³⁵⁸Panel Report, para. 7.171.

³⁵⁹*Supra*, paras. 120-122.

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

³⁶¹Panel Report, para. 8.1(d).

³⁶²*Supra*, paras. 157-162.

separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized "development, financial and trade needs" of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this "positive response" would not, as such, fail to comply with the "non-discriminatory" requirement in footnote 3 of the Enabling Clause³⁶³, even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.³⁶⁴ With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause³⁶⁵, we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to "respond positively to the development, financial and trade needs of developing countries" or with the obligation contained in paragraph 3(a) not to "raise barriers" or "create undue difficulties" for the trade of other Members.

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

³⁶³*Supra*, para. 165.

³⁶⁴*Supra*, para. 167.

³⁶⁵See *supra*, para. 134.

³⁶⁶*Supra*, para. 165.

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

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

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

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

183. What is more, the Drug Arrangements themselves do *not* set out any clear prerequisites—or "objective criteria"³⁷⁰—that, if met, would allow for other developing countries "that are similarly affected by the drug problem"³⁷¹ to be *included* as beneficiaries under the Drug Arrangements.³⁷² Indeed, the European Commission's own Explanatory Memorandum notes that "the benefits of the drug regime ... are given without *any* prerequisite."³⁷³ Similarly, the Regulation offers no criteria

³⁶⁸The 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))

³⁶⁹Regulation, Title III.

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

³⁷¹*Ibid.*, para. 186.

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

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

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

³⁷³Explanatory 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).

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

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

³⁷⁴Regulation, Art. 25.1(b).

³⁷⁵In 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.

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

³⁷⁷Regulation, Art. 26.1(d).

the Panel appeared to recognize, this condition is not connected to the question of whether the beneficiary is a "seriously drug-affected country".³⁷⁸

185. We note, moreover, that the Drug Arrangements will be in effect until 31 December 2004.³⁷⁹ Until that time, other developing countries that are "similarly affected by the drug problem" can be included as beneficiaries under the Drug Arrangements only through an amendment to the Regulation. The European Communities confirmed this understanding in response to questioning at the oral hearing.

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

187. We recall our conclusion that the term "non-discriminatory" in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation.

³⁷⁸Panel Report, para. 7.216.

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

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

³⁸¹*Ibid.*, para. 186.

³⁸²Council 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)

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

Such a "closed list" of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.

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

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

³⁸⁴See *supra*, footnote 372.

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

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.

Signed in the original at Geneva this 18th day of March 2004 by:

Georges Abi-Saab
Presiding Member

Luiz Olavo Baptista
Member

Giorgio Sacerdoti
Member

ANNEX 1

**WORLD TRADE
ORGANIZATION**

WT/DS246/7
8 January 2004

(04-0070)

Original: English

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

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

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

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

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

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

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

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

legal conclusion that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". That conclusion is based on the following erroneous legal findings:

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

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

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

ANNEX 2

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

*Decision of 28 November 1979
(L/4903)*

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

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:²
 - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³
 - (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
 - (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another
 - (d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
3. Any differential and more favourable treatment provided under this clause:
 - (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
 - (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

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

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

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

- (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.
4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:⁴
- (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
- (b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.
5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's 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
APPELLATE BODY

Brazil – Measures Affecting Imports of Retreaded Tyres

European Communities, *Appellant*
Brazil, *Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
China, *Third Participant*
Cuba, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Paraguay, *Third Participant*
Separate Customs Territory of Taiwan, Penghu,
Kinmen, and Matsu, *Third Participant*
Thailand, *Third Participant*
United States, *Third Participant*

AB-2007-4

Present:

Abi-Saab, Presiding Member
Baptista, Member
Taniguchi, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (the "Panel Report").¹ The Panel was established to consider a complaint by the European Communities concerning the consistency of certain measures imposed by Brazil on the importation and marketing of retreaded tyres² with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

¹WT/DS332/R, 12 June 2007.

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 or all of the sidewalls. (See Panel Report, para. 2.1) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retreading". These methods are: (i) top-capping, which consists of replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. (See *ibid.*, para. 2.2) The retreaded tyres covered in this dispute are classified under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types) of the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983. In contrast, used tyres are classified under subheading 4012.20. New tyres are classified under heading 4011. (See *ibid.*, para. 2.4)

2. Before the Panel, the European Communities claimed that Brazil imposed a prohibition on the importation of retreaded tyres, notably by virtue of Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")³, and that this prohibition was inconsistent with Article XI:1 of the GATT 1994.⁴ The European Communities also contended that certain Brazilian measures providing for the imposition of fines on the importation of retreaded tyres, and on the marketing, transportation, storage, keeping, or warehousing of imported retreaded tyres⁵, were similarly inconsistent with Article XI:1 or, alternatively, Article III:4 of the GATT 1994.⁶ In addition, the European Communities made claims under Article III:4 of the GATT 1994 in respect of certain state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres.⁷ Finally, the European Communities challenged the exemption from the import prohibition on retreaded tyres and associated fines provided by Brazil to retreaded tyres originating in countries of the Mercado Común

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.

(See Panel Report, para. 2.7)

⁴*Ibid.*, paras. 3.1 and 7.1.

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 whosoever trades, transports, stores, keeps or maintains in a depot a used or recycled tire imported under such conditions.

(*Ibid.*, para. 2.10 (referring to Exhibit BRA-72 submitted by Brazil to the Panel); see also Exhibit EC-34 submitted by the European Communities to the Panel)

⁶Panel Report, paras. 3.1 and 7.358.

⁷*Ibid.*, para. 7.391. The measures of the State of Rio Grande do Sul are identified in paragraphs 2.11 and 2.12 of the Panel Report.

del Sur ("MERCOSUR") (Southern Common Market).⁸ The European Communities contended that these exemptions were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.⁹

3. Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were *prima facie* inconsistent with Article XI:1¹⁰; or that state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres were *prima facie* inconsistent with Article III:4¹¹; or that the exemptions from both the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries were *prima facie* inconsistent with Articles I:1 and XIII:1 of the GATT 1994.¹² Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all justified under Article XX(b) of the GATT 1994.¹³ Brazil contended that the fines associated with the import prohibition on retreaded tyres were justified also under Article XX(d) of the GATT 1994.¹⁴ Brazil further maintained that the exemption from the import prohibition and associated fines afforded to imports of *remoulded* tyres from MERCOSUR countries was justified under Articles XX(d) and XXIV of the GATT 1994.¹⁵

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 MCN 4012.1100, 4012.1200, 4012.1300 and 4012.1900, originating in the MERCOSUR member countries under Economic Complementation Agreement No. 18 shall be exempt from payment of the fine referred to in this Article.

(See *supra*, footnote 5; see also Panel Report, para. 2.16)

⁹Panel Report, para. 7.448.

¹⁰*Ibid.*, paras. 7.2 and 7.359. Brazil did not acknowledge any inconsistency of the fines with Article III:4 of the GATT 1994. (See *ibid.*, para. 7.359)

¹¹*Ibid.*, para. 7.392.

¹²*Ibid.*, para. 7.449.

¹³*Ibid.*, paras. 7.2, 7.217, 7.359, and 7.392.

¹⁴*Ibid.*, para. 7.359.

¹⁵*Ibid.*, para. 7.449.

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 12 June 2007. The Panel found that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX of the GATT 1994.¹⁶ In its analysis, the Panel found that the import prohibition on retreaded tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b).¹⁷ However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both "a means of unjustifiable discrimination [between countries] where the same conditions prevail"¹⁸ and "a disguised restriction on international trade"¹⁹, within the meaning of the chapeau of Article XX of the GATT 1994.

5. The Panel found further that the fines associated with the import prohibition on retreaded tyres were inconsistent with Article XI:1 and not justified under either paragraph (b) or (d) of Article XX of the GATT 1994.²⁰ The Panel also determined that state law restrictions on the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Article III:4 and not justified under Article XX(b) of the GATT 1994.²¹ The Panel exercised judicial economy with respect to the European Communities' claims that the exemption from the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, and with respect to Brazil's related defence under Articles XX(d) and XXIV of the GATT 1994.²² The Panel accordingly recommended that the Dispute Settlement Body (the "DSB") request Brazil to bring those measures found to be inconsistent into conformity with its obligations under the GATT 1994.²³

6. At its meeting on 10 August 2007, the DSB agreed to a joint request by Brazil and the European Communities to extend the time period for adoption of the Panel Report until no later than 20 September 2007.²⁴ On 3 September 2007, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures*

¹⁶Panel Report, paras. 7.357 and 8.1(a)(i) and (ii).

¹⁷*Ibid.*, para. 7.215.

¹⁸*Ibid.*, para. 7.310; see also para. 7.306.

¹⁹*Ibid.*, para. 7.349.

²⁰*Ibid.*, para. 8.1(b). The Panel did not rule on the European Communities' alternative claim that the fines associated with the prohibition on the importation of retreaded tyres were inconsistent with Article III:4 of the GATT 1994. (See *ibid.*, para. 7.364)

²¹*Ibid.*, para. 8.1(c).

²²*Ibid.*, paras. 7.456 and 8.2.

²³*Ibid.*, para. 8.4.

²⁴WT/DS332/8, 31 July 2007. The minutes of the DSB meeting are set out in WT/DSB/M/237.

Governing the Settlement of Disputes (the "DSU"), and filed a Notice of Appeal²⁵ pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").²⁶ On 10 September 2007, the European Communities filed an appellant's submission.²⁷ On 28 September 2007, Brazil filed an appellee's submission.²⁸ On the same day, Argentina, Australia, Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, and the United States each filed a third participant's submission.²⁹ Also on 28 September 2007, China, Cuba, Guatemala, Mexico, and Thailand each notified its intention to appear at the oral hearing as a third participant.³⁰ On 5 October 2007, Paraguay notified its intention to appear at the oral hearing as a third participant.³¹

7. On 28 September 2007, the Appellate Body received an *amicus curiae* brief from the Humane Society International. On 11 October 2007, the Appellate Body further received an *amicus curiae* brief submitted jointly by a group of nine non-governmental organizations.³² The Appellate Body Division hearing the appeal did not find it necessary to take these *amicus curiae* briefs into account in rendering its decision.

8. The oral hearing in this appeal was held on 15 and 16 October 2007. The participants and the third participants, with the exception of Argentina, China, Guatemala, Mexico, Paraguay, and Thailand, made oral statements. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal.

²⁵WT/DS332/9, 3 September 2007 (attached as Annex I to this Report).

²⁶WT/AB/WP/5, 4 January 2005.

²⁷Pursuant to Rule 21 of the *Working Procedures*.

²⁸Pursuant to Rule 22 of the *Working Procedures*.

²⁹Pursuant to Rule 24(1) of the *Working Procedures*.

³⁰Pursuant to Rule 24(2) of the *Working Procedures*.

³¹Pursuant to Rule 24(4) of the *Working Procedures*.

³²These non-governmental organizations are: Associação de Combate aos Poluentes (ACPO), Brazil; Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Brazil; Centro de Derechos Humanos y Ambiente (CEDHA), Argentina; Center for International Environmental Law (CIEL), United States and Switzerland; Conectas Direitos Humanos, Brazil; Friends of the Earth Europe, Belgium; The German NGO Forum on Environment and Development, Germany; Justiça Global, Brazil; and Instituto O Direito por Um Planeta Verde, Brazil.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by the European Communities – Appellant

1. The Necessity Analysis

9. The European Communities claims that the Panel erred in finding that the import prohibition on retreaded tyres imposed by Brazil (the "Import Ban") was necessary to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the Import Ban is not "necessary" within the meaning of Article XX(b).

10. The European Communities' claims of error are directed at three distinct aspects of the Panel's necessity analysis: first, the Panel's finding that the Import Ban contributed to the realization of its stated objective; secondly, the Panel's finding that there were no reasonably available alternatives to the Import Ban; and thirdly, the Panel's alleged failure to conduct the process of weighing and balancing the relevant factors and the alternatives that was required to determine whether the Import Ban was "necessary" under Article XX(b). The arguments advanced by the European Communities in relation to each of these claims of error are addressed in turn.

(a) The Contribution Analysis

11. The European Communities argues that the Panel erred in finding that the Import Ban contributed to the protection of human, animal, or plant life or health. The European Communities maintains that the Panel "applied an erroneous legal standard"³³ by examining whether the Import Ban could make, or *could have made*, a contribution to the protection of human life or health, rather than establishing the *actual* contribution of the measure to its objective. By applying a standard of potential contribution, rather than one of actual contribution, the Panel acted inconsistently with the case law of the Appellate Body³⁴, which requires the Panel to have assessed the extent of the contribution made by the Import Ban to the reduction of waste tyres arising in Brazil. The European Communities reasons that "no meaningful weighing and balancing is possible"³⁵ absent a proper determination of the extent of the contribution made by the measure, and that, for necessity to be demonstrated, the contribution required is "more than mere suitability", it must be "verifiable and significant".³⁶ In this case, assessing the contribution of the measure to the achievement of its stated

³³European Communities' appellant's submission, para. 166.

³⁴*Ibid.*, para. 169 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 164).

³⁵*Ibid.*, para. 171.

³⁶*Ibid.*, para. 172.

goals involved assessing whether the Import Ban reduced the number of waste tyres in Brazil. The European Communities does not see how this could have been done in any way *other than* through quantification, and stresses that this is *not* a case involving scientific uncertainty about the existence of risks. Rather, that "[t]he very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of waste tyres arising in Brazil."³⁷

12. In addition, the European Communities claims that the Panel did not make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in determining the contribution of the Import Ban to the realization of the ends pursued by it. The European Communities asserts that the Panel ignored significant facts and arguments in its analysis, and failed to conduct an overall assessment of the evidence, instead, referring to the evidence before it in a selective and distorted manner.

13. According to the European Communities, in concluding that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"³⁸ that were not capable of being retreaded, the Panel ignored evidence that demonstrated "the existence ... of low-quality non-retreadable tyres"³⁹ in Brazil. The Panel's finding that "at least some domestic used tyres are being retreaded in Brazil"⁴⁰ is based exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association of the Retreading Industry) (the "ABR Report")⁴¹ and on Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality).⁴² The European Communities submits that the Panel failed to consider that the former is directly contradicted by a second report by the ABR⁴³, or to discount the evidentiary value of the latter

³⁷European Communities' appellant's submission, para. 177. For the European Communities, the indirect nature of the alleged risk distinguishes this case from *EC – Asbestos*, as the factual context of this case does not concern the evaluation of risk in quantitative or qualitative terms. Rather, it concerns the quantification of the contribution of the measure to achieving its stated objective. (See *ibid.*, para. 175)

³⁸*Ibid.*, para. 183 (quoting Panel Report, para. 7.137).

³⁹*Ibid.* (referring to Exhibits EC-15 and EC-67 to EC-71 submitted by the European Communities to the Panel; European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254-255).

⁴⁰Panel Report, para. 7.136.

⁴¹European Communities' appellant's submission, para. 186 (referring to the report of the ABR on tyre retreading activities in Brazil, 26 May 2006 (Exhibit BRA-95 submitted by Brazil to the Panel), para. 6)).

⁴²Exhibit BRA-163 submitted by Brazil to the Panel.

⁴³European Communities' appellant's submission, para. 187 (referring to the report of the ABR on the reformed tyres sector in Brazil, 23 June 2006 (Exhibit BRA-157 submitted by Brazil to the Panel), para. 6)).

given that it was issued during the course of the Panel proceedings and contradicts the earlier INMETRO Technical Note 83/2000.⁴⁴

14. Moreover, the European Communities contends that the Panel ignored evidence that contradicted its findings regarding the retreadability of used tyres in Brazil, namely, a study by the consultancy LAFIS⁴⁵, and the fact that domestic retreaders have sought court injunctions to obtain the right to import used tyres for further retreading in Brazil. The European Communities also denounces the Panel's references to measures that Brazil might adopt in the future (such as more frequent automotive inspections), emphasizing that the question of whether the Import Ban contributed to the achievement of its stated objective had to be determined at the time of the establishment of the Panel, and speculation about future events is not a sufficient basis for an objective assessment of the facts.

(b) Alternatives to the Import Ban

15. The European Communities argues that the Panel committed multiple errors in holding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection of human life and health. The European Communities points out that it presented two categories of alternative measures: measures to reduce the *accumulation* of waste tyres; and measures to improve the *management* of waste tyres.

16. In the view of the European Communities, the Panel improperly excluded measures to ensure a better implementation and enforcement of the import ban on *used* tyres from its analysis of possible alternatives to the Import Ban on *retreaded* tyres. The most relevant and obvious alternative that would allow Brazil to prevent the risks associated with the accumulation of waste tyres would be to put an end to the importation of used tyres. Thus, the European Communities insists, the Panel should have analyzed this alternative irrespective of whether it also considered the implementation of the import ban on used tyres as part of its analysis under the chapeau of Article XX.

17. The European Communities adds that the Panel incorrectly defined as "alternatives" to the Import Ban only measures that avoid the generation of waste tyres specifically from imported retreaded tyres. Such a narrow definition of "alternatives" wrongly links the notion of alternative measures to the *means* (avoidance or non-generation of waste tyres) employed by the measure at issue

⁴⁴European Communities' appellant's submission, paras. 188 and 189; Exhibit EC-45 submitted by the European Communities to the Panel.

⁴⁵*Ibid.*, para. 190 (referring to the report by LAFIS, "Auto Parts and Vehicles: Tyres", 20 April 2006 (Exhibit EC-92 submitted by the European Communities to the Panel), p. 11). This study indicates that, in Brazil, the overall rate of retreading for all types of vehicles is 9.9 per cent.

to achieve its objective, rather than to the objective itself. Available alternatives to the Import Ban are not, therefore, as the Panel found, limited to non-generation measures, but include any alternatives that would allow Brazil to attain the stated objective of the Import Ban, namely, the protection of life and health from mosquito-borne diseases and from tyre fire emissions. In the European Communities' view, the Panel's narrow conception of "alternative" resulted in the erroneous rejection of several alternatives that were capable of achieving this objective, such as measures to improve the domestic retreading and retreadability of tyres, the collection and disposal scheme imposed by the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment), and measures relating to the management of waste tyres, such as co-incineration.

18. The European Communities points to two additional errors in the Panel's conception of alternative measures. First, the Panel refused to consider as alternatives measures that could be "cumulative rather than substitutable"⁴⁶ with the Import Ban. For the European Communities, a measure that is cumulative or complementary to the Import Ban is capable of achieving the same objective as the ban and, therefore, is an alternative that must be taken into account. Secondly, in examining the CONAMA scheme and co-incineration of waste tyres, the Panel did not inquire whether the proposed options exist and are reasonably available, but, instead, examined whether those options are actually being employed.

19. Moreover, the European Communities argues that the Panel erred by excluding as alternatives a correct and complete implementation of certain state measures merely on the basis that these measures have already been implemented in Brazil. Specifically, the European Communities submits that evidence before the Panel demonstrated that Brazil neither implements correctly the obligations under the CONAMA scheme, nor enforces properly its collection and disposal system. Therefore, a better enforcement of the CONAMA scheme is an alternative that would be more effective than the Import Ban in reducing risks associated with tyre waste. The Panel also erroneously ignored the European Communities' contention that collection and disposal programmes, such as Paraná Rodando Limpo⁴⁷ should be adopted by all states in Brazil.

20. The European Communities also challenges the Panel's findings that most of the material recycling alternatives it proposed could not constitute reasonably available alternatives to the Import Ban because they "are only capable of disposing [of] a small ... number of waste tyres".⁴⁸ The case law of the Appellate Body regarding Article XX(b) does not require that one single alternative

⁴⁶European Communities' appellant's submission, para. 225 (quoting Panel Report, para. 7.169).

⁴⁷See Exhibit EC-49 submitted by the European Communities to the Panel.

⁴⁸European Communities' appellant's submission, para. 238 (referring to Panel Report, paras. 7.201, 7.205, and 7.206). (underlining omitted)

measure achieve the same objective as the challenged measure. Therefore, the Panel erred in rejecting several alternative measures on the grounds that, taken individually, each measure did not fully attain the objective of the challenged measure. The European Communities also considers that the Panel erred in its analysis by requiring alternatives to be capable of dealing with the management of *all* waste tyres in Brazil, rather than with the number of waste tyres attributable to imported *retreaded* tyres.

21. Finally, the European Communities submits that the Panel's factual findings regarding reasonably available alternatives were not based on an objective assessment of the facts, as required by Article 11 of the DSU. More specifically, the Panel's rejection of landfilling of waste tyres as an alternative to the Import Ban was based on evidence related exclusively to landfilling of *whole* tyres, when the only alternative proposed was the landfilling of *shredded* tyres, and the Panel did not take into account legislation that permits the landfilling of shredded tyres in Brazil. As regards controlled stockpiling, the Panel erred in rejecting this alternative on the grounds that stockpiling does not dispose of waste tyres, and that it entails some risk to human health and the environment. As recognized in the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal*⁴⁹, controlled stockpiling is a disposal operation that is used for temporary storage. It is a crucial element in managing waste tyres, and the mere fact that it does not avoid *all* the risks that the Import Ban seeks to eliminate does not mean that it could not be an alternative. Regarding co-incineration, the European Communities argues that the Panel relied on evidence on co-incineration activities in countries other than Brazil⁵⁰, and failed to require Brazil to explain why unused capacity in its existing incineration facilities could not be used to burn more waste tyres as an available alternative to the Import Ban. The European Communities adds that the Panel's finding that co-incineration "may potentially pose health risks to humans"⁵¹ is based on outdated evidence that does not represent the current state of the art on energy recovery.

22. The European Communities contends further that the Panel's rejection of material recycling as an alternative to the Import Ban is also not based on an objective assessment of the facts. The Panel disregarded evidence presented by the European Communities and, instead, relied on a brief paper by an unidentified organization, which related to a single material recycling application—civil engineering—to conclude that "it is not clear that these [material recycling] applications are entirely

⁴⁹Adopted 1989; entry into force 1992 (Exhibit EC-24 submitted by the European Communities to the Panel).

⁵⁰European countries and the United States. See also Panel Report, footnote 1339 to para. 7.192.

⁵¹European Communities' appellant's submission, para. 262 (quoting Panel Report, para. 7.192).

safe".⁵² The European Communities adds that the Panel's conclusion that material recycling alternatives, such as civil engineering and rubber asphalt, would not be "reasonably" available due to their prohibitive costs was based on evidence adduced exclusively in relation to a single material recycling application—devulcanization.

23. Finally, the European Communities claims that the Panel failed to analyze one of the possible alternative measures identified by the European Communities, and which has already been adopted by Brazil—the National Dengue Control Programme⁵³—and that this failure constitutes a violation of Article 11 of the DSU.

(c) The Weighing and Balancing Process

24. The European Communities claims that the Panel failed to conduct the process of weighing and balancing the relevant factors and the alternatives that was required in order to determine whether the Import Ban was "necessary" under Article XX(b) of the GATT 1994. For the European Communities, weighing and balancing involves, first, an individual assessment of each element (importance of the objective pursued; trade restrictiveness of the measure; contribution of the measure to the achievement of the objective) and, then, a consideration of the role and relative importance of each element together with the other elements, for the purposes of deciding whether the challenged measure is necessary to achieve the relevant objective. The Panel, however, failed to weigh properly the trade restrictiveness of the Import Ban. Because the Panel incorrectly analyzed the extent of the contribution of the Import Ban to the reduction in the number of waste tyres and, indirectly, to the protection of human life and health, the Panel was also incapable of properly weighing and balancing this contribution against any of the other elements. The Panel failed to consider that the risks addressed by the Import Ban were not directly linked to retreaded tyres but to the waste they eventually turn into, and that the level of such risks depends on how waste tyres are managed and disposed of. Thus, the Panel failed to acknowledge the indirect, uncertain, and relative contribution of the Import Ban to its stated objective and, in turn, failed to limit the weight afforded to this element in the weighing and balancing process.

⁵²European Communities' appellant's submission, para. 274 (referring to Panel Report, para. 7.208). The European Communities also criticizes the Panel for reaching its finding on high costs of rubber asphalt applications on the basis of a piece of evidence describing this application as a "promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt". (*Ibid.*, para. 279 (quoting Panel Report, footnote 1367 to para. 7.205, in turn quoting the report of the Organisation for Economic Co-operation and Development ("OECD"), Working Group on Waste Prevention and Recycling, ENV/EPOC/WGWPR(2005)3/FINAL, 26 September 2005 (Exhibit EC-16 submitted by the European Communities to the Panel)))

⁵³Brazil's Ministry of Health National Dengue Control Programme (NDCP), adopted 24 July 2002 (Exhibit EC-93 submitted by the European Communities to the Panel).

25. The European Communities contends that the Panel based its weighing and balancing exercise on its flawed analysis of reasonably available alternatives. The Panel also failed to take proper account of the trade restrictiveness of the Import Ban in the weighing and balancing exercise. The Panel focused on non-generation measures, and overlooked the considerable advantages of sound waste tyre collection and disposal schemes, including the fact that the implementation of the CONAMA scheme is less trade restrictive than the Import Ban. The Panel conducted an individual analysis of possible alternatives, did not really carry out a global assessment, and discarded measures that have already been implemented without verifying the extent of implementation. In sum, asserts the European Communities, the Panel did not conduct a proper weighing and balancing of the relevant elements and alternatives, but, rather, a superficial analysis that repeated all of the errors it had already made in its assessment of the necessity of the Import Ban.

26. For all of the above reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the Import Ban was "necessary" to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. Should the Appellate Body accept this request, the European Communities further requests the Appellate Body to find that the Import Ban is not "necessary" within the meaning of Article XX(b) of the GATT 1994.

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

27. The European Communities claims that the Panel erred in finding that the exemption from the Import Ban on imports of retreaded tyres from MERCOSUR countries (the "MERCOSUR exemption") did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade and was not, therefore, contrary to the chapeau of Article XX of the GATT 1994. These findings were based on a "confused" analysis "marred by serious errors of law".⁵⁴ In particular, the European Communities emphasizes that the fact that Brazil introduced the MERCOSUR exemption in order to comply with its obligations under MERCOSUR does not preclude a finding of "arbitrary" discrimination. The European Communities argues further that the volume of imports from MERCOSUR countries is irrelevant to the analysis of whether that exemption constitutes arbitrary or unjustifiable discrimination. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX.

⁵⁴European Communities' appellant's submission, para. 304.

28. For the European Communities, the "arbitrary" discrimination and the "unjustifiable" discrimination mentioned in the chapeau of Article XX are closely related. Both require discrimination to be explained through convincing, reasonable, and rational arguments. What is arbitrary and unjustifiable discrimination must, in the view of the European Communities, be established in relation to the objective of the measure at issue and the conditions prevailing in the countries concerned. At the same time, the notions of "arbitrary" and "unjustifiable" are not identical: "the term 'arbitrary' has its 'centre of gravity' in the lack of consistency and predictability in the application of the measure, while the term 'unjustifiable' refers more to the lack of motivation and capacity to convince."⁵⁵

29. The European Communities submits that, in its analysis, the Panel wrongly defined "arbitrary" discrimination as being limited to "capricious", "unpredictable", or "random" discrimination.⁵⁶ This definition failed to take into account the object and purpose of Article XX, as well as the context provided by the close link between "arbitrary discrimination" and "unjustifiable discrimination". The European Communities adds that this definition would deprive arbitrary discrimination of its useful value, because "few actions of governments are ever entirely 'random' or 'capricious'."⁵⁷ The chapeau of Article XX expresses "requirements of good faith, and requires a delicate balancing of the interests of the Member invoking an exception ... and the rights of other Members".⁵⁸ The European Communities contends that the Panel's approach, however, was not consistent with the required balancing of interests, because it would allow discrimination "on the basis of purely extraneous factors which have nothing to do with the objectives of the measure"⁵⁹, as long as the discrimination is not random or capricious.

30. According to the European Communities, whether a measure involves arbitrary discrimination can only be determined by taking into account the objective of the measure in respect of which Article XX is invoked. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"⁶⁰ in the light of that objective.

⁵⁵European Communities' appellant's submission, para. 310 (referring to European Communities' first written submission to the Panel, para. 152).

⁵⁶Panel Report, paras. 7.272, 7.280, and 7.281.

⁵⁷European Communities' appellant's submission, para. 316.

⁵⁸*Ibid.*, para. 319 (referring to Appellate Body Report, *US – Shrimp*, paras. 158 and 159, where the Appellate Body also found that the "rigidity" and "inflexibility" of certain certification requirements introduced by the United States constituted "arbitrary discrimination").

⁵⁹*Ibid.*, para. 319.

⁶⁰*Ibid.*, para. 321.

31. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it had been introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further, and has the potential of undermining, the stated objective of the measure (the protection of life and health from risks arising from mosquito-borne diseases and tyre fires), and for this reason must be regarded as unreasonable, contradictory, and thus arbitrary. For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The fact that the chapeau of Article XX prohibits discrimination "between countries where the same conditions prevail" provides further support for the European Communities' interpretation, because whether the same conditions prevail in different countries is an objective question, not a question of legal obligations *vis-à-vis* another country. It is thus "inconceivable that the mere compliance with an international agreement would suffice to render discrimination between countries where the same conditions prevail compatible with the chapeau of Article XX".⁶¹

32. As regards the Panel's attempt to buttress its reasoning by referring to Article XXIV of the GATT 1994 and the "'nature' of Mercosur as an agreement"⁶² within the meaning of that provision, the European Communities submits that agreements justified under Article XXIV would not entitle Members to discriminate in the application of Article XX measures, because Article XXIV:8(a)(i) and (b) explicitly excludes measures that are justified under Article XX from the requirement to eliminate restrictive regulations of commerce with respect to substantially all the trade within a customs union or free trade area. The European Communities further criticizes the Panel for not verifying whether MERCOSUR is a customs union that complies with the requirements of Article XXIV of the GATT 1994.

