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Appellate Body

EC MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)

AB-1997-4

Report of the Appellate Body

I. Introduction: Statement of the Appeal 1

II. Arguments of the Participants and Third Participants 4

A. *Claims of Error by the European Communities - Appellant* 4

1. Burden of Proof 4
2. Standard of Review 6
3. The Precautionary Principle 7
4. Objective Assessment of the Facts 7
5. Temporal Application of the *SPS Agreement* 8
6. Article 3.1 9
7. Article 3.3 10
8. Article 5.1 10
9. Article 5.5 13
10. Procedural Issues 15

B. *Arguments by the United States - Appellee* 16

1. Burden of Proof 16
2. Standard of Review 17
3. The Precautionary Principle 18
4. Objective Assessment of the Facts 18
5. Temporal Application of the *SPS Agreement* 18
6. Article 3.1 19
7. Article 3.3 19
8. Article 5.1 19
9. Article 5.5 20
10. Procedural Issues 21

C. *Arguments by Canada - Appellee* 23

1. Burden of Proof 23
2. The Precautionary Principle 23
3. Objective Assessment of the Facts 24
4. Temporal Application of the *SPS Agreement* 24
5. Article 3.1 24
6. Article 3.3 25
7. Article 5.1 25
8. Article 5.5 26
9. Procedural Issues 26

D. *Claims of Error by the United States - Appellant* 27

1. Article 2.2 27
2. Article 5.6 28

E. *Claims of Error by Canada - Appellant* 29

1. Article 5.6 29

F. *Arguments by the European Communities - Appellee* 30

1. Article 2.2 30
2. Article 5.6 31

G. *Arguments by the Third Participants* 32

1. Australia 32
2. New Zealand 34
3. Norway 34

III. Issues Raised in this Appeal 35

IV. Allocating the Burden of Proof in Proceedings Under the *SPS Agreement* 36

V. The Standard of Review Applicable in Proceedings Under the *SPS Agreement* 41

VI. The Relevance of the Precautionary Principle in the Interpretation of the *SPS Agreement* 46

VII. Application of the *SPS Agreement* to Measures Enacted Before 1 January 1995 49

VIII. The Requirement of Objective Assessment of the Facts by a Panel Under Article 11 of the DSU 51

A. *Evidence with Regard to MGA* 52
B. *Evidence with Regard to the Five Other Hormones* 53
C. *Evidence with Regard to the Issue of Control* 56
D. *Evidence on Article 5.5* 57

IX. Certain Procedures Adopted by the Panel 58

A. *The Selection and Use of Experts* 58
B. *Additional Third Party Rights to the United States and Canada* 59
C. *The Difference Between Legal Claims and Arguments* 62

X. The Interpretation of Articles 3.1 and 3.3 of the *SPS Agreement* 64

A. *The Meaning of "Based On" as Used in Article 3.1 of the SPS Agreement* . . . 64
B. *Relationship Between Articles 3.1, 3.2 and 3.3 of the SPS Agreement* 68
C. *The Requirements of Article 3.3 of the SPS Agreement* 69

XI. The Reading of Articles 5.1 and 5.2 of the *SPS Agreement*: Basing SPS Measures on a Risk Assessment 72

A. *The Interpretation of "Risk Assessment"* 72

1. Risk Assessment and the Notion of "Risk" 73
2. Factors to be Considered in Carrying Out a Risk Assessment 75

B. *The Interpretation of "Based On"* 76

1. A "Minimum Procedural Requirement" in Article 5.1? 76
2. Substantive Requirement of Article 5.1 - Rational Relationship Between an SPS Measure and a Risk Assessment 77

XII. The Reading of Article 5.5 of the *SPS Agreement*: Consistency of Levels of Protection and Resulting Discrimination or Disguised Restriction on International Trade 86

A. *General Considerations: the Elements of Article 5.5* 86
B. *Different Levels of Protection in Different Situations* 88
C. *Arbitrary or Unjustifiable Differences in Levels of Protection* 89
D. *Resulting in Discrimination or a Disguised Restriction on International Trade* 95

XIII. Appeals by the United States and Canada: Articles 2.2 and Article 5.6 of the *SPS Agreement* 101

XIV. Findings and Conclusions 102

WORLD TRADE ORGANIZATION
APPELLATE BODY

EC Measures Concerning Meat and Meat Products (Hormones)

European Communities, *Appellant/Appellee*

United States, *Appellant/Appellee*
Canada, *Appellant/Appellee*

Australia, New Zealand and Norway, *Third Participants*

AB-1997-4

Present:

Feliciano, Presiding Member
Ehlermann, Member
Matsushita, Member

I. Introduction: Statement of the Appeal

1. The European Communities, the United States and Canada appeal from certain issues of law and legal interpretations in the Panel Reports, *EC Measures Concerning Meat and Meat Products (Hormones)*.[1] These two Panel Reports, circulated to Members of the World Trade Organization ("WTO") on 18 August 1997, were rendered by two Panels composed of the same three persons.[2] These Panel Reports are similar, but they are not identical in every respect. The Panel in the complaint brought by the United States was established by the Dispute Settlement Body (the "DSB") on 20 May 1996. On 16 October 1996, the DSB established the Panel in the complaint brought by Canada. The European Communities and Canada agreed, on 4 November 1996, that the composition of the latter Panel would be identical to the composition of the Panel established at the request of the United States.

2. The Panel dealt with a complaint against the European Communities relating to an EC prohibition of imports of meat and meat products derived from cattle to which either the natural hormones: oestradiol-17β, progesterone or testosterone, or the synthetic hormones: trenbolone acetate, zeranol

[1]Complaint by the United States, WT/DS26/R/USA, (the "US Panel Report") and Complaint by Canada, WT/DS48/R/CAN, (the "Canada Panel Report").