33. The European Communities points to two additional flaws in the Panel's reasoning: its statement that it took into account "the nature of the ruling on the basis of which Brazil has acted"⁶³; and the Panel's reliance on Brazil's statement that the MERCOSUR exemption was "the only course of action available to it"⁶⁴ to implement the ruling. The nature of the ruling on the basis of which Brazil has acted is irrelevant for the determination of whether the MERCOSUR exemption constitutes arbitrary discrimination. Moreover, before the MERCOSUR tribunal, Brazil chose not to defend the Import Ban by invoking an exception clause related to the protection of human life and health, and

⁶¹European Communities' appellant's submission, para. 325.

⁶²*Ibid.*, para. 329.

⁶³*Ibid.*, para. 330 (referring to Panel Report, para. 7.283).

⁶⁴*Ibid.*, para. 332 (referring to Panel Report, para. 7.280).

thus the fact that it invoked such grounds in this dispute must be regarded as arbitrary. The European Communities further submits that the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, because Brazil could have implemented the arbitral ruling by lifting the Import Ban with respect to all third countries.

34. The European Communities argues further that the Panel erred in finding that unjustifiable discrimination could arise only if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. By assessing the existence of unjustifiable discrimination on the basis of import volumes, the Panel applied a test that has no basis in the text of Article XX and finds no support in WTO case law. The European Communities adds that, if adopted by the DSB, this finding would diminish its rights under the covered agreements, contrary to Article 3.2 of the DSU.

35. The European Communities submits that import volumes under the MERCOSUR exemption are irrelevant for determining whether this exemption constitutes arbitrary or unjustifiable discrimination. The specific volume of imports from MERCOSUR countries in a given year is not related to the manner in which the Import Ban is applied, but rather dependent upon economic factors relating to supply and demand. Moreover, this volume can fluctuate significantly from year to year, and may be more likely to do so if the Panel's finding stands, given that it creates an incentive to shift retreaded tyre production to MERCOSUR countries, especially to those that do not restrict the importation of used tyres. Thus, reasons the European Communities, in addition to being incorrect, the Panel's findings increase the likelihood of future litigation on whether increases in imports from MERCOSUR countries have rendered the exemption inconsistent with the chapeau. This is not consistent with Article 3.3 of the DSU, which provides that the prompt settlement of disputes "is essential for the effective functioning of the WTO".⁶⁵

36. According to the European Communities, the Panel's approach is also inconsistent with the Appellate Body Report in *US – Gambling*, where "the Appellate Body did not attach importance to the 'volume' of services traded under [that] exemption, and to how that volume compared with the volume of online gambling services offered by Antigua and Barbuda or, in fact, all other WTO Members cumulatively."⁶⁶ The Panel's approach also goes against Appellate Body reports confirming the right of Members to challenge measures, *as such*, and the need to protect the security and predictability of the multilateral trading system that underpins that right.⁶⁷ Yet, under the Panel's

⁶⁵European Communities' appellant's submission, para. 343.

⁶⁶*Ibid.*, para. 344 (referring to Appellate Body Report, *US – Gambling*, para. 369).

⁶⁷*Ibid.*, para. 345 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

approach, the question of which volumes of imports would be regarded as "significant" for purposes of the chapeau of Article XX would ultimately depend on market factors, and could be assessed only *ex post* based on data relating to trade flows.

37. The European Communities also contests the Panel's conclusions that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" within the meaning of the chapeau of Article XX. Like its finding on unjustifiable discrimination, the Panel's finding was based on the rationale that MERCOSUR imports have not been significant in volume. Thus, submits the European Communities, the Panel's finding on a disguised restriction on international trade is equally erroneous. The European Communities fails to understand how the Panel could characterize the imports under the MERCOSUR exemption, increasing tenfold since 2002 from 200 to 2,000 tons of tyres per year by 2004, as "insignificant".⁶⁸

38. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, within the meaning of the chapeau of Article XX, and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the requirements of that provision.

(b) Imports of Used Tyres

39. With respect to the Panel's analysis of imports of used tyres under the chapeau of Article XX, the European Communities supports the Panel's conclusion that such imports constituted unjustifiable discrimination between countries where the same conditions prevail, but challenges several other findings made by the Panel in this part of its analysis. Specifically, the European Communities contends that the Panel erred, first, in finding that the imports of used tyres through court injunctions did not result in arbitrary discrimination and, secondly, in finding that such imports constituted unjustifiable discrimination and a disguised restriction on international trade only to the extent that they occurred in such amounts as to significantly undermine the objective of the Import Ban.

40. For the European Communities, the Panel adopted an overly restrictive approach to the notion of "arbitrary discrimination", in considering that action is not arbitrary as long as there is some cause or reason to explain it. What is arbitrary must be decided in the light of the stated objective of the measure. The European Communities reasons that, because, from the perspective of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the

⁶⁸European Communities' appellant's submission, para. 348.

European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination. The European Communities adds that the Panel's attempt to distinguish between, on the one hand, the actions of Brazilian courts in granting injunctions allowing imports of used tyres and, on the other hand, the compliance of administrative authorities with those injunctions, is ill-founded. A WTO Member must assume responsibility for the acts of all the branches of its government. The contradiction between the actions of the branches of the Brazilian government that have allowed the importation of used tyres, and those that ban the importation of retreaded tyres, must be regarded as arbitrary behaviour on the part of Brazil.

41. The European Communities also submits that the Panel erred in finding that the imports of used tyres under court injunctions resulted in unjustifiable discrimination only to the extent that they significantly undermined the objective of the Import Ban. In analyzing whether imports of used tyres under court injunctions were inconsistent with the chapeau of Article XX, the Panel applied the same quantitative approach that it had incorrectly applied when assessing the MERCOSUR exemption under that provision. The European Communities refers to the arguments it advanced in relation to the MERCOSUR exemption to explain why the volumes of imports are irrelevant for purposes of determining the consistency of a measure with the chapeau of Article XX.

42. The European Communities observes further that the court injunctions effectively exempt Brazilian retreaders from the import ban on used tyres, because they do not contain any temporal or quantitative limitations. Thus, the Panel's quantitative approach engenders uncertainty for the implementation of the Panel Report and is not in accordance with the prompt settlement of the dispute as required by Article 3.3 of the DSU. The Panel characterized imports of 10.5 million used tyres into Brazil in 2005 as "significant", but failed to identify the threshold below which imports of used tyres would no longer be "significant". The European Communities adds that, for the same reasons adduced in relation to unjustifiable discrimination, the Panel erred in finding that the imports of used tyres through court injunctions resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports occurred in such quantities that they significantly undermined the objective of the Import Ban.

43. For all these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that imports of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, and constituted unjustifiable discrimination or a disguised restriction on international trade under the terms of this provision only to the extent that those imports significantly undermined the objective of the Import Ban. The European Communities requests the Appellate Body to find, instead, that imports of used tyres under court injunctions result

in the Import Ban being applied inconsistently with all of the requirements of the chapeau of Article XX of the GATT 1994.

3. Conditional Appeal

44. Should the Appellate Body not find, as requested by the European Communities, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, then the European Communities conditionally appeals the Panel's decision to exercise judicial economy with respect to its separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994. In such circumstances, the European Communities requests the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to these claims and to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Articles XX(d) and XXIV of the GATT 1994.

(a) The Panel's Exercise of Judicial Economy

45. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII:1 of the GATT 1994, the Panel exercised "false judicial economy" and did not provide a positive resolution to the dispute as required by Articles 3.3, 3.4, and 3.7 of the DSU.⁶⁹ In the light of the Panel's finding that the Import Ban was inconsistent with the chapeau of Article XX only to the extent that imports of used tyres were occurring in amounts that significantly undermined the objective of the Import Ban, Brazil was under no obligation to remove the MERCOSUR exemption *per se*. Therefore, the Panel should have addressed the European Communities' claims that the MERCOSUR exemption *per se* is incompatible with Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

46. The European Communities submits that there are sufficient factual findings of the Panel and uncontested facts on record for the Appellate Body to complete the legal analysis and find that the MERCOSUR exemption is incompatible with Articles I:1 and XIII:1, and is not justified under Articles XX(d) and XXIV of the GATT 1994. The European Communities recalls that Brazil did not contest that the MERCOSUR exemption constitutes a violation of Articles I:1 and XIII:1. Therefore, the only question to be addressed by the Appellate Body is whether this measure can be justified under Articles XX(d) and XXIV.

⁶⁹European Communities' appellant's submission, para. 375.

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

47. The European Communities argues that the MERCOSUR exemption is not justified under Article XXIV of the GATT 1994, because it does not satisfy the two conditions identified by the Appellate Body in its Report in *Turkey – Textiles*.⁷⁰ First, Brazil failed to demonstrate that MERCOSUR complies with the conditions of Article XXIV:8(a) and 5(a) of the GATT 1994. As explained extensively in the European Communities' submissions to the Panel, Brazil failed to demonstrate that MERCOSUR has achieved a liberalization of "substantially all"⁷¹ the trade within MERCOSUR, as required by Article XXIV:8(a)(i). The European Communities contends that trade in the automotive and sugar sectors has not been entirely liberalized within MERCOSUR, and highlights that "the automotive sector alone accounts for approximately 29%"⁷² of trade within MERCOSUR. In addition, according to the European Communities, exceptions to MERCOSUR's common external tariff "currently concern up to 10% of the tariff lines"⁷³ applicable to external trade, and individual MERCOSUR countries "maintain export duties and 'other regulations of commerce' on trade with third countries that are not common to all Mercosur countries."⁷⁴

48. The European Communities adds that Brazil failed to demonstrate that MERCOSUR complies with the requirement in Article XXIV:5(a) of the GATT 1994 that duties and other restrictive regulations of commerce are not to be on the whole more restrictive than the general 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

⁷⁰European Communities' appellant's submission, para. 381 (referring to Appellate Body Report, *Turkey – Textiles*, para. 58).

⁷¹*Ibid.*, para. 383.

⁷²*Ibid.*

⁷³*Ibid.*, para. 384 (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.17, 9 June 2006 (Exhibit EC-121 submitted by the European Communities to the Panel), p. 2).

⁷⁴*Ibid.*

parties to a customs union to take any measure derogating from WTO obligations⁷⁵ if WTO Members were not required to demonstrate that the measure was necessary for the formation of the customs union in question.

50. The European Communities submits that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Article XXIV:8(a)(i) explicitly exempts measures consistent with Article XX from the requirement to eliminate barriers to trade with respect to substantially all the trade between the constituent members of a customs union. For this reason, it follows that Article XX cannot be invoked in order to justify the selective elimination of such trade barriers only with respect to trade within the customs union or free trade area. Nor can the MERCOSUR exemption be characterized as necessary for the formation of MERCOSUR because it was adopted several years after the conclusion of MERCOSUR.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

51. The European Communities submits that the MERCOSUR exemption is also not justified under Article XX(d) of the GATT 1994. The Appellate Body found, in *Mexico – Taxes on Soft Drinks*, that the term "laws and regulations" in Article XX(d) covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member".⁷⁶ However, Brazil has not demonstrated that the obligation to comply with rulings of the MERCOSUR arbitral tribunals has been incorporated into the Brazilian legal system. The European Communities suggests further that the term "securing compliance" in Article XX(d) does not mean simply "complying". Instead, "securing compliance" refers to enforcement measures where compliance is achieved by persons other than the entity "securing" the compliance. Thus, Article XX(d) does not cover Brazil's adoption of the MERCOSUR exemption. Furthermore, the MERCOSUR exemption is not "necessary" within the meaning of Article XX(d) because Brazil could have complied with the ruling of the MERCOSUR arbitral tribunal by lifting the Import Ban with respect to all third countries, rather than only its MERCOSUR partners. Finally, the European Communities submits that the MERCOSUR exemption does not fulfil the requirements of the chapeau of Article XX, because it constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail, in particular, given that, by virtue of it, Brazil allows the imports of retreaded tyres from MERCOSUR countries even when those tyres are made from used tyres originating in the European Communities.

⁷⁵European Communities' appellant's submission, para. 392.

⁷⁶*Ibid.*, para. 402 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79).

B. *Arguments of Brazil – Appellee*

1. The Necessity Analysis

52. Brazil maintains that the Panel properly found that the Import Ban was "necessary" to protect human, animal, or plant life or health within the meaning of Article XX(b) of the GATT 1994, and therefore requests the Appellate Body to uphold this finding.

(a) The Contribution Analysis

53. First, Brazil argues that the Panel correctly assessed the contribution made by the Import Ban to the achievement of its objective. The paragraphs set out in Article XX focus on the measure, as such, while the chapeau focuses also on the application of the measure. Therefore, actual contribution is not relevant to the analysis under paragraph (b) of Article XX, and the Panel applied the correct legal standard in using phrases such as "can contribute" and "capable of contributing".⁷⁷ Such a standard is also particularly appropriate given that some measures—for example, environmental measures—may not have immediate effect. The Panel's approach was in line with "virtually all" other cases that have examined a measure's contribution under paragraphs (b) and (d) of Article XX of the GATT 1994 or under Article XIV of the *General Agreement on Trade in Services* (the "GATS").⁷⁸ This is the case whether the risk sought to be avoided is direct or indirect. Brazil adds that the need to undertake the weighing and balancing exercise also illustrates that the European Communities cannot be correct. If a panel were required to assess the extent of a measure's actual contribution, it would have to do the same for alternative measures in order to compare them. Yet, this is impossible, because an alternative measure is one that has not yet been realized. That the Panel was not, as the European Communities claims, required to quantify the Import Ban's contribution to reducing waste tyre volumes is confirmed in the Appellate Body Report in *EC – Asbestos*, where the Appellate Body held that "a risk may be evaluated either in quantitative or *qualitative* terms".⁷⁹ Brazil also expresses its understanding that, according to existing case law, if the measure can make a contribution to its objective, and no reasonably available alternatives exist, then the measure is "necessary".

54. In addition, Brazil argues that the Panel acted consistently with its duty under Article 11 of the DSU in finding that the Import Ban contributed to the achievement of its objective. The Panel relied on numerous studies and reports, which provided it with more than a sufficient basis to find that

⁷⁷Brazil's appellee's submission, para. 74 (referring to Panel Report, paras. 7.118 and 7.142).

⁷⁸*Ibid.*, para. 77 (referring to Panel Report, *US – Gambling*, para. 6.494; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.217; Panel Report, *Korea – Various Measures on Beef*, para. 658; and GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.31).

⁷⁹*Ibid.*, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

tyres used in Brazil are retreadable and are being retreaded. The Panel referred to the ABR Report⁸⁰ and INMETRO Technical Note 001/2006⁸¹ merely as examples of such reports and studies. In addition, the Panel's reliance on INMETRO Technical Note 001/2006, rather than on an earlier INMETRO note, was justified, because it is well established that a panel may rely on evidence that post-dates the panel's establishment, and because Brazil had explained why it was not appropriate for the Panel to rely on the earlier INMETRO note. The mere fact that the Panel did not describe its conclusions on each piece of evidence—or respond to each of the European Communities' objections—does not mean that it did not consider the evidence. The European Communities may disagree with the weight the Panel assigned to the various factual elements before it, but there is no indication that the Panel exceeded its discretion as the trier of fact.

55. As regards numerous other arguments raised by the European Communities, Brazil identifies evidence that provides support for the Panel's findings that retreaded tyres have a shorter lifespan than new tyres and that new tyres are retreadable and are being retreaded in Brazil, and asserts that the Panel did not, as the European Communities claims, base its findings on speculation about future events. Brazil also emphasizes that imports of used tyres under court injunctions and imports of retreaded tyres under the MERCOSUR exemption are extraneous to the Import Ban and do not properly form part of the "necessity" analysis.

(b) Alternatives to the Import Ban

56. Brazil contends that the Panel correctly determined that none of the measures suggested by the European Communities constituted a reasonably available alternative to the Import Ban. As a preliminary matter, Brazil contends that the European Communities' appeal on this issue is premised on a mistaken understanding of Brazil's chosen level of protection. Brazil is *not* seeking to reach a fixed level of health and safety, or only to protect against mosquito-borne diseases and tyre fire emissions (accumulation risks). Rather, it seeks to reduce accumulation, transportation, and disposal risks associated with the generation of waste tyres in Brazil *to the maximum extent possible*. Because the Panel's finding of fact correctly identified the level of protection sought by Brazil, and the European Communities, in its appeal, does not challenge this finding under Article 11 of the DSU, the European Communities' claims of error regarding reasonably available alternatives fall outside the scope of appellate review.

⁸⁰*Supra*, footnote 41.

⁸¹*Supra*, footnote 42.

57. Taking account of the proper definition of its chosen level of protection (including against disposal risks), Brazil asserts that the Panel properly recognized that stockpiling, landfilling, co-incineration, and material recycling all present risks to human health and the environment. The Panel also correctly dismissed a better enforcement of the import ban on used tyres as an alternative to the Import Ban, because such a measure would not allow Brazil to reduce the number of additional waste tyres generated by imported short-lifespan retreaded tyres. Brazil also rejects the European Communities' assertion that the Panel applied an incorrect definition of "alternative", because, for Brazil, an alternative must allow a Member to achieve its chosen level of protection, and that level requires a reduction to the maximum extent possible of risks arising from waste tyre accumulation, transportation, and disposal risks. Because the Panel correctly defined Brazil's level of protection, it was also correct to consider that other complementary measures to reduce the overall number of waste tyres were not "alternatives" to the Import Ban on retreaded tyres. Brazil adds that, contrary to the European Communities' claims on appeal, the Panel did not require a single alternative measure to achieve fully the desired objective, did not refuse to consider the proposed alternatives collectively, and did not focus on whether options were actually being employed instead of whether they were reasonably available.

58. Furthermore, Brazil argues that the Panel's findings on the availability of alternative measures rested on an objective assessment of the facts, as required by Article 11 of the DSU. According to Brazil, the Panel based its finding that disposal of waste tyres presents serious health and environmental risks on an extensive factual record. The evidence on record fully supports the Panel's finding that landfilling of *both* whole and shredded waste tyres presents human health and environmental risks. Brazil also argues that the Panel's reference to the fact that the European Communities prohibits landfilling was relevant, because the health and environmental objectives listed in the European Communities' Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste⁸² mirror Brazil's objective. Furthermore, the Brazilian legislation that allowed landfilling, and which the European Communities claims the Panel should have taken into account, was a temporary measure adopted in a single Brazilian state to combat a significant increase in dengue cases. That legislation does not demonstrate that landfilling is safe, but only that, in those circumstances, the short-term need to combat dengue was more pressing.

⁸²Exhibit BRA-42 submitted by Brazil to the Panel.

59. In relation to stockpiling, Brazil submits that the evidence on record, including a study by the California Environmental Protection Agency⁸³, supports the Panel's finding that stockpiling presents human health and environmental risks. Furthermore, the European Communities itself acknowledges that "'controlled stockpiling is *not a final disposal operation*' but merely 'temporary storage.'"⁸⁴ As regards co-incineration, the evidence on record fully supports the Panel's finding that incineration of waste tyres presents risks to human health, that toxic emissions from the incineration of tyres cannot be eliminated, and that these emissions are higher than those generated by the burning of conventional fuels. In the light of these acknowledged risks, it would not have made sense, as the European Communities now argues, for the Panel to have required Brazil to provide evidence on co-incineration in Brazil rather than in other countries, or to use increased co-incineration as an alternative. The Panel acted within its discretion in determining the weight attributed to several reports that the European Communities considers outdated and, in any event, the evidence relied upon by the Panel is not as "outdated", nor is the evidence cited by the European Communities as "recent", as the European Communities claims on appeal. The Appellate Body, therefore, should reject the European Communities' attempts to have it second-guess the Panel's appreciation of the evidence.

60. In relation to material recycling, Brazil submits that the Panel did not consider only civil engineering in reaching its findings on alternative measures. The Panel also considered evidence related to rubber asphalt, use of rubber granulates, and devulcanization. Nor did the Panel base its finding that material recycling applications could not dispose of existing volumes of waste tyres on evidence of devulcanization alone. Instead, contends Brazil, the Panel cited documents suggesting that material recycling applications *collectively* lacked adequate disposal capacity.

(c) The Weighing and Balancing Process

61. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in determining that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994, and that the European Communities' appeal on this point amounts to mere disagreement with the Panel's exercise of its discretion in determining which evidence to rely upon in support of its findings. The Panel expressly recognized that the Import Ban is highly trade restrictive, but rejected the European Communities' argument that this fact alone precluded a finding that the ban was "necessary". Instead, the Panel properly recognized that there may be circumstances in which a highly restrictive measure is nonetheless necessary and, in the process of weighing and balancing,

⁸³California 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).

⁸⁴Brazil's appellee's submission, para. 154 (quoting European Communities' appellant's submission, para. 255). (emphasis added by Brazil)

identified the specific circumstances of this case that led it to such a conclusion. With respect to the question of contribution, Brazil recalls its position that Article XX(b) does not require a party to quantify the measure's contribution to the objective pursued. In any event, the Import Ban's contribution is substantial "because it reduced imports of retreaded tyres from 18,455 tons in 1999 to 1,727 tons in 2005 (over 90 percent)."⁸⁵ Brazil also argues that, because imports of retreaded tyres, by definition, increase the amount of waste tyres in Brazil, the relationship between the Import Ban and Brazil's goal of reducing waste tyre risks to the maximum extent possible is both direct and certain.

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,

⁸⁵Brazil's appellee's submission, para. 177 (referring to Panel Report, para. 4.54; and Brazil's response to Question 40 posed by the Panel, Panel Report, p. 270).

⁸⁶*Ibid.*, para. 191 (referring to Panel Report, paras. 7.260, 7.273, and 7.283).

volumes of retreaded tyres imported under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, reasons Brazil, it would *not* have been reasonable or rational, in the light of the objective of the Import Ban, for Brazil to have implemented the MERCOSUR ruling by abolishing the ban altogether, as the European Communities suggests.

65. Brazil considers that the Panel correctly found that the discrimination resulting from the MERCOSUR exemption was not arbitrary. In Brazil's view, even under the European Communities' definition of "arbitrary", the following considerations identified by the Panel demonstrate that the MERCOSUR exemption did not amount to arbitrary discrimination: (i) Brazil introduced the exemption only after a dispute settlement tribunal established under MERCOSUR ruled that the ban violated Brazil's obligations under MERCOSUR; (ii) the MERCOSUR ruling was adopted in the context of an agreement intended to liberalize trade that is expressly recognized in Article XXIV of the GATT 1994; (iii) agreements of the type recognized by Article XXIV inherently provide for discrimination; (iv) Brazil had an obligation under international law to implement the ruling by the MERCOSUR tribunal; (v) Brazil applied the MERCOSUR ruling in the most narrow way possible, that is, by exempting imports of a particular kind of retreaded tyres (remoulded) from the application of the ban; and (vi) it was not reasonable for Brazil to implement the MERCOSUR ruling with respect to imports from all sources, because doing so would have forced Brazil to abandon its policy objective and its chosen level of protection. The Panel appropriately determined that these circumstances provided a rational basis for enacting the MERCOSUR exemption. Brazil rejects as a "blatant misrepresentation"⁸⁷ the European Communities' argument that the Panel's finding necessarily implies that mere compliance with any international agreement would exclude the existence of arbitrary discrimination, particularly given that the Panel expressly stated that its finding was limited to the "specific circumstances of the case".⁸⁸ Furthermore, the European Communities' systemic concerns in this respect are contrary to the well-established precept under general international law that "bad faith on the part of States is not to be presumed"⁸⁹, and it is "absurd"⁹⁰ to suggest that a WTO Member would conclude an agreement under Article XXIV for purposes of circumventing the requirements of the chapeau of Article XX.

66. Brazil also submits that the Panel correctly concluded that the legal standard under the chapeau of Article XX is different from the legal standard under Article XXIV. As Brazil argued

⁸⁷Brazil's appellee's submission, para. 209.

⁸⁸*Ibid.*, para. 210 (quoting Panel Report, para. 7.283).

⁸⁹*Ibid.*, para. 213. (footnote omitted)

⁹⁰*Ibid.*, para. 214.

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 2007⁹¹ established annual limits on the number of retreaded tyres that can be imported into Brazil from MERCOSUR countries. According to Brazil, these import volumes "correspond roughly" to the import volumes that the Panel found "were not significant".⁹²

68. Brazil considers that the European Communities' reference to the right of Members to challenge measures, as such, is misplaced. The chapeau of Article XX requires an examination of the manner in which a measure is being applied, and this will "rarely" be based on "immutable, static situations".⁹³ The European Communities' challenge to the Panel's finding that 2,000 tons of retreaded tyres is "insignificant" is similarly without merit. According to Brazil, it is worth noting that the level of 2,000 tons is only one seventh of the 14,000 tons previously imported from the European Communities and, in any event, the Panel's finding that 2,000 tons is not a significant amount is a factual finding that cannot be revisited on appeal.

69. In addition, Brazil submits that the Panel's finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX is legally sound, and refers to its arguments before the Panel in support of this position.

⁹¹Exhibit BRA-175 submitted by Brazil to the Appellate Body.

⁹²Brazil's appellee's submission, para. 225 (referring to Panel Report, para. 7.288).

⁹³*Ibid.*, para. 229.

(b) Imports of Used Tyres

70. Brazil submits that the Panel committed no error in the analytical approach it adopted in determining whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary discrimination", "unjustifiable discrimination", or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings that the imports of used tyres did not constitute "arbitrary discrimination" and constituted "unjustifiable discrimination" or "a disguised restriction on international trade" within the meaning of that provision only to the extent that import volumes of used tyres "significantly undermined" the objective of the Import Ban.

71. Brazil argues that the Panel correctly found that the imports of used tyres under court injunctions did not result in the Import Ban being applied in a manner that constituted "arbitrary discrimination". The Panel was satisfied, on the basis of the evidence before it, that there was a rational basis for the importation of used tyres. Furthermore, as it did in the context of the MERCOSUR exemption, the Panel did analyze whether the imports of used tyres significantly undermined the objective of the Import Ban—that is, it took the very approach advocated by the European Communities. The Panel did *not*, as the European Communities now claims, draw a distinction between the actions of certain Brazilian courts granting injunctions and the compliance by Brazilian administrative authorities with those court injunctions. Brazil also rejects the European Communities' allegation that there is a contradiction between the actions of different branches of the Brazilian government. Rather, insists Brazil, the Import Ban, the court injunctions, and the enforcement of the injunctions by the customs authorities were the result of the operation of the Rule of Law. "There is nothing unpredictable, irrational, abnormal, unreasonable, or even illegal in the conduct of Brazil's legislative, executive, or judiciary branches."⁹⁴

72. With respect to the Panel's analysis of "unjustifiable discrimination", Brazil submits that it was appropriate for the Panel to consider the level of imports of used tyres. For the same reasons that Brazil articulated with respect to the MERCOSUR exemption, the effect that the volume of imports of used tyres had on Brazil's ability to achieve its policy objective was relevant to the Panel's analysis of unjustifiable discrimination. Brazil points out the inconsistencies in the European Communities' arguments, which, on the one hand, criticize the Panel for taking into account the effects of import volumes on Brazil's ability to achieve its policy objective, and, on the other hand, insist that arbitrary and unjustifiable discrimination can be established only when analyzed in relation to the objective of

⁹⁴Brazil's appellee's submission, para. 245.

the measure at issue. Brazil disputes the European Communities' assertion that the Panel's analysis of the volume of imports involves uncertainty for implementation of its report. According to Brazil, monitoring of a WTO Member's compliance is an integral part of the dispute settlement mechanism, and there are various examples of cases where panels made findings that were based on facts and circumstances that were potentially subject to change.⁹⁵

73. Finally, Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted "a disguised restriction on international trade", and refers to the arguments it made before the Panel in support of this position.

3. The European Communities' Conditional Appeal

(a) The Panel's Exercise of Judicial Economy

74. Brazil considers that the Panel was justified in deciding to exercise judicial economy with respect to the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 and not justified under Articles XX(d) and XXIV of the GATT 1994. In the light of the Panel's finding that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, a separate finding in relation to an exemption to the Import Ban was not necessary to secure a positive resolution of the dispute. The MERCOSUR exemption could not exist in the absence of the Import Ban, which had previously been found to be inconsistent with the GATT 1994. The allegedly limited basis for the Panel's finding of inconsistency under Article XI:1 is not relevant, because Article 3.7 of the DSU "does not distinguish between different *degrees* of solutions".⁹⁶ Brazil also distinguishes the facts of this case from those in *EC – Export Subsidies on Sugar*, on the basis that "the remedies under the GATT and the DSU for a violation of Article XI (found by the Panel) are no different from the remedies for a violation of Article XIII or I."⁹⁷ Furthermore, the very condition on which the European Communities appeals the Panel's exercise of judicial economy contradicts its contention that separate rulings under Article I:1 and Article XIII:1 were necessary. According to Brazil, by conditioning its appeal on a finding by the Appellate Body that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with Article XX, the European Communities is implicitly recognizing that a finding that the Import Ban is

⁹⁵See Brazil's appellee's submission, para. 253 (referring to Panel Report, *US – Section 301 Trade Act*, paras. 7.131-7.136, 7.170, 7.179, and 7.185; and Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 6.1).