[2]As the composition of both Panels was identical, we will refer to the Panels as "the Panel".

or melengestrol acetate ("MGA"), had been administered for growth promotion purposes. This import prohibition was set forth in a series of Directives of the Council of Ministers that were enacted before 1 January 1995. Those Directives were:

1. Council Directive 81/602/EEC of 31 July 1981 ("Directive 81/602")[3];
2. Council Directive 88/146/EEC of 7 March 1988 ("Directive 88/146")[4]; and
3. Council Directive 88/299/EEC of 17 May 1988 ("Directive 88/299").[5]

3. Directive 81/602 prohibited the administration to farm animals of substances having a hormonal action and of substances having a thyrostatic action. It also prohibited the placing on the European market of both domestically produced and imported meat and meat products derived from farm animals to which such substances had been administered. Two exceptions to this prohibition were provided for. One exception covered substances with an oestrogenic, androgenic or gestagenic action when used for therapeutic or zootechnical purposes and administered by a veterinarian or under a veterinarian's responsibility. The other exception related to three natural hormones (oestradiol - 17β, progesterone and testosterone) and two synthetic hormones (trenbolone acetate and zeranol) used for growth promotion purposes if allowed under the regulations of the Member States of the European Economic Community ("EEC"), until a detailed examination of the effects of these substances could be carried out and until the EEC could take a decision on the use of these substances for growth promotion. The sixth hormone involved in this appeal, MGA, was not included in the second exception; it was covered by the general prohibition concerning substances having a hormonal or thyrostatic action.

4. Seven years later[6], Directive 88/146 was promulgated prohibiting the administration to farm animals of the synthetic hormones: trenbolone acetate and zeranol, for any purposes, as well as the administration of the natural hormones: oestradiol - 17β, progesterone and testosterone, for growth promotion or fattening purposes. This Directive permitted Member States of the EEC to authorize,

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[3]Official Journal, No. L 222, 7 August 1981, p. 32.

[4]Official Journal, No. L 70, 16 March 1988, p. 16.

[5]Official Journal, No. L 128, 21 May 1988, p. 36.

[6]It should be noted that on 31 December 1985 the Council of Ministers adopted Directive 85/649/EEC prohibiting the use in livestock farming of certain substances having a hormonal action, Official Journal, No. L 382, 31 December 1985, p. 228. This Directive prohibited the use of all the hormones (except MGA, the use of which had been previously prohibited) for growth promotion purposes and established more detailed provisions concerning authorized therapeutic uses. This Directive was challenged in the Court of Justice of the European Communities, which annulled it on procedural grounds in its Judgment of 23 February 1988, [1988] E.C.R. 855. Shortly afterwards, the European Commission submitted to the Council a proposal for a substantively identical Directive, which the Council adopted on 7 March 1988 as Directive 88/146/EEC.

under specified conditions, the use of the three natural hormones for therapeutic and zootechnical purposes. Directive 88/146 explicitly prohibited both the intra-EEC trade and the importation from third countries of meat and meat products obtained from animals to which substances having oestrogenic, androgenic, gestagenic or thyrostatic action had been administered. Trade in meat and meat products derived from animals treated with such substances for therapeutic or zootechnical purposes was allowed only under certain conditions. Those conditions were set out in Directive 88/299.

5. Effective as of 1 July 1997, Directives 81/602, 88/146 and 88/299 were repealed and replaced with Council Directive 96/22/EC of 29 April 1996 ("Directive 96/22").[7] This Directive maintains the prohibition of the administration to farm animals of substances having a hormonal or thyrostatic action. As under the previously applicable Directives, it is prohibited to place on the market, or to import from third countries, meat and meat products from animals to which such substances, including the six hormones at issue in this dispute, were administered. This Directive also continues to allow Member States to authorize the administration, for therapeutic and zootechnical purposes, of certain substances having a hormonal or thyrostatic action. Under certain conditions, Directive 96/22 allows the placing on the market, and the importation from third countries, of meat and meat products from animals to which these substances have been administered for therapeutic and zootechnical purposes.

6. The Panel circulated its Reports to the Members of the WTO on 18 August 1997. The US Panel Report and the Canada Panel Report reached the same conclusions in paragraph 9.1:

> (i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
>
> (ii) The European Communities, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirement contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
>
> (iii) The European Communities, by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements of Article 3.1 of that Agreement.

[7]Official Journal, No. L 125, 23 May 1996, p. 3.

In both Reports, the Panel recommended in paragraph 9.2:

> ... that the Dispute Settlement Body requests the European Communities to bring its measures in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures.

7. On 24 September 1997, the European Communities notified the DSB of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed two notices of appeal[8] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). Pursuant to Rule 21 of the *Working Procedures*, the European Communities filed an appellant's submission on 6 October 1997. On 9 October 1997, the United States and Canada filed appellants' submissions pursuant to Rule 23(1) of the *Working Procedures*. On 20 October 1997, the United States and Canada each filed an appellee's submission pursuant to Rule 22 of the *Working Procedures* and the European Communities filed its own appellee's submission pursuant to Rule 23(3) of the *Working Procedures*. On the same day, Australia, New Zealand and Norway filed separate third participants' submissions in accordance with Rule 24 of the *Working Procedures*.

8. The oral hearing was held on 4 and 5 November 1997. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing this appeal. The participants and third participants also gave oral concluding statements.

II. Arguments of the Participants and Third Participants

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

1. Burden of Proof

9. The European Communities argues that the Panel erred in its allocation of the burden of proof in this dispute in three respects. In the view of the European Communities, the Panel erred on the

[8]WT/DS26/9, 25 September 1997, and WT/DS48/7, 25 September 1997.

issue of burden of proof under the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*") in general; in allocating the burden of proof under Article 3.3 of the *SPS Agreement*; and in allocating the burden of proof under Article 5.1 of the *SPS Agreement*.

10. In respect of the issue of burden of proof under the *SPS Agreement* in general, the European Communities argues that the Panel erred in finding that the burden of proof under the *SPS Agreement* rests on the Member imposing a measure.[9] According to the European Communities, none of the general considerations invoked by the Panel supports the view that special rules on the burden of proof should be applied in proceedings concerning the *SPS Agreement*.

11. As to the allocation of the burden of proof under Article 3.3 of the *SPS Agreement*, the European Communities disagrees with the Panel's finding that Article 3.3 constitutes an exception to the general obligation, contained in Article 3.1, to base measures on international standards, and that the burden of proof under Article 3.3 is therefore on the responding party.[10] The European Communities argues that the *SPS Agreement* expressly recognizes that a Member has the right to choose an appropriate level of sanitary and phytosanitary protection, and that Article 3.3 lays down specific conditions governing the exercise of that right in those cases where an international standard exists. According to the European Communities, Article 3.1 does not provide a "general obligation" to be read in isolation, but presents one of three options available to a Member when an international standard exists.

12. With regard to the burden of proof under Article 5.1 of the *SPS Agreement*, the European Communities opposes the Panel's finding that Canada and the United States had met their burden of presenting a *prima facie* case of inconsistency with Article 5.1, in respect of importation of meat treated with the MGA hormone.[11] The European Communities notes that Canada and the United States stated that they had conducted risk assessments and had authorized MGA for growth promotion, but refused to provide scientific evidence and information, claiming their studies were proprietary and confidential in nature. The European Communities believes that the Panel has fundamentally erred in law by condoning the refusals by Canada and the United States to submit all studies available.

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[9]US Panel Report, paras. 8.52-8.54; Canada Panel Report, paras. 8.55-8.57.

[10]US Panel Report, para. 8.86; Canada Panel Report, para. 8.89.

[11]US Panel Report, para. 8.253; Canada Panel Report, para. 8.256.

2. Standard of Review

13. The European Communities claims that the Panel erred in law[12] by not according deference to the following aspects of the EC measures: first, the decision of the European Communities to set and apply a level of sanitary protection higher than that recommended by the Codex Alimentarius (the "Codex") for the risks arising from the use for growth promotion of the hormones in dispute; second, the EC's scientific assessment and management of the risk from the hormones at issue, and third, the EC's adherence to the precautionary principle and its aversion to accepting any increased carcinogenic risk.

14. It is submitted by the European Communities that WTO panels should adopt a deferential "reasonableness" standard when reviewing a Member's decision to adopt a particular science policy or a Member's determination that a particular inference from the available data is scientifically plausible. To the European Communities, the Panel in this case imposed its own assessment of the scientific evidence.

15. The European Communities asserts that GATT 1947 panel reports rejected a *de novo* standard of review in relation to fact-finding[13], and that this approach has been maintained by panels established under the DSU.[14] It is contended that the "reasonable deference standard of review" has been given expression in the *Marrakesh Agreement Establishing the World Trade Organization*[15] (the "*WTO Agreement*") in Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). The European Communities

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[12]US Panel Report, paras. 8.124, 8.127, 8.133, 8.134, 8.145, 8.146, 8.194, 8.199, 8.213 and 8.255; Canada Panel Report, paras. 8.127, 8.130, 8.136, 8.137, 8.148, 8.149, 8.197, 8.202, 8.216 and 8.258.

[13]The European Communities refers to: Panel Report, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, ADP/87; Panel Report, *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 28 April 1994, SCM/153; Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, adopted 27 April 1993, BISD 40S/205; Panel Report, *United States - Measures Affecting Imports of Softwood Lumber from Canada*, adopted 27-28 October 1993, BISD 40S/358, Panel Report, *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117, 24 February 1994, unadopted; Panel Report, *EC - Anti-Dumping Duties on Audio Tapes in Cassettes originating in Japan*, ADP/136, 28 April 1995, unadopted; and Panel Report, *United States - Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products originating in France, Germany and the United Kingdom*, SCM/185, 15 November 1994, unadopted.

[14]The European Communities refers to: Panel Report, *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*United States - Underwear*"), adopted 25 February 1997, WT/DS24/R; Panel Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses* ("*United States - Shirts and Blouses*"), adopted 23 May 1997, WT/DS33/R.

[15]Done at Marrakesh, Morocco, 15 April 1994.

considers that the principle of reasonable deference is applicable in all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants, and that therefore, the Panel applied an inappropriate standard of review in the present case.

3. The Precautionary Principle

16. The European Communities submits that the Panel erred in law in considering that the precautionary principle was only relevant for "provisional measures" under Article 5.7 of the *SPS Agreement*.[16] The precautionary principle is already, in the view of the European Communities, a general customary rule of international law or at least a general principle of law, the essence of which is that it applies not only in the management of a risk, but also in the assessment thereof. It is claimed that the Panel therefore erred in stating that the application of the precautionary principle "would not override the explicit wording in Articles 5.1 and 5.2 [of the *SPS Agreement*]", and in suggesting that that principle might be in conflict with those Articles. The European Communities asserts that Articles 5.1 and 5.2 and Annex A.4 of the *SPS Agreement* do not prescribe a particular type of risk assessment, but rather simply identify factors that need to be taken into account. Thus, these provisions do not prevent Members from being cautious when setting health standards in the face of conflicting scientific information and uncertainty.

4. Objective Assessment of the Facts

17. The European Communities argues that the Panel failed to make an objective assessment of the facts and therefore did not comply with its obligations under Article 11 of the DSU. The Panel, it is alleged, disregarded or distorted the evidence with regard to both the MGA and the other five hormones at issue supplied by the Panel's experts, as well as the scientific evidence presented by the European Communities. In support of this contention, the European Communities submits that the Panel has manifestly distorted the views of both Dr. Lucier[17] and Dr. André.[18] According to the European Communities, contrary to what the Panel found, the evidence provided to the Panel by the majority of its own scientific experts indicated that there was a real risk of adverse effects arising from the use of the hormones at issue. It is also claimed that the Panel manifestly distorted the scientific

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[16]US Panel Report, paras. 8.157 and 8.158; Canada Panel Report, paras. 8.160 and 8.161.

[17]See, in particular, US Panel Report, footnote 331; Canada Panel Report, footnote 437.

[18]See, in particular, US Panel Report, footnote 348; Canada Panel Report, footnote 455.

evidence by considering that the 1995 European Communities Scientific Conference on Growth Promotion in Meat Production (the "1995 EC Conference") amounted to a risk assessment in the sense of Articles 5.1 and 5.2. The distinction made by the Panel between general studies on the health risks associated with hormones and specific studies addressing the health risks of residues in food of hormones used for growth promotion purposes was, in the view of the European Communities, devised by the Panel for the sole purpose of enabling it to conclude that the Monographs of the International Agency for Research on Cancer ("IARC")[19] are not relevant as a risk assessment in this case. This, the European Communities asserts, amounts to a distortion of relevant scientific evidence. The European Communities also alleges that the Panel violated Article 11 of the DSU by discarding several articles and opinions of individual scientists invoked by the European Communities.