⁹⁶*Ibid.*, para. 268. (original emphasis)

⁹⁷*Ibid.*, para. 269.

not justified under Article XX renders unnecessary findings on its separate claims under Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

75. In the event the Appellate Body were to reverse the Panel's decision to exercise judicial economy, Brazil submits that the Appellate Body does not have a sufficient basis on which to complete the analysis of the European Communities' claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and with respect to Brazil's related defences under Articles XXIV and XX(d) of the GATT 1994. There are neither undisputed facts nor factual findings by the Panel concerning the consistency of MERCOSUR with Article XXIV:5(a) and 8(a) of the GATT 1994 or the justification of the MERCOSUR exemption under Article XX(d). Brazil specifically contests, as it did before the Panel, assertions made by the European Communities regarding intra-MERCOSUR liberalization of the automotive and sugar sectors, as well as with respect to alleged exceptions to the common external tariff. In addition, the European Communities' claims under Articles XIII:1 and I:1, and Brazil's related defence under Article XXIV, are not suitable for completion of the analysis, because they are not closely related to the provisions examined by the Panel, and because they involve novel legal issues that have not been explored in depth by the parties. Brazil cites as examples of such unexplored issues the questions of what constitutes "substantially all the trade" under Article XXIV:8(a)(i) and what constitutes "substantially the same duties and other regulations of commerce" under Article XXIV:8(a)(ii).

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

76. In the event the Appellate Body considers it can complete the analysis with respect to the separate claims made by the European Communities in relation to the MERCOSUR exemption, Brazil submits that this measure is justified under Article XXIV of the GATT 1994.

77. Brazil argues that it submitted sufficient evidence before the Panel to make a *prima facie* case that MERCOSUR meets the requirements of Article XXIV:5(a) and 8(a). In particular, Brazil submitted the results of calculations made by the Secretariat for MERCOSUR and the WTO Secretariat showing that the duties and other regulations of commerce applied at the time of MERCOSUR's formation (1995), and in 2006, were not "on the whole" higher or more restrictive than those applied prior to its formation. Brazil further suggests there is evidence on record demonstrating that "substantially all the trade" between constituent members of MERCOSUR has been liberalized, and that MERCOSUR countries maintain substantially the same duties and other regulations of commerce on trade *vis-à-vis* third countries, thus complying with the requirements of Article XXIV:8(a). Brazil notes in this regard that, before the Panel, it incorporated by reference all

of the documents submitted by MERCOSUR members to the Committee on Regional Trade Agreements (the "CRTA").

78. Brazil contends that the European Communities has failed to rebut Brazil's *prima facie* demonstration that MERCOSUR is consistent with the requirements of Article XXIV:5 and 8. The fact that the CRTA and the Committee on Trade and Development did not reach the conclusion that MERCOSUR is in compliance with Article XXIV does not suggest that MERCOSUR is inconsistent with Article XXIV, in particular, because Members' measures are presumed WTO-consistent until sufficient evidence is presented to prove the contrary, and because the CRTA has only once concluded that a regional trade agreement was compatible with the GATT 1994.

79. In addition, Brazil maintains that the European Communities failed to substantiate its claims that MERCOSUR was inconsistent with Article XXIV. Although the European Communities asserts that the automotive and sugar sectors within MERCOSUR have not been fully liberalized, this is contradicted by the evidence it submitted to the Panel. According to Brazil, evidence before the Panel demonstrated that "the automotive sector has been the subject of continuing and progressive liberalization [and that] bilateral agreements between Mercosur members have already led, in practice, to duty-free trade in almost 100 percent of the commerce in the auto sector."⁹⁸ Brazil suggests further that the sugar sector alone cannot prevent compliance with the requirement under Article XXIV:8(a)(i) that "substantially all the trade" between the constituent territories be liberalized, because it "accounts for less than 0.001 percent of the total [trade]".⁹⁹ As regards the European Communities' assertion that there are exceptions to MERCOSUR's common external tariff, Brazil submits that the evidence on record demonstrates that MERCOSUR "applies a common external tariff to products in over 90 percent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008."¹⁰⁰ Brazil also rejects the European Communities' assertion that MERCOSUR does not meet the requirement under Article XXIV:5(a) that non-tariff barriers on trade with third countries not be "*on the whole* ... more restrictive"¹⁰¹, noting that the only example provided by the European Communities is the Import Ban itself. According to Brazil, a single measure cannot constitute sufficient evidence to show that MERCOSUR does not meet the requirements of Article XXIV:5(a).

⁹⁸Brazil's appellee's submission, para. 295 (referring to Panel Report, para. 4.391; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

⁹⁹*Ibid.* (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.16, 16 May 2006 (Exhibit BRA-170 submitted by Brazil to the Panel), para. 14; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

¹⁰⁰*Ibid.*, para. 296 (referring to Brazil's response to Question 132 posed by the Panel, Panel Report, pp. 360-361, in turn citing WT/COMTD/1/Add.17, *supra*, footnote 73, p. 2).

¹⁰¹*Ibid.*, para. 297. (emphasis added by Brazil)

80. Moreover, Brazil contends that the Appellate Body's decision in *Turkey – Textiles* cannot be read as requiring Brazil to demonstrate that the MERCOSUR exemption was introduced upon the formation of a customs union, and that its formation would have been prevented if it were not allowed to introduce such a measure. The analytical approach adopted by the Appellate Body in *Turkey – Textiles* should not be applied in the present dispute, because the MERCOSUR exemption does not impose new restrictions against third countries but, rather, eliminates restrictive regulations between the parties to the customs union.¹⁰² Furthermore, Brazil contends that a Member should not be allowed to demonstrate the necessity of its measure *only* as of the time a customs union is formed, because such customs unions and the integration of their members evolve and deepen over time.

81. Brazil also rejects the European Communities' argument that the fact that the text of Article XXIV:8(a)(i) exempts Article XX measures from the requirement to eliminate duties and other restrictive regulations of commerce demonstrates that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Such an interpretation would require the members of the customs union to exempt Article XX measures from internal liberalization, "lest they are later challenged by third countries for discrimination and not permitted to invoke Article XXIV to justify those measures."¹⁰³ Moreover, the Appellate Body has explained that "the terms of [Article XXIV:8(a)(i)] offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade".¹⁰⁴ This flexibility in Article XXIV permits Brazil to eliminate the Import Ban in respect of MERCOSUR countries while maintaining it in respect of non-MERCOSUR countries. Brazil also emphasizes that the MERCOSUR exemption was not introduced pursuant to its obligations under Article XXIV:8(a)(i), but was rather the result of its unsuccessful attempt to defend the Import Ban before a MERCOSUR arbitral tribunal.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

82. Should the Appellate Body decide to complete the analysis of the European Communities' claims under Articles I:1 and XIII:1 of the GATT 1994, Brazil submits that it should find the MERCOSUR exemption to be justified under Article XX(d) of the GATT 1994.

¹⁰²For Brazil, *US – Line Pipe* is a more apposite case in the factual context of this dispute. (See Brazil appellee's submission, para. 301 (referring to Panel Report, *US – Line Pipe*, paras. 7.147 and 7.148))

¹⁰³*Ibid.*, para. 307.

¹⁰⁴*Ibid.*, para. 308 (quoting Appellate Body Report, *Turkey – Textiles*, para. 48).

83. Brazil submits that the Panel correctly interpreted and applied the term "to secure compliance" in Article XX(d), in contrast to the European Communities' interpretation that a state "secures compliance" within the meaning of Article XX(d) only when it enforces rules or regulations as regards other actors, and not when it secures its own compliance with the laws or regulations of its domestic legal system. Moreover, the Appellate Body's interpretation of Article XX(d) in *Mexico – Taxes on Soft Drinks* made no such distinction. Rather, the Appellate Body's interpretation of the text of Article XX(d) makes clear that domestic laws or regulations that ensure compliance by a state with its obligations are within the scope of that provision. Brazil also contends that it has incorporated the obligation to comply with rulings of MERCOSUR tribunals into its domestic law, and that evidence to that effect exists in the record.

84. Lastly, Brazil contends that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d). Brazil argues that it could not have complied with the ruling of the MERCOSUR tribunal by simply exempting all third countries from the Import Ban, as the European Communities suggests it should have done, because this would have forced Brazil to abandon its policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible.

C. *Arguments of the Third Participants*

85. Pursuant to Rule 24(2) and (4) of the *Working Procedures*, China, Cuba, Guatemala, Mexico, Paraguay, and Thailand chose not to file a third participant's submission but attended the oral hearing. Cuba, in its statement at the oral hearing, expressed its agreement with the Panel's findings that the Import Ban was necessary to reduce the exposure of human, animal, or plant life or health to risks arising from waste tyres. Cuba also emphasized the importance of the principle of sustainable development and environment preservation policies, and recalled that waste tyre management presents a challenge in particular for developing countries, given the significant environmental and economic costs it involves.

1. Argentina

86. Argentina agrees with the Panel's finding that the Import Ban contributed to the protection of human life and health within the meaning of Article XX(b) of the GATT 1994. Argentina submits that the Panel's necessity analysis was consistent with the case law of the Appellate Body, and that "the Panel's reasoning relie[d] on facts brought to its attention by the parties."¹⁰⁵ The Panel correctly rejected the European Communities' contention that the Import Ban did not contribute to reducing the number of waste tyres, based on its conclusion that "the direct effect of [the Import Ban] is to compel

¹⁰⁵ Argentina's third participant's submission, para. 14.

consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."¹⁰⁶ If the direct effect of the Import Ban were to impede additional imports of retreaded tyres with a shorter lifespan than new tyres, then it would fulfil Brazil's objective of avoiding generation and accumulation of waste tyres. Argentina underscores further that the Panel was not required to quantify the contribution of the Import Ban to the realization of the objective pursued.¹⁰⁷

87. Argentina submits that the Panel was correct in concluding that the objective of protecting human health and life against life-threatening diseases "is both vital and important in the highest degree".¹⁰⁸ The Panel correctly found that the alternative measures identified by the European Communities aimed at reducing the number of waste tyres and at improving the management of waste tyres in Brazil, but not at preventing the generation of waste tyres to the maximum extent possible. Argentina also agrees with the Panel's finding that "the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil would not lead to the reduction in the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres'".¹⁰⁹ For Argentina, the measures identified by the European Communities did not constitute alternatives that could be applied as a substitute for the Import Ban in preventing the generation of waste tyres to the maximum extent possible. Lastly, Argentina concludes that the Panel did not err in finding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

2. Australia

88. Australia submits that the Panel erred in finding that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. Article XX(b) should be interpreted so as to maintain the careful balance between the rights and obligations of WTO Members to secure their trade interests and the rights of Members to impose measures necessary to protect human, animal, or plant life or health. In Australia's view, the Panel incorrectly balanced these factors in making its findings on necessity.

¹⁰⁶ Argentina's third participant's submission, para. 16 (quoting Panel Report, para. 7.134).

¹⁰⁷ *Ibid.*, para. 18 (referring to Appellate Body Report, *EC – Asbestos*, para. 167).

¹⁰⁸ *Ibid.*, para. 26 (referring to Panel Report, para. 7.111).

¹⁰⁹ *Ibid.*, para. 24 (quoting Panel Report, para. 7.168).

89. Australia notes that the Panel, in identifying the measure at issue, should have considered the MERCOSUR exemption in relation to a breach of Article XI:1 of the GATT 1994. Australia encourages the Appellate Body to treat the Import Ban and the MERCOSUR exemption "as an 'integrated whole'"¹¹⁰ under Article XX(b).

90. Moreover, although the Appellate Body stated that a "necessary" measure is significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution", the Panel applied a definition of "necessary" that is closer to "making a contribution" than to "indispensable".¹¹¹ The Panel correctly considered the relative importance of the interests or values pursued by the Import Ban, but did not correctly examine the contribution of the measure to the realization of the ends pursued by it. The Panel also failed to consider adequately the restrictive impact of the Import Ban when conducting the weighing and balancing process. If the measure is properly identified as including both the Import Ban and exemptions to that ban, it is then more appropriate to determine first whether such a measure, in its totality, is necessary in the context of Article XX(b), taking into account the potential restrictive impact on international commerce, among other factors.

91. In relation to the Panel's assessment of alternative measures, Australia submits that the Panel did not properly weigh and balance possible alternatives, because it incorrectly identified the ends pursued by the measure, incorrectly limited its consideration of alternatives to those available "in reality"¹¹², and failed to consider potential alternatives cumulatively rather than only on an individual basis. Australia also argues that the Panel incorrectly excluded a better enforcement of the import ban on used tyres as an alternative measure to the Import Ban. For Australia, there is no basis in Appellate Body case law for excluding from the necessity analysis alternatives that relate to the manner in which the relevant measure is implemented in practice. The Panel also applied an incorrect definition of "alternatives" when limiting its analysis to those measures seeking to avoid the accumulation of waste tyres generated from imported retreaded tyres. Finally, Australia disagrees with the Panel's reasoning that "complementary" measures were not "alternative" measures, because they could not be directly substituted for the Import Ban. Although the Panel recognized that a combination of measures may be appropriate where different alternatives are complementary in addressing the risk, in practice, the Panel evaluated each individual alternative measure in isolation.

¹¹⁰Australia's third participant's submission, para. 5 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).

¹¹¹*Ibid.*, para. 6 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

¹¹²*Ibid.*, para. 20.

92. Australia argues further that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT 1994. In defining "arbitrary" as "motivated by capricious or unpredictable reasons", the Panel placed too much emphasis on dictionary definitions and reduced the term to "inutility".¹¹³ Consistent with the Appellate Body's statement in *US – Shrimp* that "the precise meaning of the terms in the chapeau [of Article XX] may shift 'as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ'"¹¹⁴, the Panel should have considered the specific factual situation that was before it. Australia adds that, although it accepts that compliance with an international agreement "could be considered as a factor by a panel in deciding whether discrimination was 'arbitrary'"¹¹⁵, this approach requires panels to "make a judgement on the status and validity of action under the agreement".¹¹⁶

93. With respect to the Panel's finding that unjustifiable discrimination occurs only to the extent that the objective of the Import Ban has been significantly undermined by a significant amount of imports, Australia submits that the Panel may have created a new test for the consideration of unjustifiable discrimination under the chapeau of Article XX. Australia recognizes that a measure with no real impact in practice may not constitute arbitrary or unjustifiable discrimination, but maintains that the import into Brazil of 2,000 tons of retreaded tyres per year would not appear to be insignificant or without practical impact. If the Appellate Body upholds the Panel's approach, the European Communities potentially would be forced to commence a new dispute under the DSU, either under Article 21.5 or under a newly constituted panel, in the event that imports of retreaded tyres from MERCOSUR countries increase to a level that would undermine the achievement of the objective of the Import Ban. Such re-litigation of essentially the same dispute would not ensure the prompt settlement of the dispute, as provided for in Article 3.3 of the DSU.

94. Finally, Australia considers that, for the same reasons as those presented in relation to the MERCOSUR exemption, the Panel erred in finding that the Brazilian court injunctions that permitted the importation of used tyres were not arbitrary.

¹¹³ Australia's third participant's submission, para. 38 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; and Appellate Body Report, *Canada – Dairy*, para. 133).

¹¹⁴ *Ibid.*, para. 39 (referring to Appellate Body Report, *US – Shrimp*, para. 159).

¹¹⁵ *Ibid.*, para. 42.

¹¹⁶ *Ibid.*

3. Japan

95. Japan argues that what constitutes "arbitrary or unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 relates to the manner in which a challenged measure is applied and should not be defined in relation to the objective of that measure. The objective of a measure is relevant only to the determination of whether it falls under one of the paragraphs of Article XX, and not as an element to justify the measure's compatibility with the chapeau of that provision. The ordinary meaning of the term "arbitrary" indicates that an arbitrary discrimination test should focus primarily on *subjective* elements (such as motivations) in assessing the manner in which the measure is applied. As for the term "unjustifiable", the Panel correctly concluded that it suggests the "need to be able to 'defend' or convincingly explain the rationale for any discrimination in the application of the measure."¹¹⁷ According to Japan, Members can reasonably provide such convincing explanation of the rationale based on *objective* elements, since they are considered to be easier to validate.

96. In addition, Japan agrees with the Panel that the importation of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, because the Panel focused on *subjective* elements in evaluating the manner of application of the Import Ban. For Japan, the administrative authority is obliged to follow a court order (where the authority has challenged it before the courts without success), and has no discretion not to obey it. Therefore, whether acts of all branches of a government are "arbitrary" usually needs to be examined in relation to the pertinent decision-making processes. In this case, the Panel correctly found that the actions of the Brazilian courts and those of Brazilian administrative authorities were not arbitrary. Japan adds that it does not necessarily follow that the government as a whole acted in an arbitrary manner just because acts of its different branches contradict each other.

97. Japan next submits that the Panel was incorrect in assessing whether "unjustifiable discrimination" arose from the MERCOSUR exemption and from imports of used tyres under court injunctions on the basis of import volumes. Although import volumes may be a relevant factor in determining whether the application of a measure constitutes unjustifiable discrimination, import volumes are subject to strong fluctuation due to economic factors, and are therefore an inadequate benchmark for purposes of determining the consistency of a measure with the chapeau of Article XX. According to Japan, import volumes constitute a "vague threshold"¹¹⁸ that would lead to disagreements between the parties as to the consistency of the measure in the implementation stage.

¹¹⁷Japan's third participant's submission, para. 11 (quoting Panel Report, para. 7.260).

¹¹⁸*Ibid.*, para. 25.

Japan suggests that Brazil's disposal capacity is a more reasonable threshold, because it is directly related to the reduction in the amount of waste tyre accumulation in Brazil. Japan adds that Brazil's disposal capacity is more easily quantifiable and less prone to fluctuation due to supply and demand than to import volumes.

98. Finally, Japan submits that the Panel erroneously exercised judicial economy with respect to the European Communities' claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994. The Panel should have examined these claims, because the European Communities had set out, in its panel request, claims that the MERCOSUR exemption as a specific measure was inconsistent with these GATT provisions. Japan considers that a panel's discretion in exercising judicial economy must not adversely affect the appropriateness of the recommendations and rulings of the DSB, which are key to the full and satisfactory settlement of a dispute.¹¹⁹ In this case, the Panel's exercise of judicial economy prevented the satisfactory settlement of the matter, because the Panel's findings required Brazil to rectify the Import Ban only in relation to imports of used tyres under court injunctions, but did not necessarily require Brazil to address the measure's inconsistency in relation to the MERCOSUR exemption.

4. Korea

99. Korea submits that the Panel erred in concluding that the Import Ban was capable of contributing to the achievement of its objective. Korea agrees with the Panel that "there is no requirement that there be a precise measurement of the health risk involved".¹²⁰ However, Korea distinguishes the facts in *EC – Asbestos* from the facts in this dispute, because the measure at issue in *EC – Asbestos* "was a ban on the use of the product and the qualitative linkage was of the product to cancer"¹²¹, while in the present dispute there is no inherent danger in the product itself. In particular, when unlimited domestic production and importation from MERCOSUR countries are permitted, the statement that "numerical precision" is not required can be abused as "an excuse for any lack of effort in assessing degrees of risk".¹²² In Korea's view, Brazil failed to demonstrate what amount of waste tyre reduction is optimal for achieving Brazil's objective and its chosen level of protection and how the limitations introduced by the Import Ban relate to any such level.

¹¹⁹Japan's third participant's submission, paras. 31-32 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133; and Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 330-335).

¹²⁰Korea's third participant's submission, para. 8 (referring to Panel Report, paras. 7.118 and 7.119).

¹²¹*Ibid.*, para. 9.

¹²²*Ibid.*

100. For Korea, the Panel's finding that the Import Ban was "capable of contributing to the overall reduction of the amount of waste tyres"¹²³ amounts to a violation of Article 11 of the DSU. It is unclear what the Panel understood as "capable of contributing", and the Panel should have quantified the extent of the actual contribution of the Import Ban to the achievement of its objective, particularly in the light of its subsequent finding that a quantity of 2,000 tons of retreaded tyres imported under the MERCOSUR exemption did not "significantly" undermine the objective of the measure.

101. Korea agrees with the Panel that Members can choose the level of protection they consider appropriate. However, the measure in question does not relate directly to the reduction of mosquito-borne diseases and tyre fire emissions. Rather, it is "derivative" and relates to the reduction in the number of waste tyres, which may have a "knock-on effect"¹²⁴ on the reduction of mosquito-borne diseases and tyre fire emissions. However, in Korea's view, the Panel failed to assess properly the relationship of the Import Ban to its stated goal of safeguarding human health through the reduction of waste tyres. For Korea, without a better assessment of whether or not the Import Ban actually results in a reduction of the accumulation of waste tyres, one cannot establish a measurable link (or, indeed, any link) to the stated health goal. Therefore, Korea reasons, "some sort of metric, even if not a precise one"¹²⁵, would have been necessary for the Panel to determine the contribution of the Import Ban to the achievement of its objective. Korea considers that the European Communities provided a number of alternatives to the Import Ban, any of which individually or in combination would provide less trade-restrictive measures in achieving the stated goal.

102. Korea argues further that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner inconsistent with the chapeau of Article XX of the GATT 1994. First, Korea agrees with the Panel that the ordinary meaning of the word "arbitrary" includes the "elements of capricious, unpredictable and inconsistent".¹²⁶ However, the Panel assessed the MERCOSUR exemption only in the light of the meaning of the terms "capricious" and "unpredictable". According to Korea, the term "inconsistent" informs the whole meaning of "arbitrary".¹²⁷ This is significant, because the MERCOSUR exemption is not capricious, or unpredictable. However, the Import Ban and the MERCOSUR exemption certainly were "inconsistent" in the light of the underlying justification, that is, the protection of humans from mosquito-borne diseases and tyre fire emissions. For Korea, there is no logical way of distinguishing

¹²³Korea's third participant's submission, para. 10.

¹²⁴*Ibid.*, para. 11.

¹²⁵*Ibid.*, para. 12.

¹²⁶*Ibid.*, para. 19.

¹²⁷*Ibid.*, para. 20.

between retreaded tyres from a MERCOSUR country and retreaded tyres from another WTO Member in relation to the protection of human life and health objective pursued by Brazil.

103. Secondly, Korea submits that the Panel erred in finding that 2,000 tons of retreaded tyres imported from MERCOSUR countries did not significantly undermine the objective of the Import Ban. Korea asserts that the initial burden was on Brazil to establish adequately the factual link between the health goal and the measure in question, and to do so "with some certainty and demonstrability".¹²⁸ Thus, in the absence of such a benchmark provided by Brazil, the Import Ban is by definition "arbitrary", because it "may be applied or not applied in inconsistent manners without any factual or logical basis."¹²⁹ Korea argues that the Panel misinterpreted the nature of the exception provided under Article XXIV of the GATT 1994 and how it interacts with the exception under Article XX.

104. Finally, Korea argues that there was no legal basis for the Panel to find that the open-ended MERCOSUR exemption was consistent with Brazil's defence under Article XX based on the novel standard of significantly undermining the objective that the Panel had construed.¹³⁰ This reasoning implied that MERCOSUR imports could increase to some unknown level that might then significantly undermine the protection of human life and health objective stated by Brazil. Korea contends that the Panel's approach virtually invited future disputes. This is not consistent with Article 3.3 of the DSU, which provides that prompt settlement of disputes is a key element of the dispute settlement system. According to Korea, the Panel erred by attempting to make an "as applied" ruling based on transient facts, when the structure of the measure and the open-ended MERCOSUR exemption required an "as such" finding.

5. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu

105. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel erred in its interpretation of the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted either "arbitrary discrimination" or "a disguised restriction on international trade" within the meaning of the chapeau.

¹²⁸Korea's third participant's submission, para. 29.

¹²⁹*Ibid.*

¹³⁰*Ibid.*, para. 33.

106. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel's finding that the MERCOSUR exemption did not constitute "arbitrary discrimination between countries where the same conditions prevail" was in error, because the MERCOSUR exemption "was done unpredictably".¹³¹ In support of this argument, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu recalls that Brazil maintained a general ban on the importation of used tyres even after the formation of MERCOSUR, when Brazil should have eliminated most of the trade barriers with other MERCOSUR countries, and that Brazil even enacted new restrictions on imports when it enacted the Import Ban. Moreover, Brazil did not invoke the protection of human life and health in its defence before the MERCOSUR arbitral tribunal, and that tribunal did not specify how Brazil should implement its ruling. Brazil itself decided to adopt the MERCOSUR exemption. For these reasons, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu contends that "it is quite clear that no 'predictability' could be found in Brazil's trade policy, which would justify the effect of discrimination on retreaded tyres."¹³² This lack of predictability results in the discrimination introduced by the MERCOSUR exemption being "arbitrary" within the meaning of the chapeau of Article XX.

107. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues that the MERCOSUR exemption should be considered arbitrary in the light of the objective of the Import Ban. It is uncontested that retreaded tyres exported from MERCOSUR countries into Brazil had the same potential to damage human life or health as retreaded tyres exported from non-MERCOSUR countries. For this reason, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that, "if the protection of human life or health necessitates Brazil adopting an import ban on retreaded tyres, a loophole in the ban would undermine Brazil's asserted objective."¹³³ The MERCOSUR exemption is just such a loophole, and the discrimination that it engenders is, therefore, arbitrary.

108. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues further that the Panel erred in finding that the discrimination engendered by the MERCOSUR exemption was permissible pursuant to Article XXIV of the GATT 1994. Even assuming that MERCOSUR is consistent with Article XXIV, Article XXIV:8(a) specifically excludes measures adopted consistently with Article XX from the obligation to liberalize "substantially all the trade" within a customs union.

¹³¹Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 7.

¹³²*Ibid.*, para. 13.

¹³³*Ibid.*, para. 15.

The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also highlights that the objectives of Articles XX and XXIV "are diametrically opposed".¹³⁴

109. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also argues that the Panel erred in finding that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" under the chapeau of Article XX, "because the amount of imported retreaded tyres did not increase 'significantly' following [its] introduction".¹³⁵ The chapeau of Article XX does not require evidence of a disruption in trade flows for a complainant to make a case that a disguised restriction exists. The "logic"¹³⁶ of the Appellate Body's rulings in *US – Shrimp* and in *US – Gambling* was "to discourage a [WTO] Member from adopting a measure having an adverse effect on international trade."¹³⁷ Therefore, a disguised restriction on international trade should be found to exist when there is a *possibility* that it does exist. The Panel's test of "significance", in contrast, clearly lacked a legal basis.

110. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu adds that, as a result of the MERCOSUR exemption, "the trade flow of retreaded tyres to Brazil has been changed in a manner benefiting other MERCOSUR countries"¹³⁸, because these countries are now "able to import used tyres from non-MERCOSUR countries in the first place, retread them locally, and finally re-export retreaded tyres to Brazil."¹³⁹ The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu concludes that international trade in retreaded tyres will be distorted, and that a disguised restriction results from such trade distortion.

111. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu further suggests that the Panel's findings in this dispute might cause confusion for WTO Members when assessing whether a specific measure is WTO-consistent, create a tendency for WTO Members to initiate a multiplicity of WTO disputes, and undermine the security and predictability needed to conduct future trade. These problems stem from the Panel's failure to provide clear criteria for determining what volume of imports or increase in import volumes would be considered "significant". Moreover, since import volumes are generally determined by supply and demand, the Panel's significance test, if adopted, would make it difficult for WTO Members, who do not have the power to control trade flows into

¹³⁴Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 21.

¹³⁵*Ibid.*, para. 23 (referring to Panel Report, para. 7.354).

¹³⁶*Ibid.*, para. 26.

¹³⁷*Ibid.* (referring to Appellate Body Report, *US – Shrimp*, paras. 166-184; and Appellate Body Report, *US – Gambling*, para. 369).

¹³⁸*Ibid.*, para. 27.

¹³⁹*Ibid.* (referring to Panel Report, para. 7.352).

their domestic markets, to adopt WTO-consistent measures or to eliminate WTO-inconsistent measures.

6. United States

112. The United States agrees with the European Communities that the manner in which the Panel considered the MERCOSUR exemption in its Article XX analysis was erroneous in a number of respects. First, the Panel erred in disregarding the MERCOSUR exemption when determining whether the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. The MERCOSUR exemption is contained in Portaria SECEX 14/2004¹⁴⁰, and this was the measure found by the Panel to be inconsistent with Article XI:1 of the GATT 1994. For this reason, the Panel was obliged to determine whether Brazil had established that the same measure—Portaria SECEX 14/2004—was justified under Article XX, including by considering the aspect of the MERCOSUR exemption in its necessity analysis. The United States highlights that a single sentence of Portaria SECEX 14/2004 contains both the Import Ban and the MERCOSUR exemption. According to the United States, the Panel should have considered, in determining the contribution of the measure to the ends pursued by it, the fact that retreaded tyres continue to be imported due to the MERCOSUR exemption, and its failure to do so constituted a breach of Article 11 of the DSU.

113. However, the United States disagrees with the European Communities' apparent position that the contribution of the measure to the ends pursued must be evaluated quantitatively, or that demonstrating a contribution requires "verifiable" evidence of whether the measure "actually" contributed to the ends pursued.¹⁴¹ Article XX(b) does not contain a requirement to quantify "necessity", and both quantitative and qualitative evidence may be relevant to the necessity analysis, including the analysis of the contribution of the measure to the ends pursued.

114. The United States also argues that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade", contrary to the chapeau of Article XX. First, the Panel erred in basing its finding that the MERCOSUR exemption did not constitute arbitrary discrimination on the fact that the exemption was adopted to comply with a ruling issued by a MERCOSUR tribunal. The ruling did not prescribe any specific implementation action and, more fundamentally, the United States objects to the Panel's reference to Article XXIV in the context of the MERCOSUR ruling. The United States explains that "Article XXIV does not

¹⁴⁰See *supra*, footnote 3.

¹⁴¹United States' third participant's submission, para. 6 (referring to European Communities' appellant's submission, paras. 172-174).

'expressly recognize' *any and all* frameworks for [WTO] Members to discriminate in favor of partners in customs unions or free trade areas, but rather recognizes particular agreements that meet the conditions specified therein."¹⁴² The Panel could not have properly concluded that MERCOSUR is a type of agreement expressly recognized in Article XXIV, because it made no findings as to whether MERCOSUR meets the terms of Article XXIV.

115. Secondly, the United States maintains that the Panel erred in relying on the number of retreaded tyres imported into Brazil from MERCOSUR countries as a basis for its finding that the MERCOSUR exemption did not constitute "unjustifiable discrimination" or "a disguised restriction on international trade" under the chapeau of Article XX. The Panel found that the volume of imports from MERCOSUR countries appears not to have been "significant", but failed to offer any meaningful analysis of what volume would be "significant". The United States points out that import volumes may change, and that simple reliance on a figure "appears a dubious basis for the Panel's conclusion that the permitted imports will not 'undermine' the objective of the measure."¹⁴³ According to the United States, the chapeau of Article XX requires panels to evaluate whether unjustifiable discrimination or a disguised restriction on international trade exists, and not simply whether the discrimination that exists undermines the objective of the measure.

116. Finally, should the Appellate Body reach the European Communities' conditional appeal and decide to rule on the European Communities' separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994, the United States submits that Brazil may not rely on Article XXIV of the GATT 1994 as a defence. MERCOSUR has not been notified under Article XXIV as a customs union, as required by Article XXIV:7 of the GATT 1994. According to the United States, failure to notify a customs union under Article XXIV:7 does not merely render a customs union inconsistent with that paragraph; rather, pursuant to paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (the "*Understanding on Article XXIV of the GATT 1994*"), such a customs union is not consistent with Article XXIV as a whole. Members that opt not to subject their customs union to the procedures set out in Article XXIV and the *Understanding on Article XXIV of the GATT 1994* or its interpretation are not entitled to invoke that provision as a defence. Moreover, the United States notes that 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

¹⁴²United States' third participant's submission, para. 9. (original emphasis)

¹⁴³*Ibid.*, para. 11.

¹⁴⁴L/4903, 28 November 1979, BISD 26S/203.

United States argues that regional arrangements as defined under Articles 1, 2, and 3 of the Enabling Clause have different characteristics and are subject to different obligations than customs unions and free trade areas covered by Article XXIV.

III. Issues Raised in This Appeal

117. The following issues are raised in this appeal:

- (a) with respect to the Panel's analysis of "necessity" within the meaning of Article XX(b) of the GATT 1994:
 - (i) whether the Panel erred in finding that the Import Ban is "necessary" to protect human or animal life or health¹⁴⁵; 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 chapeau¹⁴⁶; 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

¹⁴⁵Panel Report, para. 7.215.

¹⁴⁶*Ibid.*, paras. 7.289 and 7.354.

- (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.

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 countries¹⁴⁷ may have a choice between new tyres or "retreaded" tyres. This dispute concerns the latter category of tyres.¹⁴⁸ Retreaded tyres are used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls.¹⁴⁹ Retreaded tyres can be produced through different methods, one of which is called "remoulding".¹⁵⁰

119. At the end of their useful life¹⁵¹, tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health.¹⁵² Specific risks to human life and health include:

¹⁴⁷We note that Brazil is not the only WTO Member that has adopted a ban on imports of retreaded tyres. According to Brazil, countries that have restricted imports of used and retreaded tyres include Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela. (Brazil's first submission to the Panel, para. 67) At the oral hearing, Brazil identified the following as countries that ban imports of retreaded tyres: Argentina, Morocco, Nigeria, Pakistan, Thailand, Tunisia, and Venezuela.

¹⁴⁸Retreaded tyres are classified in the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983, under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types). (Panel Report, para. 2.4)

¹⁴⁹Panel Report, para. 2.1.

¹⁵⁰"Remoulding" consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. The other two methods of retreading are "top-capping", which consists of replacing only the tread, and "re-capping", which entails replacing the tread and part of the sidewall. (*Ibid.*, para. 2.2)

¹⁵¹The Panel assumed that, on average, a tyre—whether new or retreaded—can be used on a passenger car for five years before it becomes a used tyre. (*Ibid.*, para. 7.128)

¹⁵²*Ibid.*, para. 7.109.

(i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.¹⁵³

Risks to animal and plant life and health include: "(i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals."¹⁵⁴

120. Governments take actions to minimize the adverse effects of waste tyres. Policies to address "waste" include preventive measures aiming at reducing the generation of additional waste tyres¹⁵⁵, as well as remedial measures aimed at managing and disposing of tyres that can no longer be used or retreaded, such as landfilling, stockpiling, the incineration of waste tyres, and material recycling.

121. The Panel observed that the parties to this dispute have not suggested that retreaded tyres used on vehicles pose any particular risks compared to new tyres, provided that they comply with appropriate safety standards. Various international standards exist in relation to retreaded tyres, including, for example, the norm stipulating that passenger car tyres may be retreaded only once.¹⁵⁶ One important difference between new and retreaded tyres is that the latter have a shorter lifespan and therefore reach the stage of being waste earlier.¹⁵⁷

B. *The Measure at Issue*

122. Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")¹⁵⁸ reads as follows:

¹⁵³Panel Report, para. 7.109. See also *ibid.*, paras. 7.53-7.83.

¹⁵⁴*Ibid.*, para. 7.112.

¹⁵⁵See the Panel's finding, in paragraph 7.100 of its Report, that "policies to address 'waste' by non-generation of additional waste are a generally recognized means of addressing waste management issues", as well as footnote 1170 thereto, detailing the evidence on which the Panel relied in reaching this conclusion.

¹⁵⁶*Ibid.*, para. 2.3.

¹⁵⁷*Ibid.*, paras. 7.129 and 7.130.

¹⁵⁸Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. We note that, in November 2006, Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX No. 35 dated 24 November 2006, the text of which is identical to that of Article 40 of Portaria SECEX 14/2004. (European Communities' appellant's submission, para. 145 and footnote 18 thereto)

Article 40 – An import license will not be granted for retreaded tyres and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.¹⁵⁹

Article 40 of Portaria SECEX 14/2004 contains three main elements: (i) an import ban on *retreaded* tyres (the "Import Ban")¹⁶⁰; (ii) an import ban on *used* tyres; and (iii) an exemption from the Import Ban of imports of certain retreaded tyres from other countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market), which has been referred to in this dispute as the "MERCOSUR exemption".¹⁶¹ The MERCOSUR exemption did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX No. 8 of 25 September 2000 ("Portaria SECEX 8/2000")¹⁶², but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.¹⁶³

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres.¹⁶⁴ In its request for the establishment of a panel¹⁶⁵, the European Communities identified the Import Ban and the MERCOSUR exemption as distinct measures, and made separate claims against each of these measures. The European Communities claimed that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, and

¹⁵⁹See Panel Report, para. 2.7.

¹⁶⁰Throughout this Report, reference to the "Import Ban" shall be understood as referring only to the import ban on retreaded tyres. It therefore does not include the MERCOSUR exemption, despite the fact that this exemption is contained in the same legal instrument as the Import Ban, that is, Article 40 of Portaria SECEX 14/2004.

¹⁶¹The MERCOSUR exemption applies exclusively to remoulded tyres, a subcategory of retreaded tyres, which result from the process of replacing the tread and the sidewall, including all or part of the lower area of the tyre. (See Panel Report, para. 2.74 and footnote 1440 to para. 7.265)

¹⁶²Exhibits BRA-71 and EC-26 submitted by Brazil and the European Communities, respectively, to the Panel. See also Panel Report, para. 2.8.

¹⁶³Following the adoption of Portaria SECEX 8/2000, Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings within MERCOSUR. Uruguay alleged that Portaria SECEX 8/2000 constituted a new restriction of commerce between MERCOSUR countries, which was incompatible with Brazil's obligations under MERCOSUR. In its ruling of 9 January 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of 29 June 2000, which obliges MERCOSUR countries not to introduce new *inter se* restrictions of commerce. (See Panel Report, para. 2.13; see also Exhibits BRA-103 and EC-40 submitted by Brazil and the European Communities, respectively, to the Panel) Following the arbitral award, Brazil enacted Portaria SECEX No. 2 of 8 March 2002, which eliminated the import ban for remoulded tyres originating in other MERCOSUR countries. (See Panel Report, para. 2.14; see also Exhibit BRA-78 submitted by Brazil to the Panel; see also Exhibit EC-41 submitted by the European Communities to the Panel) This exemption was incorporated into Article 40 of Portaria SECEX 14/2004.

¹⁶⁴The European Communities confirmed, in response to questioning at the oral hearing, that it has not challenged the ban on the import of *used* tyres contained in Article 40 of Portaria SECEX 14/2004.

¹⁶⁵WT/DS332/4, 18 November 2005. See also European Communities' first written submission to the Panel, para. 47.

could not be justified under Article XX of the GATT 1994.¹⁶⁶ The European Communities also made distinct claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and could not be justified under either Article XXIV:5 of the GATT 1994 or the Enabling Clause.¹⁶⁷ In comments made during the interim review, Brazil stated that it had treated the Import Ban and the MERCOSUR exemption as two separate measures contained in the same legal instrument.¹⁶⁸

124. Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claims made against the MERCOSUR exemption. The Panel found the Import Ban to be inconsistent with Article XI:1 of the GATT 1994.¹⁶⁹ It then turned to Brazil's related defence under Article XX(b) of the GATT 1994, stating that its analysis of Brazil's justification of the violation should focus also on the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1.¹⁷⁰ Thus, according to the Panel, its analysis of the necessity of *that* specific measure should not have taken account of "elements extraneous to the measure itself" or of situations in which the Import Ban "does *not* apply (i.e. the exemption of MERCOSUR imports)".¹⁷¹ The Panel recognized, nonetheless, that "the MERCOSUR 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

¹⁶⁶See, for instance, European Communities' first written submission to the Panel, paras. 89-168.

¹⁶⁷*Supra*, footnote 144. See also European Communities' first written submission to the Panel, paras. 193-222.

¹⁶⁸Panel Report, para. 6.17.

¹⁶⁹The Panel found that the prohibition of the issuance of import licences for retreaded tyres has the effect of prohibiting the importation of retreaded tyres, and is thus inconsistent with Article XI:1 of the GATT 1994. (*Ibid.*, paras. 7.14, 7.15, and 7.34) In making the finding that Portaria SECEX 14/2004 is inconsistent with Article XI:1, the Panel focused on the import prohibition; its reasoning reflects the notion that an exemption from an import ban by its nature does not constitute a prohibition or restriction.

¹⁷⁰*Ibid.*, para. 7.106.

¹⁷¹*Ibid.*, para. 7.107. (footnote omitted)

¹⁷²*Ibid.*, para. 7.237; see also para. 6.19.

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

¹⁷³Indeed, two of the third participants in this appeal—Australia and the United States—suggest that the Panel should have adopted such an approach. (Australia's third participant's submission, paras. 4 and 5; United States' third participant's submission, para. 5)

¹⁷⁴See *supra*, footnote 5.

¹⁷⁵Exhibits BRA-4 and EC-47 submitted by Brazil and by the European Communities, respectively, to the Panel.

2002¹⁷⁶, created a collection and disposal scheme that makes it mandatory for domestic manufacturers of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions.¹⁷⁷ CONAMA Resolution 258/1999, as amended in 2002, aims to ensure the environmentally appropriate final disposal of unusable tyres. Also, by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil¹⁷⁸, CONAMA Resolution 258/1999, as amended in 2002, seeks to encourage Brazilian retreaders to retread more domestically used tyres.

131. Brazilian states have also enacted measures aiming at reducing risks arising from the accumulation of waste tyres. Law 12.114 of the State of Rio Grande do Sul prohibits the commercialization of imported used tyres within its territory, which includes imported retreaded tyres, as well as retreaded tyres made in Brazil from imported casings.¹⁷⁹ A 2005 amendment to that law allows the importation and marketing of imported retreaded tyres provided that the importer proves that it has destroyed ten used tyres in Brazil for every retreaded tyre imported. In the case of imports of used tyre casings, however, the destruction of only one used tyre per imported tyre is required.¹⁸⁰ The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, *inter alia*, all existing unusable tyres currently discarded throughout the territory of Paraná.¹⁸¹

132. Finally, we note that, notwithstanding the import ban on used tyres contained in Article 40 of Portaria SECEX 14/2004, a number of Brazilian retreaders have sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres from those used tyres.¹⁸² Although the Brazilian government has, within the Brazilian domestic legal system, opposed these injunctions, it has had mixed results in its efforts to prevent the grant, or obtaining the reversal, of court injunctions for the importation of used tyres.¹⁸³

¹⁷⁶Exhibit BRA-68 submitted by Brazil to the Panel.

¹⁷⁷See para. 154 and footnote 253 thereto of this Report.

¹⁷⁸Panel Report, para. 7.137.

¹⁷⁹*Ibid.*, para. 2.11.

¹⁸⁰*Ibid.*, para. 2.12.

¹⁸¹*Ibid.*, paras. 7.66, 7.174, 7.175, and 7.178.

¹⁸²*Ibid.*, paras. 7.241 and 7.92-7.305.

¹⁸³*Ibid.*, para. 7.304.

V. The Panel's Analysis of the Necessity of the Import Ban

A. *The Panel's Necessity Analysis under Article XX(b) of the GATT 1994*

133. The first legal issue raised by the European Communities' appeal relates to the Panel's finding that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.¹⁸⁴ The European Communities challenges three specific aspects of the Panel's analysis under Article XX(b). First, the European Communities contends that the Panel applied an "erroneous legal standard"¹⁸⁵ in assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban. Secondly, the European Communities submits that the Panel did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities.¹⁸⁶ Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out a proper, if any, weighing and balancing of the relevant factors.¹⁸⁷ We will examine these contentions of the European Communities in turn.

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

134. In the analysis of the contribution of the Import Ban to the achievement of its objective, the Panel first recalled its previous findings that, through the Import Ban, Brazil pursued the objective of reducing exposure to the risks to human, animal, and plant life and health arising from the accumulation of waste tyres, and that such policy fell within the range of policies covered by paragraph (b) of Article XX of the GATT 1994.¹⁸⁸ The Panel also found that Brazil's chosen level of protection is the "reduction of the risks of waste tyre accumulation to the maximum extent possible".¹⁸⁹ In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres"¹⁹⁰, the Panel examined two questions. First, the Panel sought to assess whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil. Secondly, the Panel sought to evaluate whether a reduction in the number of waste tyres can

¹⁸⁴Panel Report, para. 7.215.

¹⁸⁵European Communities' appellant's submission, para. 166.

¹⁸⁶*Ibid.*, para. 209.

¹⁸⁷*Ibid.*, para. 285.

¹⁸⁸Panel Report, para. 7.115.

¹⁸⁹*Ibid.*, para. 7.108. (footnote omitted)

¹⁹⁰*Ibid.*, para. 7.115.

contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres.¹⁹¹

135. Regarding the first question, the Panel noted Brazil's explanation that the Import Ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading. The Panel began by examining the replacement of imported retreaded tyres with new tyres on Brazil's market.¹⁹² The Panel determined that "all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres."¹⁹³ Accordingly, the Panel reasoned that "an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."¹⁹⁴ The Panel verified next whether there is a link between the replacement of imported retreaded tyres with domestically retreaded tyres and a reduction in the number of waste tyres in Brazil.¹⁹⁵ If retreaded tyres are manufactured in Brazil from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of the accumulation of waste tyres in Brazil by "giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."¹⁹⁶ The Panel added that "an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise"¹⁹⁷, because it "compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."¹⁹⁸ The Panel then assessed whether domestic used tyres can be retreaded in Brazil. On the basis of the evidence provided by the parties, the Panel found that "at least some domestic used tyres are being retreaded in Brazil"¹⁹⁹, that Brazil "has the production capacity to retread domestic used tyres"²⁰⁰, and that new tyres sold in Brazil have the potential to be retreaded.²⁰¹ The Panel also observed that "Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil" and that "the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste

¹⁹¹Panel Report, para. 7.122.

¹⁹²*Ibid.*, paras. 7.126-7.130.

¹⁹³*Ibid.*, para. 7.130.

¹⁹⁴*Ibid.*

¹⁹⁵*Ibid.*, para. 7.132.

¹⁹⁶*Ibid.*, para. 7.133.

¹⁹⁷*Ibid.*, para. 7.134. (footnote omitted)

¹⁹⁸*Ibid.*

¹⁹⁹*Ibid.*, para. 7.136.

²⁰⁰*Ibid.*, para. 7.142.

²⁰¹*Ibid.*, para. 7.137.

tyres."²⁰² The Panel concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil."²⁰³

136. The Panel then turned to the question of whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health arising from waste tyres. For the Panel, "the very essence of the problem is the actual accumulation of waste in and of itself."²⁰⁴ The Panel added that "[t]o the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires."²⁰⁵ The Panel concluded that:

... the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.²⁰⁶

137. According to the European Communities, the Panel, in its assessment of the contribution of the Import Ban to the realization of the ends pursued by it, referred only to the potential contribution this measure might make.²⁰⁷ The European Communities argues that the Panel applied an "erroneous legal standard"²⁰⁸ in so doing, and that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution".²⁰⁹ For the European Communities, the Panel was required to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective because, otherwise, it is not possible to weigh and balance properly this contribution against other relevant factors.²¹⁰ Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban.²¹¹ For the European Communities, "[t]he very indirect nature of the

²⁰²Panel Report, para. 7.139.

²⁰³*Ibid.*, para. 7.142.

²⁰⁴*Ibid.*, para. 7.146.

²⁰⁵*Ibid.*

²⁰⁶*Ibid.*, para. 7.148.

²⁰⁷European Communities' appellant's submission, para. 168.

²⁰⁸*Ibid.*, para. 166.

²⁰⁹*Ibid.*, para. 167.

²¹⁰*Ibid.*, para. 171.

²¹¹*Ibid.*, para. 174.

alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of the waste tyres arising in Brazil."²¹²

138. Brazil counters that the Panel correctly assessed the contribution of the Import Ban to the achievement of its objective. Brazil argues that actual contribution is properly assessed under the chapeau of Article XX of the GATT 1994, which focuses on the application of the measure. Brazil asserts further that the Appellate Body expressly recognized, in *EC – Asbestos*, that "a risk may be evaluated either in quantitative or *qualitative* terms"²¹³ and, therefore, the Panel was under no obligation to quantify the Import Ban's contribution to the reduction in waste tyre volumes.

139. We begin by recalling that the analysis of a measure under Article XX of the GATT 1994 is two-tiered.²¹⁴ First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX.²¹⁵ Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

140. We note at the outset that the participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve²¹⁶, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.²¹⁷

141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In *Korea – Various Measures on Beef*, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable'".²¹⁸ The Appellate Body added:

²¹²European Communities' appellant's submission, para. 177.

²¹³Brazil's appellee's submission, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

²¹⁴Appellate 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.

²¹⁵In 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)

²¹⁶Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at 28.

²¹⁷Appellate Body Report, *EC – Asbestos*, para. 168.

²¹⁸Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".²¹⁹ (footnote omitted)

142. In *Korea – Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.²²⁰

143. In *US – Gambling*, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"²²¹, and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".²²²

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"²²³, and noted that "few interests are more 'vital' and 'important' than

²¹⁹Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

²²⁰*Ibid.*, para. 164.

²²¹Appellate Body Report, *US – Gambling*, para. 306. (footnote omitted)

²²²*Ibid.* In *Korea – Various Measures on Beef*, the Appellate Body observed that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." (Appellate Body Report, *Korea – Various Measures on Beef*, para. 163)

²²³Panel Report, para. 7.102.

protecting human beings from health risks, and that protecting the environment is no less important."²²⁴ The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible."²²⁵ Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."²²⁶

145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective.²²⁷ In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified.²²⁸ To the contrary, in *EC – Asbestos*, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health".²²⁹ In other words, "[a] risk may be evaluated either in quantitative or qualitative terms."²³⁰ Although the reference by the Appellate Body

²²⁴Panel Report, para. 7.108 (referring to Brazil's first written submission, para. 101).

²²⁵*Ibid.* (footnote omitted)

²²⁶*Ibid.*, para. 7.114.

²²⁷*Ibid.*, para. 7.118.

²²⁸Appellate Body Report, *Korea – Various Measures on Beef*, paras. 163 and 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

²²⁹Appellate Body Report, *EC – Asbestos*, para. 167. (original emphasis; footnote omitted)

²³⁰*Ibid.*

to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban.²³¹ In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence. It examined first the impact of the replacement of imported retreaded tyres with *new tyres* on the reduction of waste. Secondly, the Panel sought to determine whether imported retreaded tyres would be replaced with *domestically retreaded tyres*, which led it to examine whether domestic used tyres can be and are being retreaded in Brazil. Thirdly, it considered whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health.

149. The Panel's analysis was not only directed at an assessment of the current situation and the *immediate* effects of the Import Ban on the reduction of the exposure to the targeted risks. The Panel's approach also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the exposure to these risks.²³² In the course of its reasoning, the Panel made and tested some key hypotheses, including: that imported retreaded tyres are being replaced with new tyres²³³ and domestically retreaded tyres²³⁴; that some proportion of domestic used tyres are retreadable and are being retreaded²³⁵; that Brazil introduced a number of measures to facilitate the access of

²³¹European Communities, appellant's submission, para. 174.

²³²In the Panel's view, "it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk ... or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure." (Panel Report, para. 7.145)

²³³*Ibid.*, para. 7.130.

²³⁴*Ibid.*, paras. 7.133-7.135.

²³⁵*Ibid.*, para. 7.136.

domestic retreaders to good-quality used tyres²³⁶; that more automotive inspections in Brazil lead to an increase in the number of retreadable used tyres²³⁷; and that Brazil has the production capacity to retread such tyres.²³⁸ The Panel sought to verify these hypotheses on the basis of the evidence adduced by the parties and found them to be logically sound and supported by sufficient evidence. In the next Section, we will examine the European Communities' claim that the Panel failed to make an objective assessment of the facts with respect to the verification of some of these hypotheses. Assuming, for the time being, that the Panel assessed the facts in accordance with Article 11 of the DSU, it appears to us that the Panel's analysis supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks.²³⁹ We have now to determine whether this was sufficient to conclude that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.

150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be".²⁴⁰ We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in *Korea – Various Measures on Beef*, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'".²⁴¹ Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.²⁴²

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to

²³⁶Panel Report, para. 7.137.

²³⁷*Ibid.*, para. 7.138.

²³⁸*Ibid.*, para. 7.141.

²³⁹*Ibid.*, para. 7.148.

²⁴⁰*Ibid.*, para. 7.211.

²⁴¹Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

²⁴²Brazil's appellee's submission, paras. 80 and 83. According to Brazil, given its chosen level of protection to reduce the risk of waste tyre accumulation to the maximum extent possible, "[i]f the Panel finds that there are no reasonable alternatives to the measure, the measure is necessary—no matter how small its contribution—because the WTO does not second-guess the Member's chosen level of protection." (*Ibid.*, para. 80)

isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.²⁴³ In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or 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 casings²⁴⁴, or with new tyres that are retreadable.²⁴⁵ As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres"²⁴⁶ and that, accordingly, the

²⁴³In this respect, we note that, in *US – Gasoline*, the Appellate Body stated, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable." (Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at 20)

²⁴⁴Panel Report, paras. 7.126-7.130.

²⁴⁵*Ibid.*, paras. 7.131-7.142.

²⁴⁶*Ibid.*, para. 7.130.

Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."²⁴⁷ As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres²⁴⁸ and that "at least some domestic used tyres are being retreaded in Brazil."²⁴⁹ The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres²⁵⁰, and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded.²⁵¹ The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."²⁵² For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide

²⁴⁷Panel Report, para. 7.130.

²⁴⁸*Ibid.*, para. 7.141. The Panel noted that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported) and 18.6 million retreaded tyres were produced domestically.

²⁴⁹*Ibid.*, para. 7.136.

²⁵⁰*Ibid.*, para. 7.137.

²⁵¹*Ibid.*

²⁵²*Ibid.*, para. 7.133.

for the safe disposal of waste tyres in specified proportions.²⁵³ For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil.²⁵⁴ Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material.²⁵⁵ Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil. Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on

²⁵³Article 3 of CONAMA Resolution 258/1999, as amended in 2002, provides:

The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:

I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

III – as of 1 January 2004:

a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;

b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;

IV – as of 1 January 2005:

a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;

b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres.

²⁵⁴Panel Report, para. 7.137.

²⁵⁵Leaving aside, as explained above, the imports under the MERCOSUR exemption and under court injunctions.

used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a *key element* of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel's Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.²⁵⁶ As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."²⁵⁷ We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".²⁵⁸ If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available".²⁵⁹ As the Appellate Body indicated in *US – Gambling*, "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or

²⁵⁶ Appellate Body Report, *US – Gambling*, para. 311.

²⁵⁷ *Ibid.*, para. 309. (original emphasis)

²⁵⁸ *Ibid.*, para. 308.

²⁵⁹ *Ibid.*, para. 311.

where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."²⁶⁰ If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.²⁶¹

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil.²⁶² The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

158. Regarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres. The Panel observed that these measures had already been implemented or were in the process of being implemented²⁶³ so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable".²⁶⁴ Therefore, the Panel disagreed with the European Communities that "the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban".²⁶⁵

159. The Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions. The Panel noted that imports of used tyres were already prohibited by law in Brazil, "so that if the 'alternative measure' proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure."²⁶⁶ Accordingly, the Panel concluded that the possible alternative measures identified by the European Communities to avoid the *generation* of waste tyres could not "apply as a

²⁶⁰ Appellate Body Report, *US – Gambling*, para. 308.

²⁶¹ *Ibid.*, para. 311.

²⁶² Panel Report, para. 7.159.

²⁶³ *Ibid.*, para. 7.169.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, para. 7.171.

substitute" for the Import Ban but are, rather, complementary measures that Brazil already applies, at least in part.²⁶⁷

160. Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

161. The European Communities referred mainly to two collection and disposal schemes.²⁶⁸ In the analysis of these schemes, the Panel recalled that "Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible".²⁶⁹ According to the Panel, "insofar as the level of protection pursued by Brazil involves the 'non-generation' of waste tyres in the first place", collection and disposal schemes, such as that adopted by CONAMA Resolution 258/1999 or the Paraná Rodando Limpo²⁷⁰ programme, "would not seem able to achieve the same level of protection as the import ban".²⁷¹ The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks.²⁷² The Panel concluded that these schemes cannot be considered as alternatives to the Import Ban at the level of protection sought by Brazil, because they were already implemented in Brazil and do not address the risks associated with the disposal of waste tyres.²⁷³

162. The Panel then examined the following disposal methods identified by the European Communities: (i) landfilling; (ii) stockpiling; (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.

163. Concerning *landfilling*, the Panel found that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the Import Ban, and for this reason cannot constitute a reasonably available alternative.²⁷⁴ For the Panel, landfilling of waste tyres poses problems, including the "instability of sites that will affect future land reclamation, long-term leaching of toxic substances, and the risk of tyre fires and mosquito-borne diseases."²⁷⁵ The Panel also observed that the evidence

²⁶⁷Panel Report, para. 7.172. (original emphasis)

²⁶⁸The 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)

²⁶⁹Panel Report, para. 7.177.

²⁷⁰See Exhibit EC-49 submitted by the European Communities to the Panel.

²⁷¹Panel Report, para. 7.177.

²⁷²*Ibid.*

²⁷³*Ibid.*, para. 7.178.

²⁷⁴*Ibid.*, para. 7.186.

²⁷⁵*Ibid.*, para. 7.183. (footnote omitted)

it examined showing the existence of such risks did not make a clear distinction between landfilling of shredded tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfilling"). Thus, for the Panel, it was not possible to conclude that landfilling of shredded tyres does not pose risks similar to those linked to other types of waste tyre landfills.²⁷⁶

164. Regarding *stockpiling*²⁷⁷, the Panel observed that this method does not "dispose of" waste tyres²⁷⁸, and added that "the evidence shows that even the so-called 'controlled stockpiling' that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment."²⁷⁹ The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.²⁸⁰

165. With respect to the *incineration* of waste tyres, the Panel found that sufficient evidence demonstrated that health risks exist in relation to the incineration of waste tyres, even if such risks could be significantly reduced through strict emission standards.²⁸¹ For the Panel, the evidence suggested that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans."²⁸² The Panel added that, although emission levels can vary largely depending on the emission control technology, "the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons."²⁸³

166. Finally, the Panel examined *material recycling* applications. Regarding civil engineering applications using waste tyres, the Panel found that demand for these applications was fairly limited partly due to their high costs, that they are capable of disposing of only a small number of waste tyres, and that the evidence casts doubt on the safety of some of these engineering applications.²⁸⁴ With respect to rubber asphalt, the Panel found that the information showed that "the use of rubber asphalt results in higher costs."²⁸⁵ Consequently, "the demand for this technology is limited and its waste

²⁷⁶Panel Report, para. 7.184.

²⁷⁷Stockpiling consists of storing waste tyres in designated installations. (See European Communities' second written submission to the Panel, para. 104)

²⁷⁸Panel Report, para. 7.188.

²⁷⁹*Ibid.* (footnote omitted)

²⁸⁰*Ibid.*, para. 7.189.

²⁸¹*Ibid.*, para. 7.194.

²⁸²*Ibid.*, para. 7.192. (footnote omitted)

²⁸³*Ibid.*, para. 7.193. (footnotes omitted)

²⁸⁴*Ibid.*, paras. 7.201 and 7.202.

²⁸⁵*Ibid.*, para. 7.205.

disposal capacity is reduced."²⁸⁶ The Panel also noted that the use of rubber granulates in the production of certain products may dispose of only a limited amount of waste tyres.²⁸⁷ Finally, as regards devulcanization and other forms of chemical or thermal transformation, the Panel observed that, "under current market conditions, the economic viability of these options has yet to be demonstrated."²⁸⁸ In the light of these considerations, the Panel concluded that "it is not clear that material recycling applications are entirely safe"²⁸⁹, and that even if they were completely harmless, "they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative".²⁹⁰

167. On appeal, the European Communities contends that the Panel erred in its analysis of the measures or practices that were presented as possible alternatives to the Import Ban. In particular, the European Communities submits that the Panel used in its analysis an incorrect concept of "alternative". In addition, the European Communities argues that the Panel should have considered as alternatives to the Import Ban a better enforcement of the ban on imports of used tyres and of existing collection and disposal schemes.