18. With regard to the problems relating to the control of the correct use of the hormones, the European Communities contends that it submitted convincing specific evidence to the Panel, but that the Panel either failed to take this evidence into account or failed to summarize it properly in the Panel Report. Finally, the Panel allegedly ignored the arguments made by the European Communities as to why the situations compared by the Panel under Article 5.5 were not comparable. In rejecting the six reasons advanced by the European Communities as to why the distinction in the levels of sanitary protection between carbadox and olaquindox, on the one hand, and the hormones at issue in this dispute, on the other, is not arbitrary or unjustifiable, the European Communities argues that the Panel failed to take into account the evidence before it.

5. Temporal Application of the *SPS Agreement*

19. The European Communities states that the Panel's conclusion that the *SPS Agreement* applies to measures that were enacted before the entry into force of the *SPS Agreement* but that did not cease to exist after that date, is too sweeping.[20] According to the European Communities, the *SPS Agreement* shows a different intention in some of its provisions, at least if these provisions are interpreted in the way proposed by the Panel. Articles 5.1 to 5.5 require that certain preparatory actions and procedures be followed before a measure is adopted and obligations of this kind are exhausted once the measures

[19]The 1987 Monographs of the IARC on the Evaluation of Carcinogenic Risks to Humans, Supplement 7 (the "1987 IARC Monographs").

[20]US Panel Report, paras. 8.25 and 8.26; Canada Panel Report, paras. 8.28 and 8.29.

under consideration are adopted. The European Communities, therefore, concludes that the *SPS Agreement* does not apply to the procedure for the elaboration of the EC measures at issue in this dispute.

6. Article 3.1

20. The European Communities submits that the Panel erred in interpreting the term "based on" in stating that Article 3.2 "equates" measures "based on" international standards with measures which "conform to" such standards.[21] The European Communities asserts that these terms differ in their meaning.

21. It is pointed out by the European Communities that Article 3 employs the term "based on" in paragraphs 1 and 3, whereas it uses the term "conform to" in paragraph 2. Also, Article 2 distinguishes between "based on" (paragraph 2) and "conform to" (paragraph 4). This differing language in consecutive paragraphs of different articles cannot be accidental.

22. To the European Communities, a measure may deviate – but not substantially – from the content of a recommendation of the Codex and still be considered as "based on" that recommendation for the purposes of Article 3.1. However, what constitutes a "substantial" deviation is not defined in the *SPS Agreement*. The submission of the European Communities is that Article 3 of the *SPS Agreement* accomplishes its object of furthering international harmonization by allowing Members to choose one of three alternative options. First, a Member may opt to conform its sanitary measures to the Codex recommendations, in accordance with Article 3.2. Second, a Member may wish merely to "base [its] sanitary ... measures on international ... recommendations", in accordance with Article 3.1, instead of conforming to such recommendations. Third, a Member may decide, in accordance with Article 3.3, to establish sanitary measures which provide a "higher level of sanitary protection" than would measures "based on" the Codex recommendations. As noted above[22], it is firm view of the European Communities that these three options are of equal standing and that Article 3.3 cannot be qualified as an exception to Article 3.1. The European Communities therefore objects to the Panel's interpretation of and conclusions concerning Article 3.1.

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[21]US Panel Report, para. 8.72; Canada Panel Report, para. 8.75.

[22]Para. 11 of this Report.

7. Article 3.3

23. The European Communities contends that the Panel's finding that whatever the difference might be between the two exceptions in Article 3.3, a sanitary measure can only be justified under this provision if it is consistent with the requirements contained in Article 5[23], in effect reduces the two alternative conditions in the first sentence of Article 3.3 to "mere surplusage". According to the European Communities, Article 3.3 defines the concept of the first condition ("scientific justification") in the footnote thereto without making a direct reference to Article 5, paragraphs 1 to 8, as it does with respect to the second condition ("as a consequence of choosing a higher level of protection"). The absence in the footnote to Article 3.3 of language referring to Articles 5.1-5.8 is in itself sufficient indication of the intention of the drafters to qualify the application of Article 5 in the case of the first condition. Thus, the European Communities asserts, the plain meaning and structure of Article 3.3 imply that the risk assessment requirements of Article 5 apply only if the second of these two alternative conditions is met.

8. Article 5.1

24. The European Communities contests the Panel's finding that Article 5.1 requires a Member imposing an SPS measure to submit evidence that it "took into account" a risk assessment when it enacted or maintained a measure[24], since neither the ordinary meaning of the words "based on", in context, nor the object and purpose of Article 5, suggest a "minimum procedural requirement" under Article 5.1.

25. The European Communities contends that to require concrete evidence in the preamble of the EC Directives or some other evidence that the European Communities actually considered the scientific studies in enacting or maintaining the measures at issue is unreasonable and arbitrary, and runs counter to the object and purpose of Article 5 and the *SPS Agreement*. There is no legal authority for the Panel's interpretation that risk assessment cannot be on-going and therefore no reason for restricting risk assessment to "old evidence". The European Communities asserts that there is a legitimate SPS goal of providing an opportunity for potentially affected Members to produce scientific evidence relevant to particular measures, and of ensuring consideration of that evidence by the Member adopting the

[23]US Panel Report, para. 8.83; Canada Panel Report, para. 8.86.

[24]US Panel Report, para. 8.113; Canada Panel Report, para. 8.116.

SPS measure. Therefore, the European Communities submits that all parties and third parties should have the right to present "new" relevant evidence to the Panel.

26. With regard to the Panel's findings on the consistency of the import prohibition with the substantive requirements of Article 5.1, the European Communities claims that the Panel erred in its interpretation of Article 5.1 in six separate respects. First, the Panel was incorrect in distinguishing between studies that specifically address the hormones for growth promotion purposes, such as the 1982 Report of the EC Scientific Veterinary Committee[25] (the "Lamming Report") and the JECFA Reports[26], and studies which relate to hormones in general, such as the 1987 IARC Monographs and articles and opinions of individual scientists referred to by the European Communities.[27] The Panel's assumption that such a distinction makes a qualitative difference in terms of risk assessment is wrong, and the distinction is arbitrary. The European Communities argues that Articles 5.1 and 5.2 neither prescribe risk assessment techniques nor specify the requirements of a risk assessment.