168. Brazil asserts that the Panel was correct in finding that none of the alternative measures suggested by the European Communities constituted "reasonably available" alternatives to the Import Ban. For Brazil, the Panel correctly took account of Brazil's chosen level of protection—that is, the reduction of risks associated with the generation of waste tyres in Brazil to the maximum extent possible—in concluding that none of the alternatives suggested by the European Communities avoided the generation of additional waste tyres in the first place.

169. The Panel examined each of the measures or practices put forward by the European Communities in order to determine whether they were reasonably available alternatives in the light of the objective of the Import Ban and Brazil's chosen level of protection.²⁹¹

²⁸⁶Panel Report, para. 7.205. (footnote omitted)

²⁸⁷*Ibid.*, para. 7.206. (emphasis and footnote omitted)

²⁸⁸*Ibid.*, para. 7.207. (footnote omitted)

²⁸⁹*Ibid.*, para. 7.208.

²⁹⁰*Ibid.* (footnote omitted)

²⁹¹*Ibid.*, para. 7.152.

170. We note that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"²⁹² and that "Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible"²⁹³, and that a measure or practice will not be viewed as an alternative unless it "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".²⁹⁴

171. We recall that tyres—new or retreaded—are essential for modern transportation. However, at the end of their useful life, they turn into waste that carries risks for public health and the environment.²⁹⁵ Governments, legitimately, take actions to minimize the adverse effects of waste tyres. They may adopt preventive measures aiming to reduce the accumulation of waste tyres, a category into which the Import Ban falls. Governments may also contemplate remedial measures for the management and disposal of waste tyres, such as landfilling, stockpiling, incineration of waste tyres, and material recycling. Many of these measures or practices carry, however, their own risks or require the commitment of substantial resources, or advanced technologies or know-how. Thus, the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve "prohibitive costs or substantial technical difficulties".²⁹⁶

172. Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres.²⁹⁷ Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the

²⁹²Panel Report, para. 7.102.

²⁹³*Ibid.*, para. 7.108. (footnote omitted)

²⁹⁴Appellate Body Report, *US – Gambling*, para. 308. (footnote omitted)

²⁹⁵See *supra*, para. 119.

²⁹⁶Appellate Body Report, *US – Gambling*, para. 308.

²⁹⁷The Panel noted that Brazil has already implemented or is in the process of implementing measures to encourage domestic retreading or improve the retreadability of tyres. (Panel Report, para. 7.169) The Panel observed that "imports of used tyres *are* already prohibited". (*Ibid.*, para. 7.171 (original emphasis)) The Panel agreed with Brazil that "collection and disposal schemes such as Resolution CONAMA 258/1999 as amended [in 2002] and Paraná Rodando Limpo have already been implemented in Brazil". (*Ibid.*, para. 7.178)

Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.

173. We move now to the other measures or practices proposed by the European Communities as alternatives to the Import Ban.²⁹⁸ The European Communities contends that the Panel committed an error of law by applying a "narrow definition of alternative"²⁹⁹, according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres"³⁰⁰, or one "equal to a waste non-generation measure".³⁰¹ For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure"³⁰², and resulted in the rejection of several disposal and waste management measures presented by the European Communities that should have been accepted as alternatives to the Import Ban.

174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection³⁰³, that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"³⁰⁴ to the maximum extent possible.³⁰⁵ In this respect, we believe, like the Panel, that non-generation measures are more apt to 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 landfilling³⁰⁶, or the risk of toxic emissions that might arise from the incineration of waste tyres.³⁰⁷ In our view, the Panel did not err in so doing. Indeed, we do not see how a panel

²⁹⁸These measures or practices are the following disposal methods: landfilling; stockpiling; incineration of waste tyres; and material recycling.

²⁹⁹European Communities' appellant's submission, para. 227.

³⁰⁰*Ibid.*, para. 219. (underlining omitted)

³⁰¹*Ibid.*, para. 222.

³⁰²*Ibid.*, para. 221.

³⁰³Panel Report, para. 7.157.

³⁰⁴*Ibid.*, para. 7.102.

³⁰⁵*Ibid.*, para. 7.108. (footnote omitted) See also *ibid.*, para. 7.152:

We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection. (footnote omitted)

³⁰⁶*Ibid.*, para. 7.183.

³⁰⁷*Ibid.*, para. 7.194.

could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative.³⁰⁸ In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban.³⁰⁹ Because these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres.³¹⁰ We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it".³¹¹ According to the European Communities, although the Appellate Body has not defined the term "weighing and balancing", "this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued."³¹² The European Communities reasons that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and balancing' this contribution against any of the other relevant factors."³¹³ In addition, the

³⁰⁸This was recognized by the Appellate Body in *EC – Asbestos*, where it stated that the risks attached to a proposed measure should be included in the exercise of comparison aiming to determine whether it is a reasonably available alternative to the measure at issue. (Appellate Body Report, *EC – Asbestos*, para. 174)

³⁰⁹Panel Report, para. 7.195; see also para. 7.186 (landfilling); para. 7.189 (stockpiling); and para. 7.194 (waste tyre incineration).

³¹⁰*Ibid.*, paras. 7.201 and 7.205-7.208.

³¹¹European Communities' appellant's submission, para. 285.

³¹²*Ibid.*, para. 284.

³¹³*Ibid.*, para. 288.

European Communities contends that "the Panel base[d] ... its 'weighing and balancing' exercise on the wrong analysis it ... made of the alternatives".³¹⁴ In sum, the European Communities argues that the Panel conducted a "superficial analysis"³¹⁵ that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued."³¹⁶

177. Brazil counters that the Panel correctly weighed and balanced the relevant factors and proposed alternatives in its necessity analysis. Brazil argues that the Panel expressly recognized that the Import Ban is highly trade restrictive, but properly weighed and balanced this factor against the other relevant factors. In relation to contribution, Brazil considers that Article XX(b) of the GATT 1994 does not require quantification, and that, in any event, the Import Ban's contribution to the reduction of imports of retreaded tyres is "substantial".³¹⁷ Brazil adds that, because imports of retreaded tyres by definition increase the amount of waste tyres in Brazil, the contribution of the Import Ban to the reduction of risks arising from waste tyres to the maximum extent possible is "both direct and certain".³¹⁸

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.³¹⁹ It is through this process that a panel determines whether a measure is necessary.³²⁰

³¹⁴European Communities' appellant's submission, para. 290. (underlining omitted)

³¹⁵*Ibid.*, para. 295.

³¹⁶*Ibid.*, para. 294.

³¹⁷Brazil's appellee's submission, para. 177.

³¹⁸*Ibid.*, para. 178.

³¹⁹Appellate Body Report, *US – Gambling*, para. 307.

³²⁰*Ibid.*

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree".³²¹ The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important.³²² Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.³²³

180. The Panel then proceeded to examine the alternatives to the Import Ban proposed by the European Communities. The Panel explained that some of them could not be viewed as alternatives to the Import Ban because they were complementary to it and were already included in Brazil's comprehensive policy.³²⁴ Next, the Panel compared the other alternatives proposed by the European Communities—landfilling, stockpiling, incineration, and material recycling—with the Import Ban, taking into consideration the specific risks associated with these proposed alternatives. The Panel concluded from this comparative assessment that none of the proposed options was a reasonably available alternative to the Import Ban.

181. The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that "none of these, either individually *or collectively*, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban."³²⁵ Secondly, as noted by

³²¹Panel Report, para. 7.210. (footnote omitted)

³²²*Ibid.*, para. 7.112.

³²³*Supra*, paras. 150-155.

³²⁴For example, measures to encourage domestic retreading and improve the retreadability of domestic used tyres, a better implementation of the import ban on used tyres, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.

³²⁵*Ibid.*, para. 7.214. (emphasis added)

the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy.³²⁶ Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives.

182. In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body.³²⁷ The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not "actually" weigh and balance the relevant factors³²⁸, 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.

³²⁶Panel Report, para. 7.213.

³²⁷Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

³²⁸European Communities' appellant's submission, para. 285.

1. Article 11 of the DSU and the Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

185. We recall that Article 11 requires a panel to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case". This assessment implies, among other things, that a panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.³²⁹

186. Within these parameters, it is generally "within the discretion of the panel to decide which evidence it chooses to utilize in making findings"³³⁰, and panels are "not required to accord to factual evidence of the parties the same meaning and weight as do the parties".³³¹ A panel is entitled "to determine that certain elements of evidence should be accorded more weight than other elements—that is the essence of the task of appreciating the evidence"³³²—and the Appellate Body "will not interfere lightly with the panel's exercise of its discretion".³³³ Thus, a participant challenging a panel's findings of fact under Article 11 of the DSU is required to demonstrate that the panel has exceeded the bounds of its discretion as the trier of facts.

187. Against this background, we turn to the contentions of the European Communities. First, the European Communities argues that there was an insufficient factual foundation for the Panel's conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that were not capable of being retreaded³³⁴, and that the Panel ignored "substantial evidence" produced by the European Communities demonstrating the existence of "low-quality non-retreadable tyres"³³⁵ in the Brazilian market.

³²⁹Appellate Body Report, *EC – Hormones*, paras. 132 and 133. See also Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *Australia – Salmon*, para. 266; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141 and 142; Appellate Body Report, *Korea – Dairy*, para. 138; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161 and 162; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; Appellate Body Report, *US – Gambling*, para. 363; Appellate Body Report, *EC – Selected Customs Matters*, para. 258; and Appellate Body Report, *US – Carbon Steel*, para. 142.

³³⁰Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

³³¹Appellate Body Report, *Australia – Salmon*, para. 267.

³³²Appellate Body Report, *EC – Asbestos*, para. 161.

³³³Appellate Body Report, *US – Wheat Gluten*, para. 151. (footnote omitted)

³³⁴Panel Report, para. 7.137; European Communities' appellant's submission, paras. 183 and 184.

³³⁵European Communities' appellant's submission, para. 183. (footnote omitted)

188. Brazil submits that the Panel's conclusion is supported by the evidence on record and adds that high rates of retreadability in the country demonstrate that new tyres sold in Brazil "generally have [the] potential for future retreading".³³⁶

189. We observe that, in support of its position that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that are not suitable for retreading, the Panel referred to standards applied to new tyres sold in Brazil that are "strict technical and performance standards that are based on international standards".³³⁷ The European Communities argues that potential retreadability is not an element of these standards and that, therefore, the Panel's position on the retreadability of new tyres sold in Brazil had no factual basis.³³⁸ We are not persuaded by this argument. The Panel's position was not that these standards include retreadability but, rather, that they result in a level of quality for new tyres that increases the potential for them to be retreaded.³³⁹ Thus, the Panel's finding did not lack a factual basis since there was a relationship between the standards to which the Panel referred and its conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"³⁴⁰ that are not retreadable.

190. Nor did the Panel disregard the evidence presented by the European Communities in reaching its conclusion on retreadability. To the contrary, the Panel expressly referred to various studies submitted by the European Communities in Exhibits EC-15 and EC-67 through EC-71, which related to the existence of "cheap low-quality new tyres in Brazil".³⁴¹ The Panel simply attached more weight to other pieces of evidence that were before it³⁴², as Article 11 of the DSU entitles it to do.³⁴³

191. The European Communities asserts further that the Panel relied on "arbitrarily chosen pieces of evidence" and failed to consider contradictory evidence³⁴⁴ in basing its finding that "at least some domestic used tyres are being retreaded in Brazil"³⁴⁵ exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association

³³⁶Brazil's appellee's submission, para. 116.

³³⁷Panel Report, para. 7.137.

³³⁸European Communities' appellant's submission, para. 184.

³³⁹Panel Report, para. 7.137.

³⁴⁰*Ibid.*

³⁴¹*Ibid.*, footnote 1252 to para. 7.137 (referring to European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254 and 255, in turn referring to Exhibits EC-15 and EC-67 through EC-71 submitted by the European Communities to the Panel).

³⁴²*Ibid.*, para. 7.137.

³⁴³Appellate Body Report, *EC – Asbestos*, para. 161.

³⁴⁴European Communities' appellant's submission, para. 185.

³⁴⁵Panel Report, para. 7.136.

of the Retreading Industry) (the "ABR Report").³⁴⁶ According to the European Communities, the Panel neglected to consider evidence contained in a second report by the ABR³⁴⁷ that contradicted this statement.³⁴⁸ We do not find merit in this argument. The Panel relied on various studies and reports other than the ABR Report.³⁴⁹ Moreover, the Panel took into account the evidence in the second report by the ABR³⁵⁰ as the express reference it made to that report confirms.³⁵¹

192. The European Communities next charges the Panel with failing to discount the evidentiary value of Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality)³⁵², on the grounds that it was issued during the course of the Panel proceedings, and with neglecting to consider contradictory evidence contained in an earlier INMETRO Technical Note 83/2000.³⁵³

193. It is well settled that a panel may consider a piece of evidence that post-dates its establishment.³⁵⁴ Thus, INMETRO Technical Note 001/2006 was clearly an admissible piece of evidence. The European Communities, however, seems to suggest that the fact that INMETRO Technical Note 001/2006 post-dates the establishment of the Panel undermines its "evidentiary value", because Brazil was well aware of the significance of INMETRO Technical Note 001/2006 at that time. In our view, this amounts to an argument that the Panel should have attached more weight to one piece of evidence than to another, and does not suffice to demonstrate that the Panel exceeded the bounds of its discretion by attaching more weight to INMETRO Technical Note 001/2006—a

³⁴⁶*Supra*, footnote 41.

³⁴⁷*Supra*, footnote 43.

³⁴⁸European Communities' appellant's submission, paras. 186 and 187.

³⁴⁹For example, the Panel relied on, *inter alia*, retreadability figures for the Brazilian company Mazola Comércio (Panel Report, para. 7.135 and footnote 1236 thereto (referring to Exhibit BRA-93 submitted by Brazil to the Panel)); studies by the consultancy LAFIS and the Institute of Technological Research of the State of São Paulo (*ibid.*, footnote 1237 (referring to Exhibits EC-92 and BRA-159 submitted by the European Communities and Brazil, respectively, to the Panel)); a video by BS Colway (*ibid.*, footnote 1239 (referring to Exhibit EC-72 submitted by the European Communities to the Panel)); and retreadability figures in Brazil (*ibid.*, footnote 1241 (referring to Brazil's oral statement at the second Panel meeting, paras. 57-61; Brazil's comments on Question 107 posed by the Panel to the European Communities, Panel Report, pp. 317-323; Brazil's response to Question 117 posed by the Panel, Panel Report, pp. 332-334; and Exhibit BRA-162 submitted by Brazil to the Panel)) and in other countries (*ibid.*, footnote 1242 (referring to Brazil's first written submission to the Panel, para. 79, where Brazil provided some examples of retreadability figures for the United Kingdom, the United States, Australia, and France)). See also Brazil's response to Question 17 posed by the Panel, *ibid.*, p. 257.

³⁵⁰Exhibit BRA-157, *supra*, footnote 43.

³⁵¹See Panel Report, footnote 1238 to para. 7.135 (referring to Exhibit BRA-157, *supra*, footnote 43).

³⁵²Exhibit BRA-163 submitted by Brazil to the Panel.

³⁵³European 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)).

³⁵⁴This was confirmed by the Appellate Body in its Report, *EC – Selected Customs Matters*, at para. 188.

more recent document—than to INMETRO Technical Note 83/2000. Furthermore, the Panel did not neglect INMETRO Technical Note 83/2000. As the European Communities acknowledges³⁵⁵, the Panel expressly referred to this particular piece of evidence in its analysis.³⁵⁶

194. The European Communities further maintains that the Panel ignored evidence contained in a study by the consultancy LAFIS³⁵⁷ indicating that the rate of retreading of passenger car tyres in Brazil is below 9.99 per cent.³⁵⁸ The Panel, however, specifically considered the LAFIS study in its analysis as to whether domestic used tyres are retreadable and are being retreaded in Brazil.³⁵⁹ It also discussed the arguments presented by Brazil and the European Communities in relation to this figure.

195. The European Communities charges the Panel with "bolster[ing] its conclusions"³⁶⁰ on the retreadability of domestic casings with speculation on future measures that Brazil may take and, in particular, in stating that "mandatory inspections are taking place in Brazil and that more frequent inspections are to be expected once Bill 5979/2001 is approved".³⁶¹ However, the Panel's finding that "mandatory inspections are taking place"³⁶² was based on inspection requirements imposed by Brazil's National Code of Traffic and applicable technical standards, which were in force at the time the Panel conducted its review³⁶³, and is not vitiated by the Panel's additional reference to possible consequences of the approval of Bill 5979/2001.

196. In addition, the European Communities contends that, in analyzing the contribution of the Import Ban to the realization of the ends pursued by it, the Panel erred in failing to accord any evidentiary weight to the fact that Brazilian retreaders have sought court injunctions that permit the importation of used tyres for further retreading.³⁶⁴ The European Communities claims that the Panel engaged in a "wilful exclusion"³⁶⁵ of evidence relating to the importation of used tyres through court injunctions, even though this evidence was relevant because it demonstrates that Brazilian retreaded

³⁵⁵European Communities' appellant's submission, para. 189 and footnote 56 thereto.

³⁵⁶Panel Report, footnote 1240 to para. 7.135.

³⁵⁷European Communities' appellant's submission, para. 190 (referring to LAFIS report, *supra*, footnote 45, p. 11).

³⁵⁸*Ibid.*, para. 190.

³⁵⁹Panel Report, para. 7.135 and footnote 1237 thereto.

³⁶⁰European Communities' appellant's submission, para. 195.

³⁶¹Panel Report, para. 7.138.

³⁶²*Ibid.*

³⁶³See *ibid.*, para. 7.138 (referring to Law No. 9.503 of 23 September 1997 (National Code of Traffic) (Exhibit BRA-102 submitted by Brazil to the Panel); and Brazil's response to Question 8 posed by the European Communities).

³⁶⁴European Communities' appellant's submission, para. 191.

³⁶⁵*Ibid.*, para. 192.

tyres are produced with imported casings, and casts doubt on Brazil's position that domestic casings suitable for retreading are readily available in Brazil.³⁶⁶

197. We are not persuaded that the Panel ignored evidence relating to the importation of used tyres through court injunctions in its analysis of the contribution of the Import Ban to the realization of the ends pursued by it. The Panel acknowledged these injunctions and the arguments put forth by the European Communities in its analysis of the conflicting arguments and evidence regarding the level of retreadability of tyres in Brazil.³⁶⁷ In the end, the Panel ascribed more weight to evidence adduced by Brazil suggesting that "at least some domestic used tyres are being retreaded in Brazil"³⁶⁸ and that "domestic used tyres are suitable for retreading".³⁶⁹ It appears to us that, in proceeding in that manner, the Panel did not exceed the bounds of its discretion as the trier of facts.

198. In the light of the above considerations, we *find* that the Panel did not fail to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, when evaluating the contribution of the Import Ban to the achievement of its objective.

2. Article 11 of the DSU and the Panel's Examination of Possible Alternatives to the Import Ban

199. The European Communities contends that, in its analysis of possible alternatives to the Import Ban, the Panel did not make an objective assessment of the facts as required by Article 11 of the DSU. The European Communities' claim of error under Article 11 is directed at the Panel's appreciation of the evidence concerning a number of disposal methods for waste tyres suggested by the European Communities as alternatives to the Import Ban, namely, landfilling, controlled stockpiling, co-incineration, and material recycling.

200. According to the European Communities, the Panel's factual findings in relation to each of these alternatives were not based on an objective assessment, because the Panel ignored important facts and arguments submitted by the European Communities and referred to the evidence before it "in a selective and distorted manner".³⁷⁰ The European Communities also charges the Panel with failing to consider one specific alternative to the Import Ban suggested by the European Communities, namely, the National Dengue Control Programme.³⁷¹

³⁶⁶European Communities' appellant's submission, paras. 192 and 193.

³⁶⁷Panel Report, para. 7.140.

³⁶⁸*Ibid.*, para. 7.136.

³⁶⁹*Ibid.*, para. 7.142.

³⁷⁰European Communities' appellant's submission, para. 247.

³⁷¹*Supra*, footnote 53.

201. Regarding the landfilling of waste tyres, the Panel reviewed the extensive evidentiary record on the risks posed by landfills of waste tyres.³⁷² In the course of its analysis of this evidence, the Panel noted the distinction made by the European Communities between "uncontrolled" and "controlled" landfills³⁷³, but observed that "the evidence on the health and environmental risks posed by landfills of waste tyres does not make a clear distinction between 'uncontrolled' and the so-called 'controlled' landfills"³⁷⁴, and that its assessment of that evidence indicated that "it [was] not possible to conclude that controlled landfills do not pose risks similar to those linked to other types of waste tyre landfills."³⁷⁵ Therefore, contrary to the European Communities' assertion that the Panel erred in basing its findings exclusively on evidence relating to uncontrolled landfilling, the Panel's conclusion that landfilling "may pose the very risks Brazil seeks to avoid through the import ban"³⁷⁶ was based on evidence that demonstrates that risks arise indistinctively from controlled and uncontrolled landfills.

202. The European Communities also suggests that the Panel erred under Article 11 in its rejection of landfilling as an alternative to the Import Ban because it did not take into account legislation allowing some landfilling of shredded tyres in Brazil. It is true that the Panel did not refer specifically to this legislation in its analysis. We note, however, that Brazil had argued that the legislation in question was exceptional, temporary, and in no way contradicted the existence or risks generally associated with landfilling.³⁷⁷ A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning³⁷⁸, and is not required to discuss, in its report, each and every piece of evidence.³⁷⁹

203. We turn to the European Communities' argument that the Panel did not objectively assess the facts in observing that "stockpiling as such does not 'dispose of' waste tyres" and that controlled stockpiling "may still pose considerable risks to human health and the environment".³⁸⁰ The Panel did not, as the European Communities contends, erroneously treat stockpiling as a "final disposal

³⁷²Panel Report, para. 7.183 and footnotes 1318 and 1319 thereto (referring to Exhibits BRA-1, BRA-8, BRA-38, BRA-41, BRA-45, and BRA-58 submitted by Brazil to the Panel).

³⁷³*Ibid.*, para. 7.184.

³⁷⁴*Ibid.*

³⁷⁵*Ibid.* In particular, we observe that the evidence relating to the risk of tyre fires and to the long-term leaching of toxic chemicals referred to in paragraph 7.183 and footnote 1318 thereto of the Panel Report does not appear to distinguish between landfilling of whole tyres and landfilling of shredded tyres.

³⁷⁶*Ibid.*, para. 7.186.

³⁷⁷Brazil's appellee's submission, para. 152.

³⁷⁸See Appellate Body Report, *EC – Hormones*, para. 132.

³⁷⁹See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240; see also Appellate Body Report, *EC – Hormones*, para. 138.

³⁸⁰Panel Report, para. 7.188. (footnote omitted)

operation".³⁸¹ To the contrary, the Panel recognized that stockpiling is used only for temporary storage.³⁸² Moreover, the Panel's finding that stockpiling, even as an intermediate operation, carries risks of its own rested on various pieces of evidence, including a California Environmental Protection Agency study that concludes, in relation to controlled stockpiling, that "[a]ll tire and rubber storage facilities should be considered high-risk storage facilities."³⁸³

204. Regarding co-incineration, the Panel found that "Brazil has provided sufficient evidence to demonstrate that health risks exist in relation to the incineration of waste tyres, even if such risks can be significantly reduced through strict emission standards."³⁸⁴ In reaching this conclusion, the Panel relied on evidence consisting of technical studies and reports of regulatory agencies relating to activities in countries other than Brazil.³⁸⁵ The Panel acted within its margin of discretion as the trier of facts in considering that evidence relating to co-incineration activities in countries other than Brazil was relevant to the question of whether co-incineration poses health risks if used in Brazil, and in relying on that evidence.

205. With respect to material recycling applications such as civil engineering, rubber asphalt, rubber products, and devulcanization, the Panel found that it is not clear that they "are entirely safe"³⁸⁶, and that even if they were, material recycling applications "would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs".³⁸⁷ The European Communities contends that both of these findings lacked a proper factual foundation.

³⁸¹European Communities' appellant's submission, para. 255.

³⁸²Panel Report, footnote 1330 to para. 7.188. The Panel referred to the *Basel Convention Technical Guidelines on the Identification and Management of Used Tyres* (1999) (Exhibit BRA-40 submitted by Brazil to the Panel), p. 12, which states, *inter alia*, that "[s]tockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation."

³⁸³Panel Report, para. 7.189 and footnote 1331 thereto (referring to California Environmental Protection Agency (US), Integrated Waste Management Board, "Tire Pile Fires: Prevention, Response, Remediation" (2002) (Exhibit BRA-29 submitted by Brazil to the Panel)).

³⁸⁴*Ibid.*, para. 7.194.

³⁸⁵*Ibid.*, para. 7.192 and footnotes 1339-1342 thereto. In particular, the Panel referred to a report which concluded that "emissions of toxic organics ... [as a result of co-incineration of waste tyres] cannot be effectively controlled." (*Ibid.*, footnote 1339 (quoting Okopol Institut für Ökologie und Politik GmbH, "Expertise on the Environmental Risk Associated with the Co-Incineration of Wastes in the Cement Kiln 'Four E' of CBR Usine de Lixhe, Belgium" (circa 1998) (Exhibit BRA-46 submitted by Brazil to the Panel)) The Panel also pointed to evidence that demonstrated that "there is no scientific basis for [concluding] that burning waste tires in cement kilns is safe" (*ibid.* (quoting letter from Seymour I. Schwartz to the California Integrated Waste Management Board, dated 21 January 1998 (Exhibit BRA-49 submitted by Brazil to the Panel)), and that "[u]se [of waste tyres] in wet cement kilns is not an optimal environmental solution" (*ibid.* (quoting European Environment Agency, "Waste from road vehicles" (2001) (Exhibit BRA-108 submitted by Brazil to the Panel)).

³⁸⁶*Ibid.*, para. 7.208.

³⁸⁷*Ibid.*

206. The Panel stated that "*it is not clear* whether some of these engineering applications are sufficiently safe."³⁸⁸ It also expressed the view that "the evidence is *inconclusive* on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures."³⁸⁹ Furthermore, the Panel did "not find evidence showing that devulcanization or other forms of chemical or thermal transformation such as pyrolysis pose substantial health or environmental risks."³⁹⁰ It is on the basis of these findings that the Panel concluded that "*it is not clear* that material recycling applications are entirely safe."³⁹¹ The Panel relied on numerous pieces of evidence to make these findings³⁹², and the European Communities has not demonstrated that this evidence cannot support the Panel's finding. Moreover, in finding that material recycling was not a reasonably available alternative to the Import Ban, the Panel relied mainly on the limited disposal capacity of these applications; safety considerations were not central to its reasoning.

207. Indeed, the Panel determined that evidence adduced in relation to civil engineering³⁹³, rubber asphalt³⁹⁴, rubber products³⁹⁵, and devulcanization³⁹⁶ suggested that each of these applications involve high costs that would significantly limit their ability "to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection".³⁹⁷ The European Communities argues that the Panel erred in rejecting material recycling applications on the basis of their costs³⁹⁸, 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

³⁸⁸Panel Report, para. 7.202. (emphasis added)

³⁸⁹*Ibid.*, para. 7.205. (footnote omitted; emphasis added)

³⁹⁰*Ibid.*, para. 7.207.

³⁹¹*Ibid.*, para. 7.208. (emphasis added)

³⁹²*Ibid.*, para. 7.202 and footnote 1359 thereto.

³⁹³*Ibid.*, para. 7.201 and footnote 1358 thereto (referring to 2006 report by the European Tyre and Rubber Manufacturers' Association (Exhibit EC-84 submitted by the European Communities to the Panel); California Environmental Protection Agency (US), Integrated Waste Management Board, "Five-Year Plan for the Waste Tire Recycling Management Program" (2003) (Exhibit BRA-36 submitted by Brazil to the Panel); and K. Cannon, "Environment; Where Mosquitoes And Tires Breed", *The New York Times*, 8 July 2001 (Exhibit BRA-130 submitted by Brazil to the Panel)).

³⁹⁴*Ibid.*, para. 7.205 and footnote 1367 thereto (referring to OECD Report, *supra*, footnote 52).

³⁹⁵*Ibid.*, para. 7.206 and footnote 1368 thereto (referring to J. Serungard, "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.

³⁹⁸European Communities' appellant's submission, para. 278.

distinction between high and prohibitive costs. Further, in our view, this is not an issue relating to the Panel's appreciation of the evidence, but rather to its legal characterization of the facts. In any event, what disqualifies these alternatives, according to the Panel, is not their high costs as such, but the effect of these high costs in limiting the disposal capacity of these methods.

208. Finally, the European Communities claims that the Panel failed to analyze as a possible alternative measure the National Dengue Control Programme, and that this failure constitutes a violation of Article 11 of the DSU.³⁹⁹ We observe that the European Communities referred to the National Dengue Control Programme in its second written submission to the Panel in support of its contention that "authorities in Brazil seem to encourage material recycling as an alternative."⁴⁰⁰ We note further that the alternative measure identified there was material recycling, and that the National Dengue Control Programme was discussed under the subheading "Material recycling" in the European Communities' written submission merely as one example of material recycling.⁴⁰¹ Thus, the National Dengue Control Programme was not submitted by the European Communities as a distinct alternative measure but, rather, was presented as an illustration of material recycling, which the Panel discussed extensively.

209. Accordingly, we *find* that the Panel did not fail to conduct an objective assessment of the facts, as required by Article 11 of the DSU, in finding that the disposal methods for waste tyres suggested by the European Communities were not reasonably available alternatives to the Import Ban.