27. Second, the Panel's view of Article 5.1 as imposing a substantive obligation on Members to conform their SPS measures to the conclusions reflected in the JECFA Reports or the reports of other scientific committees is manifestly incorrect. The "scientific basis" of SPS measures cannot be confined to the formalized conclusions of committees called upon to review or analyze the risks a substance may pose. Those conclusions are just one of the elements to be taken into account. The "available scientific evidence", referred to in Article 5.2, includes both generally held or majority scientific views as well as minority, or dissenting, scientific opinion (often first expressed by individual scientists). The European Communities also controverts the Panel's finding that the reports of the European Parliament are "non-scientific"[28], and contends that this finding is manifestly wrong, certainly as regards the so-called Pimenta Report.[29]

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[25]1982 Report of the EC Scientific Veterinary Committee, Scientific Committee for Animal Nutrition and the Scientific Committee for Food on the basis of the Report of the Scientific Group on Anabolic Agents in Animal Production.

[26]Evaluation of certain veterinary drug residues in food: Thirty-second Report of the Joint FAO/WHO Expert Committee on Food Additives, Technical Report Series 763 (World Health Organization, 1988); and the evaluation of certain veterinary drug residues in food: Thirty-fourth Report of the Joint FAO/WHO Expert Committee on Food Additives, Technical Report Series 788 (World Health Organization, 1989).

[27]US Panel Report, paras. 8.127 and 8.130; Canada Panel Report, paras. 8.130 and 8.133.

[28]US Panel Report, para. 8.109; Canada Panel Report, para. 8.112.

[29]European Parliament, Session Documents, Report drawn up on behalf of the Committee of Inquiry into the Problem of Quality in the Meat Sector, Rapporteur: Mr. Carlos Pimenta, Document A2-11/891/PARTS A-B, March 1989 ("Pimenta Report").

28. Third, the Panel's interpretation that "based on" within the meaning of Article 5.1 means "in conformity with" is mistaken.[30] The European Communities states that reports of scientific committees frequently say practically nothing or very little on some of the factors indicated in Articles 5.1 and 5.2. To the European Communities, Article 5.1 is designed to compel Members to have some plausible scientific rationale as the "basis" for their sanitary measures, but not to conform their measures absolutely to the technical and scientific conclusions of the reports.

29. Fourth, the European Communities contends that the "most fundamental error of interpretation" of the Panel relates to the concept of risk and risk assessment.[31] "Risk" does not mean "harm" or "adverse effect". "Risk", for the purposes of the *SPS Agreement*, is the "potential" for the harm or adverse effects arising and, therefore, the mere possibility of risk arising suffices for the purposes of Articles 5.1 and 5.2. A risk evaluated to be one in a million is sufficient justification. If there is a potential for adverse effects (no matter how small), then there is, according to the European Communities, a risk. The concept of risk in the *SPS Agreement* is a qualitative, not a quantitative concept. Any identified increase in cancer (whether quantitative or qualitative) must be sufficient to constitute a risk against which WTO Members are entitled to protect their population.

30. Fifth, the European Communities disputes the Panel's finding that the problem of control is irrelevant to risk assessment[32], as contrary to common sense and to the express language of Article 5.2 and Annex C of the *SPS Agreement* clarifies. The European Communities also points out that the condition "in accordance with good veterinary practice" is part of the content of the Codex recommendation, and that effective control is necessary to ensure that the hormones at issue are administered in accordance with good practice. Evaluation of any potential risk arising from lack of observance of good practice is an inherent part of the risk assessment exercise. Moreover, it was for the European Communities, and not for the Panel, to determine whether the control measures of an exporting Member are adequate to achieve the EC's appropriate level of sanitary protection. The Panel has disregarded the EC's arguments relating to the practical and technical difficulties that are specific to control of the hormones at issue. The European Communities also protests as an error in law the Panel's conclusion that banning the use of a substance does not necessarily offer better protection of human health than other means of merely regulating its use.

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[30]US Panel Report, para. 8.117; Canada Panel Report, para. 8.120.

[31]As reflected in para. 8.124 of the US Panel Report and para. 8.127 of the Canada Panel Report.

[32]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

31. Finally, the European Communities submits that the Panel was manifestly wrong in finding that a risk assessment must be carried out for each individual substance.[33] Nowhere in the *SPS Agreement*, and in particular in Articles 5.1 and 5.2, is there language requiring a risk assessment "for each individual substance". In the view of the European Communities, there is nothing to prevent classes or categories of substances from being assessed together if this is scientifically justified.

9. Article 5.5

32. The European Communities argues that the Panel erred in its interpretation of Article 5.5. With respect to the first element, namely, the existence of different levels of protection in different situations, the Panel erroneously interpreted Article 5.5 in holding that situations involving the same health risk or substance are comparable situations for the purposes of Article 5.5.[34] The European Communities submits that it is inappropriate to compare the level of protection relating to hormones used for growth promotion purposes with the level of protection relating to naturally-occurring hormones. Science and the regulatory practices of Members do not treat man-made risks, such as the risks created by hormones used for growth promotion, and naturally-occurring risks, such as those arising from the presence of hormones in meat, milk, cabbage or broccoli, in the same way. The *SPS Agreement* applies only to man-made risks because the naturally-occurring hormones in meat and other foodstuffs are not "contaminants and toxins" within the meaning of the *SPS Agreement*. Furthermore, the European Communities submits that, contrary to what the Panel found[35], there is no difference, let alone a significant difference, in the EC level of protection against naturally-occurring hormones and its level of protection against added hormones. The EC measures provide for the same level of protection against naturally-occurring hormones and added hormones, namely, the risk determined by nature.

33. In respect of the second element of Article 5.5, namely, the arbitrary or unjustifiable nature of distinctions in levels of protection, the European Communities contends that the Panel has erroneously assumed that the only factors relevant to determining what is an arbitrary or unjustifiable distinction are "scientific" factors. Other factors, such as public perception of what is dangerous and of what level of risk is acceptable, and the benefit, if any, to be gained from shouldering a risk, must also be

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[33]US Panel Report, para. 8.257; Canada Panel Report, para. 8.260.

[34]US Panel Report, para. 8.176; Canada Panel Report, para. 8.179.

[35]US Panel Report, paras. 8.191 and 8.212; Canada Panel Report, paras. 8.194 and 8.215.

relevant. Moreover, the European Communities argues that, contrary to what the Panel found[36], the distinction between the level of protection adopted in respect of the hormones at issue when used for growth promotion and the level of protection adopted with respect to carbadox and olaquindox is not arbitrary or unjustifiable.

34. As to the third element of Article 5.5, namely discrimination or a disguised restriction on international trade resulting from the distinction in the levels of protection, the European Communities objects to the Panel's finding that it was sufficient to demonstrate "the significance of the difference in levels of protection combined with the arbitrariness thereof".[37] Article 5.5 makes a resultant "discrimination or a disguised restriction on international trade" an additional element beyond arbitrary and unjustifiable distinctions in the levels of protection a Member considers appropriate. The European Communities does not consider the approach developed by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*[38] ("*Japan - Alcoholic Beverages*") and invoked by the Panel in this case as appropriate for the very different problem in determining discrimination (between countries) and a disguised restriction of trade in a regulatory regime designed to protect human health.

35. Furthermore, it is argued by the European Communities that Article 5.5 must be interpreted together with Article 2.3 of the *SPS Agreement*. Accordingly, "discrimination" in Article 5.5 means "discrimination between States where identical or similar conditions prevail". The Panel ignored Article 2.3 and assumed that discrimination can be between substances, risks and levels of protection. This assumption cannot be correct since otherwise the term "discrimination" would add nothing to "arbitrary and unjustifiable distinctions", in the view of the European Communities.

36. The European Communities stresses that there is no import ban for beef as such and that the restriction applies only to non-conforming products. This is the inevitable consequence of any SPS measure, and cannot be enough to establish a "disguised restriction on international trade". The European Communities continued to import the same amount of meat after the ban as before, and the prohibition of hormones for growth promotion has no effect on the surpluses of beef. The suggestion of the Panel that the reduction of beef surpluses in the European Communities might have been a secondary motive, is, in any event, not sufficient to establish the discrimination or disguised restriction

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[36]US Panel Report, para. 8.238; Canada Panel Report, para. 8.241.

[37]US Panel Report, para. 8.184; Canada Panel Report, para. 8.187.

[38]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

on international trade contemplated in Article 5.5. Finally, the European Communities submits that the fact that 70% of the bovine meat produced in the United States and Canada is from cattle to which hormones have been administered for growth promotion is no indication of a disguised restriction on trade.

10. Procedural Issues

37. The European Communities asserts that a number of procedural decisions taken by the Panel were unfair and require review by the Appellate Body. The European Communities objects to the Panel's view that it need consider the EC's procedural objections only where the European Communities could make a "precise claim" of prejudice.[39] The Panel should have asked itself whether its procedural decisions were consistent with the DSU, not whether the European Communities could make a precise claim of prejudice. It is asserted by the European Communities that the Panel committed a legal procedural error in refusing to accept the scientific assessments of the European Communities, declining to set up an expert review group, and proceeding to decide itself a scientific matter on which the Panel had no expertise. The Panel's decision to receive a range of opinions from individual experts[40] deprived the European Communities of the procedural guarantees provided for expert review groups in the DSU. By following this procedure, the Panel put itself in a position to choose freely between different scientific opinions. The European Communities contends that the selection of scientific experts by the Panel violated Articles 11, 13.2 and Appendix 4 of the DSU as well as Article 13.2 of the *SPS Agreement*. The European Communities objects to the selection of two experts on the grounds that one of them was a national of a party or third party and had links with the pharmaceutical industry, while the other was a member of the Codex/JECFA group that had produced the report on the use of hormones in animal growth promotion and was the "rapporteur" of this study. Further, according to the European Communities, these two experts lacked expertise in the field.

38. The European Communities also alleges that the Panel erred in refusing to request that Canada and the United States provide the studies on which their authorities had based their decisions to authorize the use of MGA for growth promotion. In the view of the European Communities, the Panel had a duty to carry out an objective assessment of the facts, and declining to request the complainants to produce the evidence on which they based their own domestic decisions is not compatible with this

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[39]US Panel Report, paras. 8.14-8.15; Canada Panel Report, paras. 8.18-8.19.

[40]US Panel Report, para. 8.7; Canada Panel Report, para. 8.7.

duty. Moreover, Article 18.2 of the DSU provides safeguards for the protection of confidential information. Thus, the allegedly confidential nature of the information on MGA should have been no obstacle to its production and use in the proceeding. The European Communities also asserts that the Panel based the main part of its reasoning concerning Article 5.5 of the *SPS Agreement* on a claim that the complainants had *not* made, i.e. that there was a difference of treatment between artificially-added, or exogenous, natural and synthetic hormones when used for growth promotion purposes and the naturally-present endogenous hormones in untreated meat and other foods (such as milk, cabbage, broccoli or eggs). In the view of the European Communities, not only is this "claim" wrong in law and in fact, but the Panel also violated the DSU in relying on it especially since the United States expressly protested against the Panel's use of such a "claim". The European Communities asserts that panels are not entitled to make findings going beyond what has been requested by the parties.

39. The European Communities submits further that the Panel took a number of decisions granting "extended third party rights" to Canada and the United States -- and not to other third parties -- that are not justified by Article 9.3, and are contrary to Articles 7.1, 7.2, 18.2 and 10.3 of the DSU as well as the terms of reference of the Panel. These decisions were: first, to give access to all of the information submitted in the United States' proceeding to Canada; second, to give access to all the information submitted in the Canadian proceeding to the United States; third, to hold a joint meeting with the scientific experts; and fourth, to invite the United States to observe and make a statement at the second substantive meeting in the proceeding initiated by Canada.

B. *Arguments by the United States - Appellee*

1. Burden of Proof

40. With regard to the allocation of the burden of proof under Article 3.3 of the *SPS Agreement*, the United States refers to the Appellate Body Report in *United States - Shirts and Blouses*[41] and argues that, like Articles XX and XI:2(c)(i) of the GATT 1994, Article 3.3 of the *SPS Agreement* is not a positive rule establishing an obligation in itself. It is in the nature of an affirmative defence, and the Panel was therefore correct in finding that the burden of proof under Article 3.3 rests on the defending party. As to the burden of proof under Article 5.1 of the *SPS Agreement*, the United States contends that the European Communities, in complaining that Canada and the United States did not provide

[41]Adopted 23 May 1997, WT/DS33/AB/R, pp. 14 and 16.

their confidential information concerning MGA, misses the point that the Panel had to determine whether the European Communities had based its import ban on a risk assessment.