C. *General Conclusion on the Necessity Analysis under Article XX(b) of the GATT 1994*

210. At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is

³⁹⁹European Communities' appellant's submission, para. 280.

⁴⁰⁰European Communities' second written submission to the Panel, para. 137.

⁴⁰¹See *Ibid.*, para. 138 under subheading II.A.4 (c) iv) "Material recycling", p. 41.

as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.

211. The European Communities proposed a series of alternatives to the Import Ban. Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

212. Accordingly, having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations, we *uphold* the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary to protect human, animal or plant life or health."

VI. The Panel's Interpretation and Application of the Chapeau of Article XX of the GATT 1994

A. The MERCOSUR Exemption and the Chapeau of Article XX of the GATT 1994

213. After finding that the Import Ban was provisionally justified under Article XX(b) of the GATT 1994⁴⁰², the Panel examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX.

⁴⁰²Panel Report, para. 7.215.

214. The chapeau of Article XX of the GATT 1994 reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

215. The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX.⁴⁰³ The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.⁴⁰⁴

216. Having determined that the exemption from the Import Ban of remoulded tyres originating in MERCOSUR countries resulted in discrimination in the application of the Import Ban, the Panel examined whether this discrimination was arbitrary or unjustifiable. The Panel concluded that, as of the time of its examination, the operation of the MERCOSUR exemption had not resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination", within the meaning of the chapeau of Article XX.⁴⁰⁵ The Panel also found that the MERCOSUR exemption had not been shown "to date" to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade", within the meaning of the chapeau of Article XX.⁴⁰⁶ The European Communities appeals these findings of the Panel.

⁴⁰³ Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20; Appellate Body Report, *US – Gambling*, para. 339.

⁴⁰⁴ Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Gambling*, para. 339.

⁴⁰⁵ Panel Report, para. 7.289.

⁴⁰⁶ *Ibid.*, paras. 7.354 and 7.355.

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

217. Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable.⁴⁰⁷ The Panel also observed that it was only after a MERCOSUR tribunal found Brazil's ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating in MERCOSUR countries from the application of the Import Ban.⁴⁰⁸ For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."⁴⁰⁹ The Panel added that the discrimination arising from the MERCOSUR exemption was not "*a priori* unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."⁴¹⁰

218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.⁴¹¹ The Panel was not persuaded by this submission. Indeed, the Panel considered it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."⁴¹²

219. For the Panel, the MERCOSUR ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary.⁴¹³ The Panel indicated, however, that it was not suggesting that "the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the

⁴⁰⁷Panel Report, para. 7.270.

⁴⁰⁸*Ibid.*, para. 7.271.

⁴⁰⁹*Ibid.*, para. 7.272.

⁴¹⁰*Ibid.*, para. 7.273.

⁴¹¹Article 50(d) of the Treaty of Montevideo provides for an exception similar to Article XX(b) of the GATT 1994. (See *infra*, footnote 443)

⁴¹²Panel Report, para. 7.276 and footnote 1451 thereto.

⁴¹³*Ibid.*, para. 7.281.

application of a measure under the chapeau of Article XX."⁴¹⁴ The Panel acknowledged that "casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR."⁴¹⁵ The Panel underscored that, "[i]f such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination."⁴¹⁶ However, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant."⁴¹⁷ The Panel concluded that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.⁴¹⁸

220. The European Communities claims that the Panel erred in its interpretation and application of the term "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption does not constitute such discrimination. According to the European Communities, whether a measure involves arbitrary or unjustifiable discrimination can only be determined by taking into account the objective of the measure at issue, in this case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"⁴¹⁹ in the light of this objective. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it was introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further but may undermine the stated objective of the measure. For this reason, it must be regarded as "unreasonable, contradictory, and thus arbitrary".⁴²⁰ For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The

⁴¹⁴Panel Report, para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV:8(a) of the GATT 1994—which specifically excludes measures taken under Article XX from the requirement to liberalize "substantially all the trade" within a customs union—to take into account, as it did, "the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR." (*Ibid.*, para. 7.284)

⁴¹⁵*Ibid.*, para. 7.286.

⁴¹⁶*Ibid.*, para. 7.287.

⁴¹⁷*Ibid.*, para. 7.288. The Panel noted that imports of retreaded tyres under the MERCOSUR exemption had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. For the Panel, "[t]hat figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban." (*Ibid.* (referring to European Communities' first written submission to the Panel, para. 80))

⁴¹⁸*Ibid.*, para. 7.289.

⁴¹⁹European Communities' appellant's submission, para. 321.

⁴²⁰*Ibid.*, para. 323.

European Communities adds that, in any event, the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, and that Brazil could have implemented the ruling by lifting the Import Ban for all third countries.⁴²¹

221. With respect to the Panel's finding that unjustifiable discrimination could arise if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined⁴²², the European Communities argues that the Panel applied a test that has no basis in the text of Article XX and no support in the case law of the Appellate Body or of previous panels. The European Communities also notes that "the level of imports in a given year may be subject to strong fluctuations, and for this reason ... is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX".⁴²³

222. Brazil, for its part, supports the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied in a manner that constitutes "arbitrary discrimination", contrary to the chapeau of Article XX. In addition, Brazil disputes the European Communities' argument that what constitutes "arbitrary discrimination" must be determined only in relation to the objective of the Import Ban. According to Brazil, the specific contents of the measure, including its policy objectives, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objectives. Brazil adds, for the sake of argument, that the Panel in any event considered the objective of the Import Ban when it determined that, at the time of its examination, volumes of imports of retreaded tyres under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, according to Brazil, the Panel was correct in finding that the ruling of the MERCOSUR tribunal provided a rational basis for the adoption of the MERCOSUR exemption.

223. For Brazil, the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute "unjustifiable discrimination". The Panel determined how Brazil's policy objective of reducing to the maximum extent possible unnecessary generation of tyre waste was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue.

⁴²¹European Communities' appellant's submission, para. 332.

⁴²²Panel Report, para. 7.287.

⁴²³European Communities' appellant's submission, para. 340.

224. We begin our analysis by recalling that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.⁴²⁴ In *US – Shrimp*, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."⁴²⁵ The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."⁴²⁶ Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."⁴²⁷ The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."⁴²⁸

225. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Thus, we observe that, in *US – Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.⁴²⁹ As it found them unsatisfactory, the Appellate Body concluded that the application of the baseline establishment rules resulted in arbitrary or unjustifiable discrimination.⁴³⁰ In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part

⁴²⁴ Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

⁴²⁵ Appellate Body Report, *US – Shrimp*, para. 158.

⁴²⁶ *Ibid.* (quoting B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), chap. 4, at 125).

⁴²⁷ *Ibid.*, para. 159.

⁴²⁸ *Ibid.*

⁴²⁹ The *US – Gasoline* case involved a programme aiming to ensure that pollution from gasoline combustion did not exceed 1990 levels. Baselines for the year 1990 were set as a means for determining compliance with the programme requirements. These baselines could be either individual or statutory, depending on the nature of the entity concerned. Whereas individual baselines were available to domestic refiners, they were not to foreign refiners.

The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. (Appellate Body Report, *US – Gasoline*, pp. 25-26, DSR 1996:I, 3, at 23-24) Secondly, the United States explained that imposing the statutory baseline requirement on domestic refiners as well was not an option, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. (*Ibid.*, p. 28, DSR 1996:I, 3, at 26-27)

⁴³⁰ *Ibid.*, p. 29, DSR 1996:I, 3, at 27.

of an analysis that was directed at the cause, or the rationale, of the discrimination.⁴³¹ *US – Shrimp (Article 21.5 – Malaysia)* concerned measures taken by the United States to implement recommendations and rulings of the DSB in *US – Shrimp*. The Appellate Body's analysis of these measures under the chapeau of Article XX focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX.⁴³²

226. The Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision.⁴³³ In our view, there is

⁴³¹These factors were: (i) the discrimination that resulted from a "rigid and unbending requirement" (Appellate Body Report, *US – Shrimp*, para. 177; see also para. 163) that countries exporting shrimp into the United States adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the discrimination that resulted from the failure to take into account different conditions that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles (*ibid.*, paras. 163 and 164); (iii) the discrimination that resulted from the application of the measure was "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" (*ibid.*, para. 165), because, in some circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market; and (iv) the discrimination that resulted from the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members (*ibid.*, paras. 166 and 172).

⁴³²Thus, the Appellate Body endorsed the panel's conclusion that conditioning market access on the adoption of a regulatory programme for the protection and conservation of sea turtles comparable in effectiveness—as opposed to the adoption of "essentially the same" regulatory programme—"allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'". (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144) The Appellate Body also considered that the measures adopted by the United States permitted a degree of flexibility that would enable the United States to consider the particular conditions prevailing in Malaysia, notably because it provides that, in making certification determinations, the United States authorities "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles". (*Ibid.*, para. 147)

⁴³³Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market⁴³⁴) was "difficult to reconcile with the declared objective of protecting and conserving sea turtles".⁴³⁵ Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined".⁴³⁶ The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is

⁴³⁴ Appellate Body Report, *US – Shrimp*, para. 165.

⁴³⁵ *Ibid.*

⁴³⁶ Panel Report, para. 7.287.

"unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.⁴³⁷

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above⁴³⁸, the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random"⁴³⁹ because it was adopted further to a ruling within the framework of MERCOSUR.⁴⁴⁰

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a

⁴³⁷See *supra*, paras. 225 and 226. We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan – Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims to ensure "equality of competitive conditions for imported products in relation to domestic products". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (*Ibid.*, at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (*Ibid.* (footnote omitted))

⁴³⁸*Supra*, para. 215.

⁴³⁹Panel Report, para. 7.281.

⁴⁴⁰*Ibid.*, para. 7.272.

rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.⁴⁴¹

233. Accordingly, we *find* that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we *reverse* the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore *reverse* the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also *reverse* the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.

234. This being said, we observe, like the Panel⁴⁴², that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo.⁴⁴³ Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings⁴⁴⁴, 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 1994.⁴⁴⁵

⁴⁴¹See *supra*, paras. 227 and 228.

⁴⁴²Panel Report, paras. 7.275 and 7.276.

⁴⁴³Treaty 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;

⁴⁴⁴See Panel Report, para. 7.275.

⁴⁴⁵In 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.

2. The MERCOSUR Exemption and Disguised Restriction on International Trade

235. The European Communities also challenges the Panel's conclusion that the MERCOSUR exemption had not been shown to date to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade".⁴⁴⁶

236. When examining whether the Import Ban was applied in a manner that constitutes a disguised restriction on international trade, the Panel was not persuaded by the European Communities' contention that Brazil adopted the prohibition on the importation of retreaded tyres as "a disguise to conceal the pursuit of trade-restrictive objectives".⁴⁴⁷ The Panel recalled that Brazil bans both used and retreaded tyre imports; for the Panel, such an approach "is consistent with Brazil's declared objective of reducing to the greatest extent possible the unnecessary accumulation of short-lifespan tyres"⁴⁴⁸, and "in principle deprives Brazilian retreaders of the opportunity to source casings from abroad".⁴⁴⁹

237. The Panel went on to examine more specifically the European Communities' argument that "the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries."⁴⁵⁰ The Panel recalled that, under this exemption, "it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyres to Brazil under the MERCOSUR exemption."⁴⁵¹ The Panel referred to the reasoning that it had developed with respect to arbitrary or unjustifiable discrimination and considered that, if imports from MERCOSUR countries were to occur in significant amounts, the Import Ban would be applied in a manner that constitutes a disguised restriction on international trade.⁴⁵² The Panel was however of the view that, as of the time of its examination, "the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant."⁴⁵³

⁴⁴⁶Panel Report, para. 7.355.

⁴⁴⁷*Ibid.*, para. 7.330 (quoting Panel Report, *EC – Asbestos*, para. 8.236).

⁴⁴⁸*Ibid.*, para. 7.343.

⁴⁴⁹*Ibid.*

⁴⁵⁰*Ibid.*, para. 7.350.

⁴⁵¹*Ibid.*, para. 7.352. (footnote omitted)

⁴⁵²*Ibid.*, para. 7.353.

⁴⁵³*Ibid.*, para. 7.354. (footnote omitted) See also *supra*, footnote 417.

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 exemption⁴⁵⁴ and the imports of used tyres through court injunctions.⁴⁵⁵ For the European Communities, the Panel addressed this question with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable discrimination.⁴⁵⁶ Therefore, the European Communities reasons, if the Panel's approach concerning arbitrary or unjustifiable discrimination is not endorsed by the Appellate Body, the Panel's finding that the MERCOSUR exemption has not been shown to date to result in a disguised restriction on international trade should also be reversed.⁴⁵⁷ In response to questioning at the oral hearing, the European Communities confirmed that its claim in this regard is based on the same arguments it put forward in relation to arbitrary or unjustifiable discrimination.

239. We agree with the European Communities' observation that the reasoning developed by the Panel to reach the challenged conclusion was the same as that made in respect of arbitrary or unjustifiable discrimination. Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined.⁴⁵⁸ As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also *reverse* the Panel's findings, in paragraphs 7.354 and 7.355 of the Panel Report, that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

⁴⁵⁴Panel Report, paras. 7.350-7.355.

⁴⁵⁵*Ibid.*, paras. 7.347-7.349 and 7.355. We examine this aspect of the European Communities' appeal in Section VI.B.2 of this Report.

⁴⁵⁶European Communities' appellant's submission, para. 366.

⁴⁵⁷*Ibid.*, paras. 367 and 368.

⁴⁵⁸*Supra*, Section VI.A.1.

B. *Imports of Used Tyres through Court Injunctions and the Chapeau of Article XX of the GATT 1994*

1. Imports of Used Tyres through Court Injunctions and Arbitrary or Unjustifiable Discrimination

240. The European Communities submits that the Panel erred in its analysis of the imports of used tyres through court injunctions under the chapeau of Article XX of the GATT 1994. We begin our analysis with the requirement in the chapeau of Article XX that the measure at issue not be applied in a manner that would result in "arbitrary or unjustifiable discrimination".

241. The Panel determined that the imports of used tyres through court injunctions resulted in discrimination in favour of domestic retreaders. This is because these imports enabled retreaded tyres to be produced in Brazil from imported casings, while retreaded tyres produced abroad using the same casings could not be imported.⁴⁵⁹ Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

242. The Panel noted that the importation of used tyres into Brazil is prohibited, and that "used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases."⁴⁶⁰ The Panel found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and that, to this extent, the Import Ban was not applied in a manner that would constitute arbitrary discrimination.⁴⁶¹

243. The Panel recalled, however, that the contribution of the Import Ban to the achievement of its objective "is premised on imports of used tyres being prohibited".⁴⁶² For the Panel, the granting of injunctions allowing used tyres to be imported "runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading."⁴⁶³ The Panel examined the volumes of imports of used tyres that have taken place under the court injunctions. For the Panel, the amounts of imports of used tyres that have

⁴⁵⁹Panel Report, para. 7.243.

⁴⁶⁰*Ibid.*, para. 7.292. (footnote omitted) The Panel also observed that Brazil has challenged these injunctions "with a certain degree of success". (*Ibid.*) For the Panel, the imports of used tyres were "the result of successful court challenges", and found their basis "in the customs authorities' need to give effect to judicial orders". (*Ibid.*) The Panel added that nothing in the evidence suggested that the decisions of the Brazilian courts granting those injunctions were capricious or unpredictable, nor does "the decision of the Brazilian administrative authorities to comply with the preliminary injunctions ... seem irrational or unpredictable". (*Ibid.*, para. 7.293)

⁴⁶¹*Ibid.*, para. 7.294.

⁴⁶²*Ibid.*, para. 7.295.

⁴⁶³*Ibid.* (original emphasis)

actually taken place under the court injunctions were significant.⁴⁶⁴ Accordingly, the Panel found that, "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination."⁴⁶⁵

244. For the European Communities, the Panel erred in finding that the imports of used tyres through court injunctions do not result in arbitrary discrimination, given that "[w]hat is arbitrary must be decided in the light of the stated objectives of the measure".⁴⁶⁶ Because, from the point of view of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, prohibiting imported retreaded tyres while allowing the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination.⁴⁶⁷ Furthermore, the European Communities maintains that, as regards the issue of whether court injunctions constitute unjustifiable discrimination, the Panel adopted the same erroneous quantitative approach as it did when discussing the MERCOSUR exemption.⁴⁶⁸ The European Communities adds that the Panel's approach engenders uncertainty for 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.

⁴⁶⁴Panel Report, paras. 7.297 and 7.303. In particular, the Panel noted that, in 2005, Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted (Portaria SECEX 8/2000). The Panel also observed that the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the Import Ban. Thus, according to the Panel, in 2005, the imports of used tyres were approximately three times the amount of retreaded and used tyres combined that were imported annually prior to the Import Ban. (*Ibid.*, paras. 7.301 and 7.302)

⁴⁶⁵*Ibid.*, para. 7.306.

⁴⁶⁶European Communities' appellant's submission, para. 357.

⁴⁶⁷*Ibid.*

⁴⁶⁸*Ibid.*, para. 360.

⁴⁶⁹*Ibid.*, para. 363.

246. As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination.⁴⁷⁰ For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions.⁴⁷¹ We observe that this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we *find* that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

247. The Panel approached the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as it did with the MERCOSUR exemption. We explained above why we are of the view that this quantitative approach—according to which discrimination would be characterized as unjustifiable only if imports under the MERCOSUR exemption take place in such amounts that the achievement of the objective of the measure at issue would be "significantly undermined"⁴⁷²—is flawed.⁴⁷³ Accordingly, we *reverse* the Panel's findings, in paragraphs 7.296 and 7.306 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban. Furthermore, for the same reasons as those explained in paragraph 232, we *reverse* the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of "capricious" or "random" action.

⁴⁷⁰*Supra*, Section VI.A.1.

⁴⁷¹See Panel Report, paras. 7.292 and 7.293; see also Brazil's appellee's submission, para. 245.

⁴⁷²Panel Report, para. 7.287 (as regards the MERCOSUR exemption); see also para. 7.296 (with respect to the imports of used tyres through court injunctions).

⁴⁷³*Supra*, Section VI.A.1.

2. Imports of Used Tyres and Disguised Restriction on International Trade

248. The Panel found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied 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

⁴⁷⁴Panel Report, para. 7.349.

⁴⁷⁵*Ibid.*, para. 7.348. (footnote omitted)

⁴⁷⁶*Ibid.*, para. 7.349.

⁴⁷⁷European Communities' appellant's submission, para. 367.

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 *prima facie* inconsistent with Articles I:1 and XIII:1, but claimed that it was justified under Articles XX(d) and XXIV of the GATT 1994.

254. After noting that the MERCOSUR exemption and the Import Ban have the same legal basis, namely, Article 40 of Portaria SECEX 14/2004⁴⁷⁸, the Panel emphasized that, under Article 11 of the DSU, "it was required to address only those issues that are necessary for the resolution of the matter between the parties."⁴⁷⁹ The Panel recalled its earlier findings that the Import Ban was inconsistent with Article XI:1 and not justified under Article XX(b). It then decided to exercise judicial economy in respect of the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1, and not justified under Articles XX(d) or Article XXIV of the GATT 1994. According to the Panel, the MERCOSUR exemption derives from and exists only in relation to the Import Ban. The Panel reasoned that, as it had already found that the Import Ban was inconsistent with the requirements of the GATT 1994, it was unnecessary to examine the European Communities' separate claims regarding the MERCOSUR exemption.⁴⁸⁰

⁴⁷⁸See Panel Report, para. 7.453.

⁴⁷⁹*Ibid.*, para. 7.454 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1996:I, 323, at 339).

⁴⁸⁰*Ibid.*, para. 7.455.

255. On appeal, the European Communities requests that we reverse the Panel's decision to exercise judicial economy in relation to its separate claims regarding the MERCOSUR exemption. The European Communities also requests us to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Article XX(d) or Article XXIV of the GATT 1994. This request, however, is conditioned upon our upholding the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the requirements of the chapeau of Article XX.

256. As we have found that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, the condition on which the European Communities' request is predicated has not been fulfilled. It is therefore not necessary for us to rule on the European Communities' conditional appeal. Accordingly, we do not examine the European Communities' conditional appeal and make no finding in relation to its separate claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and not justified under Article XX(d) or Article XXIV of the GATT 1994.

257. Having said that, we observe that it might have been appropriate for the Panel to address the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1. We have previously indicated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"⁴⁸¹, and it seems that the Panel assumed this to be the case in the present dispute. However, the Panel found that the MERCOSUR exemption resulted in the Import Ban being applied *consistently* with the requirements of the chapeau of Article XX. In view of this finding, we must acknowledge that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption. We emphasize that panels must be mindful, when applying the principle of judicial economy, that the aim of the dispute settlement mechanism under Article 3.7 of the DSU is to secure a positive solution to the dispute. Therefore, a panel's discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that 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

⁴⁸¹ Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

⁴⁸² Appellate Body Report, *Australia – Salmon*, para. 223.

VIII. Findings and Conclusions

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

- (a) with respect to the analysis of the necessity of the Import Ban under Article XX(b) of the GATT 1994:
 - (i) upholds the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision; and
 - (ii) finds that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts;
- (b) with respect to the analysis under the chapeau of Article XX of the GATT 1994:
 - (i) reverses the Panel's findings, in paragraphs 7.287, 7.354, and 7.355 of the Panel Report, that the MERCOSUR exemption would result in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the Import Ban;
 - (ii) reverses the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX;
 - (iii) reverses the Panel's findings, in paragraphs 7.296, 7.306, 7.349, and 7.355 of the Panel Report, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban;

- (iv) reverses the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and finds, instead, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX; and
- (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.

Signed in the original in Geneva this 16th day of November 2007 by:

Georges Abi-Saab
Presiding Member

Luiz Olavo Baptista
Member

Yasuhei Taniguchi
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS332/9
3 September 2007

(07-3724)

Original: English

BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 3 September 2007, from the Delegation of the European Commission, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Appeal on certain issues of law covered in the Report of the Panel on *Brazil – Measures Affecting Imports of Retreaded Tyres*¹ and certain legal interpretations developed by the Panel.

2. The European Communities seeks review by the Appellate Body of the following aspects of the Report of the Panel:

(a) The Panel's finding that the import ban on retreaded tyres was necessary within the meaning of Article XX(b) of the GATT. The Panel's finding and corresponding reasoning are contained in paragraphs 7.103 to 7.216 of the Panel Report. The EC appeals this finding notably because:

- in assessing the contribution of the measure to the protection of human, animal and plant life and health, the Panel merely assesses whether the ban is capable of making a potential contribution to its stated objectives. This reasoning is inconsistent with Article XX(b) of the GATT. Moreover, in reaching its conclusion regarding the potential contribution of the ban, the Panel also fails to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU, and effectively shifts the burden of proof to the EC;

¹ WT/DS332/R, circulated on 12 June 2007.

- in assessing the reasonably available alternative measures, the Panel wrongly excludes some of the alternatives proposed by the European Communities, on the basis that those alternatives are related to the manner in which the import ban is implemented *in practice*, that they are not necessarily readily available, that they do not avoid the waste tyres arising specifically from imported retreaded tyres, that they already exist in Brazil, or that they are individually capable of disposing only of a small number of waste tyres. Moreover, the Panel has ignored important facts and arguments presented by the European Communities, has referred to the evidence submitted by the parties in a selective and distorted manner, and has effectively shifted the burden of proof to the EC. These findings are inconsistent with Article XX(b) of the GATT and with the Panel's duty to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU;
 - contrary to Article XX (b) of the GATT, the Panel has erred by not carrying out a process of weighing and balancing the relevant factors and elements (objective pursued, trade-restrictiveness of the measure, contribution and alternatives);
- (b) the Panel's finding that the exemption, from the import ban and other challenged measures, of imports of retreaded tyres from other Mercosur countries does not constitute arbitrary or unjustifiable discrimination (paragraphs 7.270 to 7.289 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;
- (c) the Panel's finding that the imports of used tyres do not constitute arbitrary discrimination and that they constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.292 to 7.294, 7.296 and 7.306 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;
- (d) the Panel's finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that imports of used tyres would constitute a disguised restriction only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.347 to 7.355 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;
- (e) the Panel's decision to exercise judicial economy with respect to the European Communities' claims under Articles XIII:1 and I:1 of the GATT (paragraphs 7.453 to 7.456 and 8.2 of the Panel Report). Since the Panel found that the Mercosur exemption is not incompatible with the chapeau of Article XX GATT, a separate finding on the compatibility of this exemption with Articles XIII:1 and I:1 GATT would have been necessary to secure a positive resolution of the dispute, as required by Articles 3.3, 3.4, 3.7 and 11 of the DSU. The European Communities therefore asks the Appellate Body to find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 of the GATT, and is not justified either by Article XXIV or by Article XX(d) of the GATT.

WORLD TRADE ORGANIZATION
APPELLATE BODY

Mexico – Tax Measures on Soft Drinks and Other Beverages

Mexico, *Appellant*
United States, *Appellee*

Canada, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*

AB-2005-10

Present:

Taniguchi, Presiding Member
Janow, Member
Sacerdoti, Member

I. Introduction

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (the "Panel Report").¹ The Panel was established to consider a complaint by the United States concerning certain tax measures and bookkeeping requirements imposed by Mexico on soft drinks and other beverages that use sweeteners other than cane sugar.

2. The measures challenged by the United States include: (i) a 20 per cent tax on the transfer or, as applicable, the importation of soft drinks and other beverages that use any sweetener other than cane sugar (the "soft drink tax"); (ii) a 20 per cent tax on specific services (commission, mediation, agency, representation, brokerage, consignment, and distribution), when such services are provided for the purpose of transferring products such as soft drinks and other beverages that use any sweetener other than cane sugar (the "distribution tax"); and (iii) a number of requirements imposed on taxpayers subject to the soft drink tax and to the distribution tax (the "bookkeeping requirements").² Before the Panel, the United States claimed that these measures are inconsistent with paragraphs 2 and 4 of Article III of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

3. In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to "decline to exercise its jurisdiction in this case"³ and that it "recommend to the

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.

parties that they submit their respective grievances to an Arbitral Panel, under Chapter Twenty of the NAFTA⁴], 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 tax measures."⁵ Mexico also stated that, in the event the Panel decided to exercise jurisdiction, the Panel should find that the measures are justified pursuant to Article XX(d) of the GATT 1994.⁶

4. On 18 January 2005, the Panel issued a preliminary ruling in which it rejected Mexico's request.⁷ In doing so, the Panel concluded that, "under the DSU⁸], it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."⁹ The Panel added that, "even if it had such discretion, the Panel did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."¹⁰

5. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 7 October 2005, the Panel concluded that:

- (a) With respect to Mexico's soft drink tax and distribution tax:
- (i) As imposed on sweeteners, imported beet sugar is subject to internal taxes in excess of those applied to like domestic sweeteners, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994;
 - (ii) As imposed on sweeteners, imported HFCS¹¹ is being taxed dissimilarly compared with the directly competitive or substitutable products, so as to afford protection to the Mexican domestic production of cane sugar, in a manner inconsistent with Article III:2, second sentence, of the GATT 1994;
 - (iii) As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994;
 - (iv) As imposed on soft drinks and syrups, imported soft drinks and syrups sweetened with non-cane sugar sweeteners (including HFCS and beet sugar) are subject to internal taxes in excess of those applied to like domestic products, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.

⁴North American Free Trade Agreement (the "NAFTA").

⁵Panel Report, para. 3.2.

⁶*Ibid.*

⁷The Panel's preliminary ruling is reproduced as Annex B to the Panel Report.

⁸*Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

⁹Panel Report, para. 7.1.

¹⁰*Ibid.*

¹¹High-fructose corn syrup ("HFCS").

- (b) With respect to Mexico's bookkeeping requirements: As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994.¹²

The Panel rejected Mexico's defence under Article XX(d) of the GATT 1994, concluding that "the challenged tax measures are not justified as measures that are necessary to secure compliance by the United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994."¹³ The Panel therefore recommended "that the Dispute Settlement Body request Mexico to bring the inconsistent measures ... into conformity with its obligations under the GATT 1994."¹⁴

6. On 6 December 2005, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal¹⁵ pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").¹⁶ On 13 December 2005, Mexico filed an appellant's submission.¹⁷ In its appeal, Mexico challenges the Panel's preliminary ruling rejecting Mexico's request that the Panel decline to exercise jurisdiction in this case, as well as the Panel's findings concerning Article XX(d) of the GATT 1994. Mexico did not appeal the Panel's findings under Article III of the GATT 1994. On 6 January 2006, the United States filed an appellee's submission.¹⁸ On the same day, China, the European Communities, and Japan each filed a third participant's submission.¹⁹ Also on the same day, Canada and Guatemala each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.²⁰

7. By letter dated 5 January 2006, Mexico requested authorization to correct certain clerical errors in its appellant's submission pursuant to Rule 18(5) of the *Working Procedures*. On 9 January 2006, the Appellate Body Division hearing the appeal ("the Division") invited all participants and third participants to comment on Mexico's request, in accordance with Rule 18(5). On 11 January 2006, the United States responded that, although some of the requested corrections are

¹²Panel Report, para. 9.2. (original underlining)

¹³*Ibid.*, para. 9.3.

¹⁴*Ibid.*, para. 9.5.

¹⁵WT/DS308/10 (attached as Annex I to this Report).

¹⁶WT/AB/WP/5, 4 January 2005.

¹⁷Pursuant to Rule 21(1) of the *Working Procedures*. A courtesy English translation of Mexico's appellant's submission, prepared by Mexico, was provided to the participants and third participants on 16 December 2005.

¹⁸Pursuant to Rule 22(1) of the *Working Procedures*.

¹⁹Pursuant to Rule 24(1) of the *Working Procedures*.

²⁰Pursuant to Rule 24(2) of the *Working Procedures*.

not "clearly clerical", within the meaning of Rule 18(5), "[i]n the circumstances of this dispute", the United States did not object to Mexico's request. No other comments were received. By letter dated 16 January 2006, the Division authorized Mexico to correct the clerical errors in its appellant's submission but emphasized, however, that it had not been requested, and did not make, a finding "as to whether all of the corrections requested by Mexico are 'clerical' within the meaning of Rule 18(5) of the *Working Procedures*."

8. On 13 January 2006, the Appellate Body received an *amicus curiae* brief from *Cámara Nacional de las Industrias Azucarera y Alcohólica* (National Chamber of the Sugar and Alcohol Industries) of Mexico.²¹ The Division did not find it necessary to take the brief into account in resolving the issues raised in this appeal.

9. The oral hearing in this appeal was held on 18 January 2006. The participants and third participants presented oral arguments (with the exception of Guatemala) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Mexico – Appellant*

1. Exercise of Jurisdiction

10. Mexico argues that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of the present dispute. According to Mexico, the Panel's decision was primarily based on the Panel's view that Article 11 of the DSU "compels a WTO [p]anel to address the claims" on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties to the dispute and that, therefore, a WTO panel has no discretion to decline to exercise validly established jurisdiction.²² Mexico submits that this is incorrect and ignores the fact that, like other international bodies and tribunals, WTO panels have certain "implied jurisdictional powers"²³ that derive from their nature as adjudicative bodies. According to Mexico, such powers include the power to refrain from exercising substantive

²¹At the oral hearing, Mexico stated that its arguments are set out in its appellant's and oral submissions. Mexico added, however, that it would not object should the Appellate Body decide to accept the *amicus* brief. The United States noted that the *amicus* brief had been received late in the proceedings and that it presented new arguments and claims of error that were not part of Mexico's Notice of Appeal. Accordingly, while taking the view that the Appellate Body had the authority to accept the brief, the United States argued that it should decline to do so in the circumstances of this dispute.

²²Mexico's appellant's submission, para. 64 ("*obliga a un Grupo Especial de la OMC a abordar las reclamaciones*").

²³*Ibid.*, para. 65 ("*facultades implícitas en relación con su competencia*").

jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law"²⁴ under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions or when one of the disputing parties refuses to take the matter to the "appropriate forum".²⁵ Mexico contends, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute²⁶ 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

²⁴Mexico's appellant's submission, para. 73 ("*los elementos predominantes de una disputa derivan de reglas del derecho internacional*").

²⁵*Ibid.* ("*foro adecuado*").

²⁶*Ibid.*

²⁷*Ibid.*, para. 67 ("*función jurisdiccional*").

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.

(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)

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".

16. Turning to the meaning of the terms "laws and regulations" in Article XX(d), Mexico notes that the Panel's interpretation of these terms is based on the erroneous conclusions reached by the Panel with respect to the terms "to secure compliance". Mexico submits that the words "laws" and

²⁹Mexico's appellant's submission, para. 98 ("*destino*"; "*resultado*").

³⁰*Ibid.*, para. 102 ("*aun si el resultado de la medida es totalmente incierto, impredecible, bien puede estar 'destinada a lograr la observancia de las leyes y reglamentos' en el sentido del artículo XX(d)*").

³¹*Ibid.*, para. 104 ("*el resultado incierto de las contramedidas internacionales es una razón para excluirlas como medidas que pueden ser objeto de consideración, en el marco del inciso (d) del artículo XX*") (quoting Panel Report, para. 8.187).

"regulations" are expressly qualified in other provisions of the covered agreements; the absence of qualifying language in Article XX(d) thus supports the view that the terms are not limited to *domestic* laws or regulations, but include international agreements. Mexico adds that a review of the Article XX exceptions reveals that only three—(paragraphs (c), (g), and (i))—are, expressly or by implication, concerned with an activity that would occur *within* the territory of the Member seeking to justify its measures. This position, according to Mexico, is supported by the Appellate Body's findings in *US – Shrimp (Article 21.5 – Malaysia)*.³²

17. Mexico further requests, in the event the Appellate Body should reverse the Panel's conclusion, that it complete the Panel's analysis and find that the Mexican measures are "necessary" within the meaning of Article XX(d) and meet the requirements of the chapeau of that Article. According to Mexico, the uncontested facts and evidence in the Panel record, and the Panel's acknowledgement that Mexico's measures have "attracted the attention" of the United States, provide an ample basis on which to complete the analysis and conclude that the measures are "necessary" within the meaning of Article XX(d).

18. Mexico observes that, before the Panel, the United States could not identify any alternative measure that Mexico could and should have used in order to attain its legitimate objective. It further explains that the fact that a measure does not or has not yet achieved its objective does not mean that it is not "necessary" within the meaning of Article XX(d). It may mean that it is insufficient to secure compliance, or that it is insufficient to secure immediate compliance, but can do so over time; however, it says nothing about whether the measure is "necessary". Moreover, Mexico submits that the evidence on the record demonstrates that the measures at issue have contributed to securing compliance in the circumstances of this case by changing the dynamics of the NAFTA dispute and forcing the United States to pay attention to Mexico's grievances, and also contradicts the Panel's finding that Mexico's measures do not contribute to securing compliance in this dispute.

19. As regards the chapeau of Article XX of the GATT 1994, Mexico asserts that its measures neither arbitrarily nor unjustifiably discriminate between countries where the same conditions prevail. Rather than constituting "arbitrary or unjustifiable discrimination", the measures constitute "limited

³²Mexico's appellant's submission, paras. 174 and 177-178 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 123-124 and 128-130).

sectoral retaliation in the relevant market segment (*i.e.*, the sweeteners market)."³³ Nor can the measures be said to be a "disguised restriction on [international] trade" because they constitute "a proportionate, legitimate and legally justified response to actions and omissions of the United States"³⁴, and, furthermore, the measures have been published.

20. Finally, Mexico argues that the Panel, "separately and in addition"³⁵ to the previous errors, failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, in finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."³⁶ According to Mexico, the Panel's finding is based solely on the Panel's view that attracting the attention of the United States is not equivalent to securing compliance with a law or regulation and ignores that "achieving the objectives sought by the countermeasures can take time".³⁷

B. *Arguments of the United States – Appellee*

1. Exercise of Jurisdiction

21. The United States submits that the Panel properly rejected Mexico's request for the Panel to refrain from exercising jurisdiction in the present dispute.

22. Referring to Article 11 of the DSU, the United States observes that, if the Panel had declined to exercise jurisdiction over this dispute, or had agreed to Mexico's request that it refrain from issuing findings and recommendations, the Panel would have made no findings on the United States' claims that Mexico's tax measures are inconsistent with Article III of the GATT 1994. This would have left the DSB "unable to give any rulings or (as is appropriate in this dispute) to make any

³³Mexico's appellant's submission, para. 173 ("*retorsiones sectoriales limitadas al segmento del mercado relevante (i.e., el mercado de los edulcorantes)*"). Mexico asserts that the facts of this case are similar to the situation examined by the Appellate Body in *US – Shrimp (Article 21.5 – Malaysia)*. Mexico explains that, in that dispute, the Appellate Body found that a United States unilateral measure was not inconsistent with the chapeau of Article XX of the GATT 1994. According to Mexico, in that case, the Appellate Body did not require the United States to conclude an international agreement with the disputing parties, but rather required it to have made good faith efforts in that direction. In this case, Mexico argues that it has sought to resolve the dispute through NAFTA and bilateral negotiations, but "the United States has essentially blocked Mexico's ability to have its grievance resolved." (Mexico's appellant's submission, paras. 174-181 ("*Estados Unidos esencialmente ha bloqueado la posibilidad de México para resolver su agravio.*")

³⁴*Ibid.*, para. 182 ("*una respuesta proporcional, legítima y legalmente justificada a las acciones y omisiones de Estados Unidos*").

³⁵*Ibid.*, heading III.E ("*independiente y adicional*").

³⁶Panel Report, para. 8.186. See also, Mexico's Notice of Appeal, para. 3.

³⁷Mexico's appellant's submission, para. 166 ("*la consecución de los objetivos de las contramedidas puede llevar tiempo*").

recommendations³⁸ in accordance with the rights and obligations under the DSU and the GATT 1994. The United States emphasizes that such a result is incompatible with the text of the DSU and would have required the Panel to disregard the mandate given to it by the DSB. Moreover, the United States observes that the Panel's own terms of reference in this dispute instructed the Panel to examine the matter referred to the DSB by the United States and to make such findings as will assist the DSB in making the recommendations and rulings provided for under the DSU.

23. Referring to Articles 3.2 and 19.2 of the DSU, the United States adds that, if a panel were to decline to exercise jurisdiction over a particular dispute, it would diminish the rights of the complaining Member under the DSU and other covered agreements. The United States further notes that prior reports of panels and the Appellate Body also support the Panel's findings. In this regard, the United States refers to *Mexico – Corn Syrup (Article 21.5 – US)*, where the Appellate Body stated that "panels are required to address issues that are put before them by the parties to a dispute."³⁹

24. The United States observes that Mexico has referred to the principle of judicial economy as an example of "situations where WTO panels have refrained from exercising validly established substantive jurisdiction on certain claims that are before them."⁴⁰ However, the United States submits that, "when a panel exercises judicial economy, it does not decline to exercise substantive jurisdiction either over a dispute or certain claims in a dispute. Rather, the panel ... declines to make findings on certain claims when resolution of such claims is not necessary for the panel to fulfill its mandate under Article 11 of the DSU and its terms of reference."⁴¹ In other words, judicial economy "does not relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute"⁴² before it.

2. Article XX(d) of the GATT 1994

25. The United States submits that the Panel properly found that Mexico's tax measures are not designed "to secure compliance" and, thus, are not justified as measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. It notes that previous GATT and WTO disputes in which Article XX(d) has been invoked have involved domestic laws or regulations.

³⁸United States' appellee's submission, para. 124.

³⁹*Ibid.*, para. 127 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

⁴⁰*Ibid.*, para. 129 (quoting Mexico's appellant's submission, para. 68).

⁴¹*Ibid.* (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340; and to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133).

⁴²*Ibid.*, para. 130.

26. The United States agrees with the Panel's analysis of the terms "laws or regulations" and, therefore, supports the Panel's finding that these terms refer only to *domestic* laws or regulations and not to obligations under international agreements. The United States explains that Article XX(d) refers to "laws" and "regulations" in the plural, while the singular "law" is used when referring to "international law".⁴³ The United States further observes that the terms "laws or regulations" precede the words "which are not inconsistent" in Article XX(d) and explains that the term "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, the WTO agreements use the word "conflict" when referring to international obligations.

27. The United States further submits that Mexico's interpretation of the terms "laws or regulations" would undermine Articles 22 and 23 of the DSU, as it would permit action, including the suspension of concessions, by any Member "outside the rules of the DSU".⁴⁴ The United States observes that Article XX(d) was not intended to provide the basis for suspending concessions under the WTO agreements upon a mere allegation of a breach of a non-WTO international agreement. Otherwise, according to the United States, "this would effectively convert WTO dispute settlement into a forum of general dispute resolution for all international agreements."⁴⁵ Furthermore, the United States argues that, if the terms "laws or regulations" are read to include obligations under non-WTO agreements, the WTO dispute settlement system "would become a forum for WTO Members to allege and obtain findings as to the consistency of another Member's measure with any non-WTO agreement."⁴⁶ The United States, therefore, disagrees with Mexico's arguments that the phrase "laws or regulations" in Article XX(d) refers to international agreements.

28. With respect to the Panel's interpretation of the phrase "to secure compliance", the United States notes that the references to coercion were intended "merely [to] reinforce the Panel's view that 'enforcement' does not refer to the international level"⁴⁷ and not, as Mexico argues, to create an additional requirement for justifying a measure under Article XX(d). The United States therefore agrees with the Panel that the terms "to secure compliance" do not apply to measures taken by one Member to induce another Member to comply with obligations under a non-WTO treaty.

29. The United States also rejects Mexico's submission that the "Panel wrongly found that measures with an 'uncertain outcome' are '*a priori* ineligible' as measures to secure compliance with

⁴³The United States observes that Article 3.2 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* also use the term "law" in the singular when referring to "public international law".

⁴⁴United States' appellee's submission, para. 37.

⁴⁵*Ibid.*, para. 85. (footnote omitted)

⁴⁶*Ibid.*, para. 41.

⁴⁷*Ibid.*, para. 54 (referring to Panel Report, paras. 8.175 and 8.178).

laws or regulations."⁴⁸ While the United States concedes that the Panel's analysis "could have admittedly been clearer"⁴⁹, it also notes that the Panel did not require certainty, and argues that the Panel's remarks on this point simply characterized Mexico's failure to "put forth *any* evidence that its tax measures were designed to [secure] compliance."⁵⁰ The United States agrees with Mexico that "Article XX(d) does not require the party invoking the defense to establish that its measure will, without a doubt or with certainty, secure compliance with laws or regulations."⁵¹ Nevertheless, the United States submits that Mexico has to provide some evidence that the measure is "designed" to secure such compliance.

30. For all these reasons, the United States submits that the Appellate Body should uphold the Panel's conclusion that Mexico's tax measures are *not* designed to secure compliance and, thus, are *not* justified as measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994.

31. In the event the Appellate Body should reverse the Panel's finding and accept Mexico's request to complete the analysis, the United States asserts that Mexico's measures are neither "necessary" for purposes of Article XX(d), nor do they meet the requirements of the chapeau of that Article. According to the United States, Mexico has not demonstrated that the measures at issue contribute to compliance by the United States with its NAFTA obligations and "ignores"⁵² the fact that the trade impact of a measure is one of the factors that must be weighed and balanced when determining whether a measure is "necessary". The impact of Mexico's measures was "essentially [to] prohibit the use of imported HFCS in Mexican soft drinks and other beverages and to reduce import volumes".⁵³ The United States adds that "[i]t is difficult to understand how discriminating against imports from potentially every WTO Member is 'necessary' to secure [the United States'] compliance with [its] obligations under the NAFTA."⁵⁴ The United States further observes that the absence of alternative measures that could be reasonably available does not, in itself, mean that the challenged measures are "necessary". In any event, the United States submits that if Mexico's objective was to attract the attention of the United States, it could have pursued a variety of other actions, including pursuing the diplomatic avenues available under the NAFTA.

⁴⁸United States' appellee's submission, para. 70 (quoting Mexico's appellant's submission, paras. 104-105).

⁴⁹*Ibid.*, para. 71.

⁵⁰*Ibid.* (original emphasis)

⁵¹*Ibid.*, para. 72. (footnote omitted)

⁵²*Ibid.*, para. 96.

⁵³*Ibid.*, para. 97.

⁵⁴*Ibid.*

32. The United States submits, furthermore, that Mexico's measures do not meet the requirements of the chapeau of Article XX of the GATT 1994. The only evidence that Mexico offers to support its contention that the measures do not constitute arbitrary or unjustifiable discrimination is the characterization of the measures as international countermeasures.⁵⁵ This is insufficient, argues the United States, for Mexico to meet its burden of proof. Moreover, the fact that Mexico may have been transparent about its measures is not sufficient to establish that such measures are not a "disguised restriction on trade".⁵⁶

33. Lastly, the United States requests the Appellate Body to reject Mexico's contention that the Panel did not make an objective assessment of the facts, as required by Article 11 of the DSU. According to the United States, the Panel did not "ignore" arguments or evidence submitted by Mexico. The United States further explains that, in any event, the errors alleged by Mexico in support of its claim under Article 11 of the DSU "relate to the interpretation of Article XX, and do not support a conclusion that the Panel breached Article 11."⁵⁷

C. *Arguments of the Third Participants*

1. China

34. Referring to Articles 7 and 11 of the DSU, China argues that a WTO panel does not have an implied power to refrain from performing its "statutory function".⁵⁸ China submits that, if a panel that is "empowered and obligated"⁵⁹ to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal uncertainty and be contrary to the aim of providing security and predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU. China argues, moreover, that the notion of judicial economy is "relevant and applicable"⁶⁰ only if a panel has assumed the jurisdiction defined by its

⁵⁵According to the United States, the Appellate Body rulings in *US – Shrimp (Articles 21.5 – Malaysia)* do not support Mexico's position, because that dispute did not involve a disagreement about the commitments made under an international agreement. (United States' appellee's submission, paras. 109-110)

⁵⁶*Ibid.*, para. 114.

⁵⁷*Ibid.*, para. 118.

⁵⁸China's third participant's submission, para. 5.

⁵⁹*Ibid.*, para. 6.

⁶⁰*Ibid.*, para. 7.

terms of reference and has made "such findings as will assist the DSB" within the meaning of Article 11 of the DSU.

35. China asserts that the terms "laws or regulations" in Article XX(d) do not encompass international agreements. China states that Article X of the GATT 1994 provides contextual guidance for the interpretation of Article XX(d). Article X expressly distinguishes between "[l]aws, regulations, judicial decisions and administrative rulings" and "[a]greements ... between the government or a governmental agency of any Member and the government or governmental agency of any other Member". China adds that interpreting "laws or regulations" to include international agreements would allow a WTO Member to justify under Article XX(d) its deviation from its WTO obligations in the name of any remedial measure in response to any alleged breach of any non-WTO international agreement. Such a scenario, according to China, is not consistent with the object and purpose of the GATT 1994.

2. European Communities

36. The European Communities submits that the Appellate Body should uphold the Panel's finding that it did not have the discretion to decline to exercise jurisdiction in this case. The European Communities submits that "the functions and obligations of WTO Panels must be established on the basis of the DSU, and particularly Article 11 thereof."⁶¹ On this basis, the European Communities agrees that a panel has an inherent power to establish whether it has jurisdiction, and whether a particular matter is within its jurisdiction. However, the European Communities argues that a panel may not freely, or by "the notion of 'judicial economy'", decide to refrain from exercising its jurisdiction "in a case properly brought before it under the DSU."⁶²

37. The European Communities asserts, furthermore, that the Appellate Body should uphold the Panel's finding that only measures made applicable in the domestic legal order of a WTO Member constitute "laws or regulations" within the meaning of Article XX(d). The European Communities disagrees, however, with the Panel's finding that "international agreements, even when incorporated into the domestic law of a WTO Member, can never be regarded as 'laws or regulations' for the purposes of Article XX(d)".⁶³ In addition, the European Communities takes issue with the Panel's interpretation of the terms "to secure compliance" as requiring a degree of certainty in the results that may be achieved through the measure.

⁶¹European Communities' third participant's submission, para. 8.

⁶²*Ibid.*, paras. 10-11.

⁶³*Ibid.*, para. 44.

3. Japan

38. Japan disagrees with the Panel's interpretation of the terms "to secure compliance" in Article XX(d). In this regard, Japan submits that Article XX(d) does not necessarily exclude measures that have, as a purpose, to secure compliance, but are not accompanied by compulsory enforcement. According to Japan, compliance can be secured by a request or a command without being accompanied by any coercion. Japan considers that the Panel erred by indicating that the determination of whether a measure is designed "to secure compliance" should be analyzed based on the degree of certainty of its outcome. Nevertheless, Japan agrees with the Panel's finding that Article XX(d) does not cover international agreements. Japan explains that the terms "laws or regulations", read together with the phrase "to secure compliance", "presuppose a hierarchical structure that is associated with the relation between the state and its subjects"⁶⁴ and, therefore, excludes international agreements.

III. Issues Raised in This Appeal

39. The following issues are raised in this appeal:

- (a) whether the Panel erred in concluding that a WTO panel "has no discretion to decide whether or not to exercise its jurisdiction in a case properly before it"⁶⁵ and, if so, whether the Panel erred in declining to exercise that discretion in the circumstances of this dispute;
- (b) whether the Panel erred in concluding that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994⁶⁶; and
- (c) whether the Panel failed to make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in concluding that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance", within the meaning of Article XX(d) of the GATT 1994, "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."⁶⁷

⁶⁴Japan's third participant's submission, para. 22.

⁶⁵Panel Report, para. 7.18.

⁶⁶*Ibid.*, para. 8.198.

⁶⁷*Ibid.*, para. 8.186.

IV. The Panel's Exercise of Jurisdiction

A. Introduction

40. In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to decline to exercise jurisdiction "in favour of an Arbitral Panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA)."⁶⁸ In a preliminary ruling, the Panel rejected Mexico's request and found instead that, "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."⁶⁹ The Panel added that even if it had such discretion, it "did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."⁷⁰

41. In its reasoning, the Panel opined that "discretion may be said to exist only if a legal body has the freedom to choose among several options, all of them equally permissible in law."⁷¹ According to the Panel, "such freedom ... would exist within the framework of the DSU only if a complainant did not have a legal right to have a panel decide a case properly before it."⁷² Referring to Article 11 of the DSU and to the ruling of the Appellate Body in *Australia – Salmon*, the Panel observed that "the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes" and that a panel is required "to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties."⁷³ From this, the Panel concluded that a WTO panel "would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction."⁷⁴ Referring to Articles 3.2 and 19.2 of the DSU, the Panel further stated that "[i]f a WTO panel were to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining Member under the DSU and other WTO covered agreements."⁷⁵ The Panel added that Article 23 of the DSU "make[s] it clear that a WTO Member that considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by another Member has the right to bring the case before the WTO dispute settlement system."⁷⁶

⁶⁸Panel Report, para. 7.1.

⁶⁹*Ibid.*

⁷⁰*Ibid.*

⁷¹*Ibid.*, para. 7.7.

⁷²*Ibid.*

⁷³*Ibid.*, para. 7.8 (referring to Appellate Body Report, *Australia – Salmon*, para. 223).

⁷⁴*Ibid.*

⁷⁵*Ibid.*, para. 7.9.

⁷⁶*Ibid.*

42. On appeal, Mexico contends that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of the present dispute. Mexico submits that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies."⁷⁷ Such powers include the power to refrain from exercising substantive jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions" or "when one of the disputing parties refuses to take the matter to the appropriate forum."⁷⁸ Mexico argues, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute⁷⁹ regarding access of Mexican sugar to the United States' market under the NAFTA. Mexico further emphasizes that "[t]here is nothing in the DSU ... that explicitly rules out the existence of"⁸⁰ a WTO panel's power to decline to exercise validly established jurisdiction and submits that "the Panel should have exercised this power in the circumstances of this dispute."⁸¹

43. In contrast, the United States argues that, "[t]he Panel's own terms of reference in this dispute instructed the Panel 'to examine ... the matter referred to the DSB by the United States'"⁸² and "to make such findings as will assist the DSB" in making the recommendations and rulings provided for under the DSU. China and the European Communities agree with the United States that the Panel had no discretion to decline to exercise jurisdiction. China submits that if a panel declines to exercise jurisdiction over a dispute, such a decision will create legal uncertainty, contrary to the aim of providing security and predictability to the multilateral trading system and the prompt settlement of disputes as provided for in Article 3.3 of the DSU.⁸³ The European Communities agrees with the Panel's finding that it did not have discretion to decline to exercise jurisdiction in this case, and emphasizes that "the functions and obligations of WTO Panels must be established on the basis of the DSU, and particularly Article 11 thereof."⁸⁴

⁷⁷Mexico's appellant's submission, para. 65 ("*tienen ciertas facultades implícitas en relación con su competencia, las cuales derivan de su propia naturaleza como órganos jurisdiccionales*").

⁷⁸*Ibid.*, para. 73 ("*los elementos predominantes de una disputa derivan de reglas del derecho internacional, cuyo cumplimiento no puede reclamarse en el marco OMC, por ejemplo las disposiciones del TLCAN*"; "*cuando una de las partes contendientes se rehúsa a someterse al foro adecuado*").

⁷⁹*Ibid.*

⁸⁰*Ibid.*, para. 65 ("*Nada en el ESD ... explícitamente descarta que ... existan*").

⁸¹*Ibid.*, para. 72 ("*el Grupo Especial debió haber ejercido esa facultad en las circunstancias de esta disputa*").

⁸²United States' appellee's submission, para. 125.

⁸³China's third participant's submission, para. 6.

⁸⁴European Communities' third participant's submission, para. 8.

B. *Analysis*

44. Before addressing Mexico's arguments, we note that "Mexico does not question that the Panel has jurisdiction to hear the United States' claims."⁸⁵ Moreover, Mexico does not claim "that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might raise legal impediments to the Panel hearing this case".⁸⁶ Instead, Mexico's position is that, although the Panel had the authority to rule on the merits of the United States' claims, it also had the "implied power" to abstain from ruling on them⁸⁷, and "should have exercised this power in the circumstances of this dispute."⁸⁸ Hence, the issue before us in this appeal is not whether the Panel was legally precluded from ruling on the United States' claims that were before it, but, rather, whether the Panel could decline, and should have declined, to exercise jurisdiction with respect to the United States' claims under Article III of the GATT 1994 that were before it.

45. Turning to Mexico's arguments on appeal, we note, first, Mexico's argument that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies"⁸⁹, and thus have a basis for declining to exercise jurisdiction. We agree with Mexico that WTO panels have certain powers that are inherent in their

⁸⁵Mexico's appellant's submission, para. 71 ("*México no discute que el Grupo Especial tiene competencia para resolver la reclamación que Estados Unidos ha interpuesto*") (quoting Mexico's response to Question 35 posed by the Panel; Panel Report, p. C-16). Mexico confirmed this point in response to questioning at the oral hearing.

⁸⁶Panel Report, para. 7.13. In response to questioning at the oral hearing, Mexico argued that the panel in *Argentina – Poultry Anti-Dumping Duties* "at least contemplated the existence of a situation where an impediment found in another agreement might give rise to declining jurisdiction". The panel in *Argentina – Poultry Anti-Dumping Duties* referred to Article 1 of the Protocol of Olivos, which provides that, once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forum, that party may not bring a subsequent case regarding the same subject-matter in the other forum, and went on to state:

The Protocol of Olivos ... does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.

(Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.38) (footnote omitted)

⁸⁷Thus, Mexico suggested that, in the circumstances of this dispute, it would not have been "appropriate" for the Panel "to issue findings on the merits of the United States' claims." (Panel Report, para. 7.11 (referring to Mexico's first written submission to the Panel, paras. 102-103))

⁸⁸Mexico's appellant's submission, para. 72 ("*debió haber ejercido esa facultad en las circunstancias de esta disputa*").

⁸⁹*Ibid.*, para. 65 ("*tienen ciertas facultades implícitas en relación con su competencia, las cuales derivan de su propia naturaleza como órganos jurisdiccionales*").

adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."⁹⁰ Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."⁹¹ For example, panels may exercise judicial economy, that is, refrain from ruling on certain claims, when such rulings are not necessary "to resolve the matter in issue in the dispute".⁹² The Appellate Body has cautioned, nevertheless, that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy."⁹³

46. In our view, it does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute. To the contrary, we note that, while recognizing WTO panels' inherent powers, the Appellate Body has previously emphasized that:

⁹⁰Appellate Body Report, *US – 1916 Act*, footnote 30 to para. 54. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 53. In that dispute, the Appellate Body also stated that:

... panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. ... [P]anels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed.

(Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

⁹¹Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 247-248.

⁹²Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340. Mexico referred, in its appellant's submission, to a panel's discretion to apply judicial economy as "an example of situations where WTO panels have refrained from exercising validly established jurisdiction on certain claims that are before them." (Mexico's appellant's submission, para. 68 ("*un ejemplo de situaciones en las que grupos especiales de la OMC se han abstenido de resolver ciertas reclamaciones sobre las cuales tienen competencia sustantiva validamente establecida*") Mexico clarified at the oral hearing, however, that "it is clear that in the context of the exercise of judicial economy a panel cannot decline entirely to exercise jurisdiction." The United States noted, in this regard, that the doctrine of judicial economy "does not relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute" before it. (United States' appellee's submission, para. 130)

⁹³Appellate Body Report, *Australia – Salmon*, para. 223.

Although panels enjoy some discretion in establishing their own working procedures, *this discretion does not extend to modifying the substantive provisions of the DSU. ... Nothing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU.*⁹⁴ (emphasis added)

47. With these considerations in mind, we examine the scope of a panel's jurisdictional power as defined, in particular, in Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU. Mexico argues that "[t]here is nothing in the DSU ... that explicitly rules out the existence of"⁹⁵ a WTO panel's power to decline to exercise its jurisdiction even in a case that is properly before it.

48. We first address Article 7 of the DSU, which governs the terms of reference of panels. Article 7 of the DSU states, in its first paragraph, that panels shall have the following terms of reference:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

The Panel in this dispute was established with standard terms of reference⁹⁶, which instructed the Panel to "examine" the United States' claims that were before it and to "make findings" with respect to consistency of the measures at issue with Article III of the GATT 1994.

49. The second paragraph of Article 7 further stipulates that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The use of the words "shall address" in Article 7.2 indicates, in our view, that panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.⁹⁷

⁹⁴Appellate Body Report, *India – Patents (US)*, para. 92.

⁹⁵Mexico's appellant's submission, para. 65 ("*Nada en el ESD ... explícitamente descarta que ... existan*").

⁹⁶The Panel's terms of reference in this dispute were as follows:

To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS308/4, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

(WT/DS308/5/Rev.1, para. 2)

⁹⁷In this regard, we further note the Appellate Body's statement that, "as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute." (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

50. We turn next to Article 11 of the DSU, which provides that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. ...

51. Article 11 of the DSU states that panels *should* make an objective assessment of the matter before them. The Appellate Body has previously held that the word "should" can be used not only "to imply an exhortation, or to state a preference", but also "to express a duty [or] obligation".⁹⁸ The Appellate Body has repeatedly ruled that a panel would not fulfil its mandate if it were not to make an objective assessment of the matter.⁹⁹ Under Article 11 of the DSU, a panel is, therefore, charged with the *obligation* to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 11 also requires that a panel "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." It is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.