2. Standard of Review

41. The United States submits that the deferential "reasonableness" standard of review advocated by the European Communities is without support in the text of either the DSU or the *SPS Agreement*. The United States observes that, under Article 5.1, the Panel was called upon to determine if the EC ban was "based on" an assessment, as appropriate to the circumstances, of the risks to human health. Such a determination does not require a panel to conduct its own risk assessment or substitute its own judgement regarding risks, but only to determine if the measure is "based on" a risk assessment. Under Article 2.2, the question for a panel is not whether it would have come to a different conclusion "based on" the evidence, but rather whether the scientific evidence submitted by the Member maintaining the measure is "sufficient" as a basis for that measure. The United States believes that in this sense, the European Communities is correct in asserting that a panel is not to conduct a *de novo* review of the scientific basis of the measure.

42. The United States argues, however, that nothing in the *SPS Agreement* or the *WTO Agreement* requires a Panel to defer to the Member maintaining the SPS measure. In examining measures under the *Agreement on Textiles and Clothing* (the "ATC"), which, like the *SPS Agreement*, does not provide for a particular standard of review, two previous panels found that it would not be appropriate either to apply a *de novo* standard of review or to grant undue deference to the administrative findings of national authorities.[42] The United States cautions that the GATT panel reports cited by the European Communities, involving anti-dumping and countervailing duty disputes, do not support the existence of a deferential standard of review in the *SPS Agreement*. Those GATT panel reports involved situations where national authorities had taken anti-dumping or countervailing duty measures pursuant to detailed national legislation and procedures mandated by the *Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "*Tokyo Round Anti-Dumping Code*"). According to the United States, the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* shows that Members have yet to decide if the standard of review set out in Article 17.6 of the *Anti-Dumping Agreement*

[42]The United States refers to: Panel Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/R; and Panel Report, *United States - Shirts and Blouses*, adopted 23 May 1997, WT/DS33/R.

is capable of general application. The United States asserts that the European Communities is mistaken in arguing that this standard of review applies to the *SPS Agreement*.

3. The Precautionary Principle

43. In the view of the United States, the claim of the European Communities that there is a generally-accepted principle of international law which may be referred to as the "precautionary principle" is erroneous as a matter of international law. The United States does not consider that the "precautionary principle" represents a principle of customary international law; rather, it may be characterized as an "approach" -- the content of which may vary from context to context. The *SPS Agreement* does recognize a precautionary approach; indeed, Article 5.7 permits the provisional adoption of SPS measures even where the relevant scientific evidence is insufficient. Thus, the United States believes that there is no need to invoke a "precautionary principle" in order to be risk-averse since the *SPS Agreement*, by its terms, recognizes the discretion of Members to determine their own level of sanitary protection. The European Communities does not explain how "the precautionary principle" affects the requirements in the *SPS Agreement* that a measure be "based on" scientific principles and a risk assessment, and not maintained without sufficient scientific evidence. The EC's invocation of a "precautionary principle" cannot create a risk assessment where there is none, nor can a "principle" create "sufficient scientific evidence" where there is none.

4. Objective Assessment of the Facts

44. According to the United States, the European Communities improperly requests the Appellate Body to review the Panel's factual findings to determine whether they were either "inadequate" or "not objective", and thus inconsistent with Article 11 of the DSU. The United States submits that, according to Article 17.6 of the DSU, factual findings are clearly beyond review by the Appellate Body. Furthermore, the United States contends that the European Communities has not shown either improper influence or conflict of interest that might warrant consideration of the objectivity of the Panel.

5. Temporal Application of the *SPS Agreement*

45. The United States argues that the European Communities, in claiming that Articles 5.1 to 5.5 do not apply to SPS measures adopted before the *SPS Agreement* entered into force, has misread the *SPS Agreement*. There is no support for this claim in the text, context or negotiating history of the

SPS Agreement. If the position of the European Communities were accepted, this would, in the view of the United States, leave a gaping exception to the disciplines of the *SPS Agreement*.

6. Article 3.1

46. According to the United States, since the EC measures are not "based on" the Codex standards, even under the broad test of "based on" proposed by the European Communities, there is no need for the Appellate Body to address the alleged difference between measures "based on" international standards and measures that "conform to" international standards. The United States recognizes that Article 3 of the *SPS Agreement* uses the two different terms in Articles 3.1 and 3.2, but suggests that whether any theoretical difference between those two terms would have any meaning in practice is a question for another case.

7. Article 3.3

47. The United States believes that the European Communities is incorrect in claiming that its ban need not be "based on" a risk assessment under Article 5.1 in order to qualify under Article 3.3 as a measure for which there is a "scientific justification" for departing from an international standard. A risk assessment provides the necessary "examination and evaluation of available scientific information" required in the footnote to Article 3.3. The European Communities provides no explanation why the "relevant provisions" of the *SPS Agreement*, referred to in that footnote, do not include Article 5.1. The context of the footnote to Article 3.3 includes the definition of "risk assessment" in Annex A of the *SPS Agreement*. According to the United States, the fact that Articles 5.1 and 5.2 relate to conducting a risk assessment make it clear that these Articles are "relevant provisions" of the *SPS Agreement* for purposes of the footnote, and that any doubt regarding the applicability of Article 5.1 is removed by the last sentence of Article 3.3.

8. Article 5.1

48. The United States maintains that the Panel's finding that there is a "procedural requirement" inherent in Article 5.1 is simply a common sense reading of Article 5.1. It would be difficult to see how a measure is "based on" a risk assessment if the Member did not even know of the existence of the risk assessment or never considered the risk assessment in enacting or maintaining the measure. Furthermore, the Panel Report should not be read as imposing a rigid requirement to be satisfied only

by referring to the risk assessment in the preamble to the measure. Such a reference, the United States contends, is simply one means of demonstrating that a risk assessment was taken into account.

49. The Panel was correct, according to the United States, in finding that in order that a measure may be "based on" a risk assessment, the scientific principles underlying the measure must reflect the scientific conclusions reached by the scientists conducting the risk assessment. The United States submits that the European Communities did not, at any time during the panel proceedings, produce a risk assessment identifying any risk. In the case of the hormone MGA, it is even more obvious that the EC ban is not "based on" a risk assessment.