52. Furthermore, Article 23 of the DSU states that Members of the WTO *shall* have recourse to the rules and procedures of the DSU when they "seek the redress of a violation of obligations ... under the covered agreements". As the Appellate Body has previously explained, "allowing measures to be the subject of dispute settlement proceedings ... is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations ... under the covered agreements, and to clarify the existing provisions of those agreements'."¹⁰⁰ We also note in this regard that Article 3.3 of the DSU provides that the "prompt settlement of situations in which *a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective

⁹⁸Appellate Body Report, *Canada – Aircraft*, para. 187 (quoting *The Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1283).

⁹⁹See, for instance, Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 329 and 335. See also Appellate Body Report, *Canada – Aircraft*, paras. 187-188; and Appellate Body Report, *EC – Hormones*, para. 133.

¹⁰⁰Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. (footnote omitted)

functioning of the WTO".¹⁰¹ The fact that a Member may initiate a WTO dispute whenever it considers that "any benefits accruing to [that Member] are being impaired by measures taken by another Member" implies that that Member is *entitled* to a ruling by a WTO panel.

53. A decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU.¹⁰² We see no reason, therefore, to disagree with the Panel's statement that a WTO panel "would seem ... not to be in a position to choose freely whether or not to exercise its jurisdiction."¹⁰³

54. Mindful of the precise scope of Mexico's appeal¹⁰⁴, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute¹⁰⁵, and

¹⁰¹(emphasis added) Thus, the Appellate Body has explained that there is "little in the DSU that explicitly limits the rights of WTO Members to bring an action". (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312) In a similar vein, the Appellate Body has also observed that a WTO "Member has broad discretion in deciding whether to bring a case against another Member under the DSU." (Appellate Body Report, *EC – Bananas III*, para. 135) Further, Article 3.7 of the DSU states that "[b]efore bringing a case, a Member shall exercise *its judgement* as to whether action under these procedures would be fruitful." (emphasis added) Finally, Article 3.10 of the DSU stipulates that "if a dispute arises, *all Members will engage* in these procedures *in good faith in an effort to resolve the dispute*." (emphasis added)

¹⁰²Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

Article 19.2 of the DSU states that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

¹⁰³Panel Report, para. 7.8.

¹⁰⁴See *supra*, para. 44 and footnote 85 thereto.

¹⁰⁵Mexico's appellant's submission, para. 73.

that only a NAFTA panel could resolve the dispute as a whole.¹⁰⁶ Nevertheless, Mexico does not take issue with the Panel's finding that "neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us."¹⁰⁷ Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA.¹⁰⁸ It is furthermore undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA¹⁰⁹ had not been "exercised".¹¹⁰ We do not express any view on whether a legal impediment to

¹⁰⁶In its appellant's submission, Mexico explains that, in 1998, it initiated NAFTA dispute settlement proceedings because it was of the view that the United States was acting inconsistently with its obligation under the NAFTA relating to market access for Mexican sugar to the United States market. In 2000, Mexico requested the establishment of a panel under Article 2008 of the NAFTA. Subsequently, according to Mexico, it appointed its panelists to the NAFTA panel; however, the United States failed to appoint its panelists and also instructed the United States' Section of the NAFTA Secretariat not to appoint panelists. (Mexico's appellant's submission, paras. 15-27)

As a result, "[n]o further step could be taken by Mexico to form the NAFTA panel and have its grievance heard." (Mexico's appellant's submission, para. 28 ("*No había otros pasos que México pudiera dar conforme a las disposiciones del tratado para conseguir integrar el panel y que su agravio fuera oído*")) Mexico explains that it subsequently adopted the measures at issue in this dispute "to compel the United States to comply with its obligations and [to] protect [Mexico's] own legal and commercial interests." (*Ibid.*, para. 42 ("*para mover a Estados Unidos a cumplir con sus obligaciones, a la vez que protegió [los] legítimos intereses jurídicos y comerciales [de México]*"))

The United States disputes these arguments by Mexico and argues that "the Appellate Body [should not] undertake itself to assess the correctness of Mexico's assertions as to what the NAFTA requires." (United States' appellee's submission, para. 18) It submits that, if the WTO dispute settlement were to "become a forum for WTO Members to ... obtain findings as to the consistency of another Member's measure with any non-WTO agreement", this "would be a departure from the function the WTO dispute settlement system was established to serve". (*Ibid.*, para. 41) The United States also submits that "it is in full compliance with its obligations under NAFTA's dispute settlement mechanism." (*Ibid.*, para. 84)

While these NAFTA issues have been described by the parties by way of background to the WTO dispute, neither the Panel or the Appellate Body was called upon to examine these issues.

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.

the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present.¹¹¹ In any event, we see no legal impediments applicable in this case.

55. Finally, as we understand it, Mexico's position is that the "applicability" of its WTO obligations towards the United States would be "call[ed] into question"¹¹² as a result of the United States having prevented Mexico, by an illegal act (namely, the alleged refusal by the United States to nominate panelists to the NAFTA panel), from having recourse to the NAFTA dispute settlement mechanism to resolve a bilateral dispute between Mexico and the United States regarding trade in sweeteners.¹¹³ Specifically, Mexico refers to the ruling of the Permanent Court of International Justice (the "PCIJ") in the *Factory at Chorzów* case, and "calls into question the 'applicability' of its WTO obligations towards the United States in the context of this dispute".¹¹⁴

56. Mexico's arguments, as well as its reliance on the ruling in *Factory at Chorzów*, is misplaced. Even assuming, *arguendo*, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations.¹¹⁵ We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements. In light of the above, we do not see how the PCIJ's ruling in *Factory at Chorzów* supports Mexico's position in this case.

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.

¹¹²Mexico's appellant's submission, para. 73 ("*[es] cuestion[able]*").

¹¹³See Panel Report, para. 7.14.

¹¹⁴Mexico'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)

¹¹⁵We 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).

57. For all these reasons, we *uphold* the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it." Having upheld this conclusion, we *find* it unnecessary to rule in the circumstances of this appeal on the propriety of exercising such discretion.¹¹⁶

V. Article XX(d) of the GATT 1994

A. Introduction

58. We turn now to Mexico's claim that the Panel erred in finding that the challenged measures are not justified under Article XX(d) of the GATT 1994. Before proceeding, we note that Mexico has 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

¹¹⁶Panel Report, paras. 7.1 and 7.18.

¹¹⁷Therefore, we express no view on the Panel's interpretation of Article III in this case.

¹¹⁸Panel 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.

61. Having interpreted the terms "to secure compliance", the Panel proceeded to examine whether Mexico's measures are designed to secure compliance. The Panel explained that "when enforcement action is taken within a Member's legal system there will normally be no doubt, provided the action is pointed at the right target, that it will achieve that target."¹²⁴ In contrast, "the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable".¹²⁵ Therefore, the Panel reasoned, international countermeasures are "not eligible to be considered as measures 'to secure compliance' within the meaning of Article XX(d)".¹²⁶ The Panel added that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance, the Panel's conclusion would be that Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."¹²⁷ Thus, the Panel rejected Mexico's argument that "the challenged tax measures are *designed* to secure compliance by the United States with laws or regulations."¹²⁸

62. The Panel then examined whether the challenged measures would fall within the meaning of the terms "laws or regulations" in Article XX(d). The Panel underscored the link between the terms "to secure compliance" and the terms "laws and regulations" as set out in Article XX(d). It indicated that the same reasoning that applies in determining whether Mexico's measures are measures "to secure compliance" must also apply in determining whether the measures are "laws or regulations" 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

¹²⁴Panel 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.

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 DSU by "permit[ting] the suspension of concessions ... without DSB authorization and without any requirement to adhere to the rules established" in that provision.¹⁴²

¹³²Panel Report, para. 8.198.

¹³³*Ibid.*, para. 8.202.

¹³⁴*Ibid.*, para. 8.203.

¹³⁵*Ibid.*, para. 8.204.

¹³⁶Mexico's appellant's submission, para. 79 and footnote 49 thereto.

¹³⁷*Ibid.*, para. 126.

¹³⁸*Ibid.*, para. 129 ("*suficientemente amplia para incluir tratados internacionales, como el TLCAN*").

¹³⁹*Ibid.* ("*el empleo de los términos 'leyes' y 'reglamentos' en el resto del GATT de 1994 y en otros Acuerdos de la OMC no demuestran que los tales términos excluyen las reglas del derecho internacional*"). (footnote omitted)

¹⁴⁰United States' appellee's submission, para. 30 (referring to definitions in *Black's Law Dictionary*, (1990), p. 816).

¹⁴¹*Ibid.*, para. 37.

¹⁴²*Ibid.*, para. 38. (footnote omitted)

B. *Analysis*

1. Are Mexico's Measures Justified under Article XX(d)?

66. Article XX(d) of the GATT 1994 reads:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

67. The Appellate Body explained, in *Korea – Various Measures on Beef*, that two elements must be shown "[f]or a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX".¹⁴³ The first element is that "the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994", and the second is that "the measure must be 'necessary' to secure such compliance."¹⁴⁴ The Appellate Body also explained that "[a] Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."¹⁴⁵

68. In our view, the central issue raised in this appeal is whether the terms "to secure compliance with laws or regulations" in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member's obligations under an international agreement.

¹⁴³Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

¹⁴⁴*Ibid.*

¹⁴⁵*Ibid.* (referring to Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-16, DSR 1997:I, 323, at 335-337; and GATT Panel Report, *US – Section 337*, para. 5.27).

69. In order to answer this question, we consider it more helpful to begin our analysis with the terms "laws or regulations" in Article XX(d) (which we consider to be pivotal here) rather than to begin with the analysis of the terms "to secure compliance", as did the Panel. The terms "laws or regulations" are generally used to refer to domestic laws or regulations. As Mexico and the United States note, previous GATT and WTO disputes in which Article XX(d) has been invoked as a defence have involved domestic measures.¹⁴⁶ Neither disputes that the expression "laws or regulations" encompasses the rules adopted by a WTO Member's legislative or executive branches of government. We agree with the United States that one does not immediately think about international law when confronted with the term "laws" in the plural.¹⁴⁷ Domestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the origin of the rule is international, but the implementing instrument is a domestic law or regulation.¹⁴⁸ In our view, the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member.¹⁴⁹ Thus, the "laws or regulations" with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of *another* WTO Member under an international agreement.

70. The illustrative list of "laws or regulations" provided in Article XX(d) supports the conclusion that these terms refer to rules that form part of the domestic legal system of a WTO Member.¹⁵⁰ This list includes "[laws or regulations] relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices". These matters are typically the subject of domestic laws or regulations, even though some of these matters may also be the subject of

¹⁴⁶United States' appellee's submission, footnote 62 to para. 39; Mexico's response to questioning at the oral hearing.

¹⁴⁷Panel Report, footnote 419 to para. 8.193; United States' appellee's submission, para. 31.

¹⁴⁸In 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.

¹⁴⁹The European Communities notes that:

[i]t is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the] GATT [1994].

(European Communities' third participant's submission, para. 41)

¹⁵⁰The participants agree that the list in Article XX(d) is not exhaustive. (See Mexico's response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, p. C-61; United States' response to Question 31 posed by the Panel after the first Panel meeting; Panel Report, p. C-42; and United States' response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, pp. C-79-C-80)

international agreements. The matters listed as examples in Article XX(d) involve the regulation by a government of activity undertaken by a variety of economic actors (e.g., private firms and State enterprises), as well as by government agencies. For example, matters "relating to customs enforcement" will generally involve rights and obligations that apply to importers or exporters, and matters relating to "the protection of patents, trade marks and copyrights" will usually regulate the use of these rights by the intellectual property right holders and other private actors.¹⁵¹ Thus, the illustrative list reinforces the notion that the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member.¹⁵²

71. Our understanding of the terms "laws or regulations" is consistent with the context of Article XX(d). As the United States points out¹⁵³, other provisions of the covered agreements refer expressly to "international obligations" or "international agreements". For example, paragraph (h) of Article XX refers to "obligations under any intergovernmental commodity agreement". The express language of paragraph (h) would seem to contradict Mexico's suggestion that international agreements are implicitly included in the terms "laws or regulations".¹⁵⁴ The United States and China also draw our attention to Article X:1 of the GATT 1994¹⁵⁵, which refers to "[l]aws, regulations, judicial decisions and administrative rulings" and to "[a]greements affecting international trade policy which are in force between a government ... of any Member and the government ... of any other Member". Thus, a distinction is drawn in the same provision between "laws [and] regulations" and "international agreements". Such a distinction would have been unnecessary if, as Mexico argues, the terms "laws" and "regulations" were to encompass international agreements that have not been incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member. Thus, Articles X:1 and XX(h) of the GATT 1994 do not lend support to interpreting the terms "laws or

¹⁵¹European Communities' third participant's submission, para. 38.

¹⁵²The United States also points out that the terms "laws or regulations" are qualified by the requirement that they not be "inconsistent" with the GATT 1994. The United States explains that the word "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, when referring to treaty obligations, the WTO agreements use the word "conflict". (United States' appellee's submission, para. 33) In our view, this distinction supports the position that the terms "laws or regulations" refer to the rules that are part of the domestic legal system of a WTO Member, including international rules that have been incorporated or have direct effect in a particular domestic legal system.

¹⁵³United States' appellee's submission, para. 34.

¹⁵⁴If an international commodity agreement contains GATT-inconsistent provisions, Article XX(h) would still serve the purpose of justifying such an agreement, even if it could not be justified under Article XX(d).

¹⁵⁵United States' appellee's submission, para. 35; China's third participant's submission, para. 21.

regulations" in Article XX(d) as including the international obligations of a Member other than that invoking the provision.¹⁵⁶

72. We turn to the terms "to secure compliance", which were the focus of the Panel's reasoning and are the focus of Mexico's appeal. The terms "to secure compliance" speak to the types of measures that a WTO Member can seek to justify under Article XX(d). They relate to the design of the measures sought to be justified.¹⁵⁷ There is no justification under Article XX(d) for a measure that is not designed "to secure compliance" with a Member's laws or regulations. Thus, the terms "to secure compliance" do not expand the scope of the terms "laws or regulations" to encompass the international obligations of another WTO Member. Rather, the terms "to secure compliance" circumscribe the scope of Article XX(d).

73. Mexico takes issue with several aspects of the Panel's reasoning related to the interpretation of the terms "to secure compliance". We recall that, according to the Panel, "[t]he context in which the expression is used makes clear that 'to secure compliance' is to be read as meaning to enforce compliance."¹⁵⁸ The Panel added that, in contrast to enforcement action taken within a Member's legal system, "the effectiveness of [Mexico's] measures in achieving their stated goal—that of bringing about a change in the behaviour of the United States—seems ... to be inescapably uncertain."¹⁵⁹ Thus, the Panel concluded that "the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable".¹⁶⁰

74. It is Mexico's submission that the Panel erred in requiring a degree of certainty as to the results achieved by the measure sought to be justified.¹⁶¹ Mexico also asserts that the Panel, in its reasoning, incorrectly relied on the Appellate Body Report in *US – Gambling*.¹⁶² We agree with

¹⁵⁶The Panel noted that there are examples of international "regulations" within the WTO agreements themselves. The Panel cited, as examples, Article VI of the *Marrakesh Agreement Establishing the World Trade Organization* that refers to "regulations" to be adopted by the Ministerial Conference, and Article VII that refers to "financial regulations" to be adopted by the General Council and to the "regulations" of the GATT 1947. (Panel Report, footnotes 423 and 424 to para. 8.195) Article XXIV of the GATT 1994 also uses the term "regulations" when referring to rules applied by free trade areas or customs unions. Nevertheless, we agree with Japan that, in these instances, the context makes it clear that the regulations are international in character. (Japan's third participant's submission, paras. 17-19)

¹⁵⁷Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

¹⁵⁸Panel Report, para. 8.175.

¹⁵⁹*Ibid.*, para. 8.185.

¹⁶⁰*Ibid.*, para. 8.186. See also Mexico's appellant's submission, paras. 104-116.

¹⁶¹The European Communities and Japan agree with Mexico that the Panel erred in implying that whether a measure falls within the meaning of the phrase "to secure compliance" depends on the degree of certainty that the measure will achieve its intended results. (European Communities' third participant's submission, para. 26; Japan's third participant's submission, para. 10)

¹⁶²Panel Report, paras. 8.187-8.188 (referring to Appellate Body Report, *US – Gambling*, para. 317).

Mexico that the *US – Gambling* Report does not support the conclusion that the Panel sought to draw from it. The statement to which the Panel referred was made in the context of the examination of the "necessity" requirement in Article XIV(a) of the *General Agreement on Trade in Services*, and did not relate to the terms "to secure compliance". As the Appellate Body has explained previously, "the contribution made by the compliance measure to the enforcement of the law or regulation at issue"¹⁶³ is one of the factors that must be weighed and balanced to determine whether a measure is "necessary" within the meaning of Article XX(d). A measure that is not suitable or capable of securing compliance with the relevant laws or regulations will not meet the "necessity" requirement. We see no reason, however, to derive from the Appellate Body's examination of "necessity", in *US – Gambling*, a requirement of "certainty" applicable to the terms "to secure compliance".¹⁶⁴ In our view, a measure can be said to be designed "to secure compliance" even if the measure cannot be guaranteed to achieve its result with absolute certainty.¹⁶⁵ Nor do we consider that the "use of coercion"¹⁶⁶ is a necessary component of a measure designed "to secure compliance". Rather, Article XX(d) requires that the design of the measure contribute "to secur[ing] compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.

75. Nevertheless, while we agree with Mexico that the Panel's emphasis on "certainty" and "coercion" is misplaced, we consider that Mexico's arguments miss the point. Even if "international countermeasures" could be described as intended "to secure compliance", what they seek "to secure 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.

¹⁶³Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

¹⁶⁴We note that, at the request of the United States, the Panel clarified in the interim review phase that:

... its reasoning does not focus on whether the achievement of Mexico's objective through the measures at issue is certain or uncertain. Rather, the Panel considers that international countermeasures (as the ones allegedly imposed by Mexico) are intrinsically unable to *secure* compliance of laws and regulations. In contrast, national measures are, beyond particular factual considerations, usually in a position to achieve [] that objective, through the use of coercion, if necessary.

(Panel Report, para. 6.12) (original italics; underlining added)

¹⁶⁵The European Communities notes that "even within the domestic legal order of WTO Members, enforcement of laws and regulations may not simply be taken for granted, but may depend on numerous factors". (European Communities' third participant's submission, para. 28)

¹⁶⁶Panel Report, para. 8.178.

76. Mexico finds support for its interpretation in the Appellate Body's rulings in *US – Shrimp* and *US – Shrimp (Article 21.5 – Malaysia)*.¹⁶⁷ We fail to see how these rulings support Mexico's position. In those cases, the United States sought to justify its measures under Article XX(g) of the GATT 1994, and the measures at issue were domestic laws and regulations of the United States.¹⁶⁸ The reference to the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") was made in the context of the examination of whether the measures constituted "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" for purposes of the chapeau of Article XX.¹⁶⁹ The United States, in those cases, did not argue that its measures were justified under Article XX(d) because they were intended to secure compliance with the obligations of another Member under the Inter-American Convention. In the present case, Mexico seeks to justify its measures under paragraph (d) of Article XX, and not under paragraph (g). Moreover, Mexico not only refers to the NAFTA in relation to the chapeau of Article XX, but also seeks justification for its measures under paragraph (d) on the basis that they are allegedly intended to secure compliance with the United States' NAFTA obligations.

77. We observe, furthermore, that Mexico's interpretation of Article XX(d) disregards the fact that the GATT 1994 and the DSU specify the actions that a WTO Member may take if it considers that another WTO Member has acted inconsistently with its obligations under the GATT 1994 or any of the other covered agreements. As the United States points out¹⁷⁰, Mexico's interpretation of the terms "laws or regulations" as including international obligations of another WTO Member would logically imply that a WTO Member could invoke Article XX(d) to justify also measures designed "to secure compliance" with that other Member's WTO obligations. By the same logic, such action under Article XX(d) would evade the specific and detailed rules that apply when a WTO Member seeks to take countermeasures in response to another Member's failure to comply with rulings and recommendations of the DSB pursuant to Article XXIII:2 of the GATT 1994 and Articles 22 and 23 of the DSU.¹⁷¹ Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a *unilateral* determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994.

¹⁶⁷Mexico's appellant's submission, paras. 174-178.

¹⁶⁸See Appellate Body Report, *US – Shrimp*, paras. 2-6.

¹⁶⁹See *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.

¹⁷⁰United States' appellee's submission, para. 37.

¹⁷¹Mexico's interpretation would also undermine the limitations in paragraphs 3 and 4 of Article 22 as to the magnitude and the trade sectors in which such countermeasures could be taken. (*Ibid.*, paras. 37-38)

78. Finally, even if the terms "laws or regulations" do not go so far as to encompass the WTO agreements, as Mexico argues¹⁷², 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.¹⁷³ As we noted earlier¹⁷⁴, this is not the function of panels and the Appellate Body as intended by the DSU.¹⁷⁵

79. For these reasons, we agree with the Panel that Article XX(d) is not available to justify WTO-inconsistent measures that seek "to secure compliance" by another WTO Member with that other Member's international obligations. In sum, while we agree with the Panel's conclusion, several aspects of our reasoning set out above differ from the Panel's own reasoning. First, we conclude that the terms "laws or regulations" cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.¹⁷⁶ Second, we have found that Article XX(d) does not require the "use of coercion" nor that the measure sought to be justified results in securing compliance with absolute certainty. Rather, Article XX(d) requires that the measure be designed "to secure compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.¹⁷⁷ Finally, we do not endorse the Panel's reliance on the Appellate Body's interpretation in *US – Gambling* of the term "necessary" to interpret the terms "to secure compliance" in Article XX(d).¹⁷⁸

¹⁷²At the oral hearing, Mexico argued that the terms "laws or regulations" would not include the WTO agreements because the latter are *lex specialis*.

¹⁷³Article 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)

¹⁷⁴See *supra*, para. 56.

¹⁷⁵We note that, in its analysis, the Panel also referred to the negotiating history of the GATT 1947, and particularly to the rejection of a proposal presented by India during the negotiations on the International Trade Organization (the "ITO") Charter according to which Members would be permitted to justify, on a temporary basis, retaliatory measures under Article XX. (See Panel Report, para. 8.176 (referring to ITO Doc. E/PC/T/180 (19 August 1947), p. 97; and "Havana Charter for an International Trade Organization", United Nations Conference on Trade and Employment, Final Act and Related Documents (Lake Success, New York, April 1948), pp. 33-34)

¹⁷⁶See *supra*, paras. 69-71.

¹⁷⁷See *supra*, para. 74.

¹⁷⁸See *supra*, para. 74.

80. Therefore, we *uphold*, albeit for different reasons, the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994.

2. Mexico's Request to Complete the Analysis

81. Mexico requests the Appellate Body to complete the analysis by examining whether Mexico's measures are "necessary", within the meaning of Article XX(d) of the GATT 1994, and meet the requirements of the chapeau of that Article.¹⁷⁹ Mexico's request is premised on the Appellate Body reversing the Panel's conclusion that the measures are not designed "to secure compliance with laws or regulations" within the meaning of Article XX(d). We have upheld the Panel's conclusion that Mexico's measures do not constitute measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. Therefore, the premise on which Mexico's request is predicated is not fulfilled and, consequently, it is not necessary for us to complete the analysis as requested by Mexico.¹⁸⁰

3. Mexico's Claim under Article 11 of the DSU¹⁸¹

82. Mexico argues, "separately and in addition"¹⁸² to the previous errors, that the Panel failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, in finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."¹⁸³ Mexico argues that "[t]he evidence on the record demonstrates that the effects of the measures at issue have contributed to securing compliance in the circumstances of this case, by changing the dynamic of the NAFTA dispute and forcing the United States to pay attention to

¹⁷⁹Mexico's appellant's submission, para. 138.

¹⁸⁰See, for example, Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 74.

¹⁸¹In its Notice of Appeal, Mexico claimed that the Panel "failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico's request for determinations of fact, status and relevance of the NAFTA dispute between the parties." (Mexico's Notice of Appeal (attached as Annex I to this Report), para. 4 (referring to Panel Report, paras. 8.231 and 8.232) (footnote omitted)) Mexico also asserted that "in concluding that international countermeasures cannot qualify for consideration as measures designed to 'secure compliance' within the meaning of Article XX(d) of the GATT 1994, the Panel improperly increased the obligations of WTO Members and reduced the rights of Members under the covered agreements." (*Ibid.*, para. 5 (referring to Panel Report, paras. 8.181 and 8.186) (footnote omitted)) Mexico did not offer arguments to support these two claims in its appellant's submission. In response to questioning at the oral hearing, Mexico confirmed that it did not intend to pursue these claims further.

¹⁸²Mexico's appellant's submission, heading III.E ("*independiente y adicional*").

¹⁸³Panel Report, paragraph 8.186. See also, Mexico's Notice of Appeal, para. 3.

Mexico's grievances."¹⁸⁴ The United States submits that, contrary to Mexico's contention, the Panel did not "ignore" arguments or evidence submitted by Mexico.¹⁸⁵ The United States further explains that, in any event, Mexico's claim under Article 11 of the DSU "appears to be no more than a reiteration of its legal arguments that its ... measures are designed to 'secure compliance'".¹⁸⁶

83. In Section B.1 above, we held that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994. Therefore, Mexico's claim under Article 11 of the DSU is predicated on an interpretation of Article XX(d) of the GATT 1994 that we have found to be incorrect. Since Mexico's measures cannot be justified under Article XX(d) as a *matter of law*, we reject Mexico's claim under Article 11 of the DSU.

4. Conclusion

84. For the reasons set out above, we *uphold* the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

VI. Findings and Conclusions

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

- (a) upholds the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that, "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it";
- (b) upholds the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994;
- (c) rejects Mexico's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU, in finding, in paragraph 8.186 of the Panel Report, that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case"; and

¹⁸⁴Mexico's appellant's submission, para. 167 ("*Las pruebas en el expediente demuestran que las medidas en cuestión no están desprovistas de efectos que contribuyen a lograr la observancia en las circunstancias de este caso, cambiando la dinámica en la controversia derivada del TLCAN y forzando a Estados Unidos a prestar atención a los agravios de México*").

¹⁸⁵United States' appellee's submission, para. 118.

¹⁸⁶*Ibid.*

- (d) as a consequence, upholds the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

86. The Appellate Body recommends that the Dispute Settlement Body request Mexico to bring the measures that were found in the Panel Report to be inconsistent with the *General Agreement on Tariff and Trade 1994* into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 8th day of February 2006 by:

Yasuhei Taniguchi
Presiding Member

Merit E. Janow
Member

Giorgio Sacerdoti
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS308/10
6 December 2005

(05-5832)

Original: Spanish

**MEXICO – TAX MEASURES ON SOFT DRINKS AND
OTHER BEVERAGES**

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of the
Understanding on Rules and Procedures Governing the Settlement of
Disputes (DSU) and Rule 20(1) of the Working
Procedures for Appellate Review

The following notification dated 6 December 2005, from the delegation of Mexico, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Mexico hereby notifies its decision to appeal to the Appellate Body certain issues of law dealt with in the Report of the Panel on *Mexico – Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/R) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. Mexico seeks review by the Appellate Body of the Panel's legal conclusion that it has no discretion to decline to exercise jurisdiction in this case and its determination that, even if it had such discretion, the facts in the record do not justify a refusal by the Panel to exercise jurisdiction in this case. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations concerning Articles 3, 7, 11 and 19 of the DSU and Articles XXII and XXIII of the GATT 1994. These errors are contained, *inter alia*, in paragraphs 7.1 to 7.18, 8.215 to 8.230 and 9.1 of the Panel Report.

2. Mexico seeks review by the Appellate Body of the Panel's legal conclusion that the challenged tax measures are not justified under Article XX of the GATT 1994 as measures necessary to secure United States compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations concerning Article XX of the GATT 1994. Paragraphs 8.168 to 8.204 and 9.3 of the Panel Report, among others, contain such errors, including the following:

- (a) The Panel's interpretation and application of the expression "to secure compliance" in Article XX(d) of the GATT 1994 and its conclusion that it does not apply to measures taken by a Member in order to induce another Member to comply with obligations owed to it under a non-WTO treaty.¹
- (b) The Panel's conclusion that the challenged tax measures "are not designed to secure compliance" within the meaning of Article XX(d) of the GATT 1994 and are not eligible for consideration under Article XX(d) of the GATT 1994.²
- (c) The Panel's interpretation and application of the phrase "laws or regulations" contained in Article XX(d) of the GATT 1994 and its conclusion that this phrase does not cover international treaties such as NAFTA.³
- (d) The Panel's failure to consider whether the Mexican measures are "necessary" to secure compliance with a law that is not inconsistent with the provisions of the GATT 1994.⁴

3. Mexico seeks review by the Appellate Body, in the light of DSU Article 11, of the Panel's conclusion that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case".⁵ This conclusion does not reflect an objective approach to analysis of the available evidence on the effects of the Mexican measures, and is inconsistent with the treatment given by the Panel to relevant evidence. Accordingly, this conclusion is inconsistent with the Panel's duty to make an objective assessment of the matter before it.

4. Mexico considers that the Panel also failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico's request for determinations of fact, status and relevance of the NAFTA dispute between the parties.⁶

5. Mexico also considers that, in concluding that international countermeasures cannot qualify for consideration as measures designed to "secure compliance" within the meaning of Article XX(d) of the GATT 1994⁷, 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.

⁴ Panel Report, paragraphs 8.199 to 8.202.

⁵ Panel Report, paragraph 8.186.

⁶ Panel Report, paragraphs 8.231 and 8.232.

⁷ Panel Report, paragraphs 8.181 and 8.186.