50. With regard to the problems of control of correct use of the hormones, the United States submits that the Panel correctly characterized the argument of the European Communities as being a general statement that there is no guarantee of 100 percent compliance with any system of laws. Such a generalized concern is not an adequate basis for the EC ban. Furthermore, there is no evidence that the control of the hormones at issue is more difficult than the control of other veterinary drugs (the use of which is allowed), or that control is more difficult under a regime where hormones are allowed for growth promotion under specific conditions than under a current regime where they are banned. During the oral hearing, the United States observed that the scientific studies indicated that the hormones are safe when used in accordance with good practice. According to the United States, these studies do not address the question of whether the hormones at issue are unsafe when not used in accordance with good practice.

51. As to whether a separate risk assessment is necessary for each particular substance, the United States submits that under Article 5.1, the European Communities must base its ban with respect to MGA on an "evaluation, as appropriate to the circumstances, of the potential for adverse effects on human health arising from the presence of residues of MGA in meat ...". The European Communities provided no such evaluation of MGA. The scientific studies that the European Communities referred to deal with a general class of compounds, and do not deal specifically with MGA.

9. Article 5.5

52. The United States supports the finding that the situation involving carbadox and the situation involving the six hormones at issue are different situations which can nonetheless be compared for the purposes of Article 5.5. To the United States, the Panel was correct in finding that the EC distinction

in the levels of protection involving carbadox and the level of protection involving the hormones at issue was arbitrary and resulted in a disguised restriction on international trade. In coming to that conclusion, the Panel found that the hormones at issue, banned in the European Communities, were used for growth promotion purpose in the bovine meat sector where the European Communities wanted to limit supplies and was arguably less concerned with international competitiveness while carbadox, allowed in the European Communities, is used for growth promotion purposes in the pork meat sector where the European Communities has no domestic surpluses and where international competitiveness is a high priority. The United States claims that this issue relates to factual findings that are not reviewable by the Appellate Body.

10. Procedural Issues

53. The United States asks the Appellate Body to dismiss each of the procedural claims raised by the European Communities. The appeal by the European Communities on these issues, the United States claims, raises a threshold question as to whether, and if so, under what circumstances, the procedures employed by the Panel during the proceeding could be considered to be issues of law covered in the Panel Report or legal interpretations developed by the Panel within the meaning of Article 17.6 of the DSU. The United States asserts that the European Communities has not pointed to any textual basis for its arguments, nor to any past practice under the GATT 1947 or the *WTO Agreement*. The United States submits that, to sustain a claim that a panel's handling of procedural issues was inconsistent with the DSU, a party to a dispute must have raised objections in a timely manner during the panel proceeding, if feasible. In the view of the United States, any other response to procedural objections will weaken the authority of panels and destabilize the dispute settlement system. It would also be fundamentally unfair to permit a party to wait and see what the outcome of a panel proceeding is and make its procedural objections only when it is too late for the panel to address them. The United States urges that the objections raised by the European Communities should be rejected to the extent that they were not first made to the Panel.

54. With respect to the EC's objection concerning the Panel's selection of experts, the United States observes that during the panel proceeding, the European Communities did not object to the participation of two experts who are not only nationals of the Member States of the European Union, but are also employed by institutions of such Member States. As to the EC's objection to the alleged links of one of the experts to the pharmaceutical industry, the United States asserts that the European Communities did not question these links at the time this expert's name was raised by the Panel, even though the

European Communities expressed similar concerns at that time with regard to two other scientists proposed by the Panel.

55. Turning to the issue of whether a procedural objection should be based on a "precise claim" of prejudice, the United States believes that while a Panel clearly has the duty of following the relevant rules of the DSU and the covered agreements, a party seeking the reversal or a modification of a procedural ruling should assume the responsibility of providing concrete reasons and legal arguments justifying its objection. Otherwise, every procedural ruling of a Panel could be subject to objections posed for unspecified reasons.

56. The United States asserts that the Panel's decision to consult individual experts, instead of convening an expert review group, was consistent with the DSU and the *SPS Agreement*. The European Communities itself concedes that Article 13 of the DSU and Article 11.2 of the *SPS Agreement* are permissive, and not mandatory, provisions. The United States contends that the Panel was not required to convene an expert review group, either under the terms of Article 13 of the DSU or Article 11.2 of the *SPS Agreement*. If the Panel had convened an expert review group, the rules and procedures of Appendix 4 of the DSU would have been applicable. Since the Panel did not convene such a group, the Panel's decision not to follow the rules and procedures of Appendix 4 was completely consistent with the DSU and was within the discretion accorded to panels in their procedural decisions.

57. The United States contends that the Panel's harmonization of the two panel proceedings did not impair the rights of defence of the European Communities. The use of the same panelists for both proceedings accorded a procedural advantage to the European Communities. According to the United States, rather than having two meetings with each of the two separate Panels, the European Communities was able to have four sessions with the same Panel. The European Communities willingly agreed to have the same panelists in both proceedings.

58. With respect to the issue of extended third party rights, the United States submits that the European Communities failed to make to the Panel the detailed objections it made for the first time in its appellant's submission. There is no reason why, if one panel may grant such rights in one dispute, another panel may not also grant such rights in another dispute.[43] The United States believes that there were strong reasons to provide it with extended third party rights in the Canadian panel proceeding.

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[43]The United States refers to Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/R/USA ("*European Communities - Bananas*").

The United States asserts that the European Communities is mistaken in asserting that the Panel's grant of extended third party rights gave the complainants access to documents. Both the United States and the European Communities made public their submissions and statements to the Panel in the United States' panel proceeding, and therefore Canada already had access to all these documents.

C. *Arguments by Canada - Appellee*

1. Burden of Proof

59. On the matter of allocation of the burden of proof under the *SPS Agreement* in general, Canada contends that the Panel adopted the reasoning provided by the Appellate Body in *United States - Shirts and Blouses*.[44] As to the allocation of the burden of proof under Article 3.3 of the *SPS Agreement*, Canada insists that the Panel's findings are correct, although it would be more accurate to hold that "... the burden of proof under Article 3.1 shifts to the defending party to show either that the measure in dispute is consistent with the obligation in Article 3.1, or to invoke the exception under 3.1 and show that it meets the conditions of that exception".[45] Should the Appellate Body reverse or modify the Panel's findings on the burden of proof, Canada submits that in any event, Canada has established a *prima facie* case of violation. With regard to the burden of proof under Article 5.1 of the *SPS Agreement*, Canada believes that it had provided sufficient evidence concerning the import ban on meat treated with MGA to establish a *prima facie* case.

2. The Precautionary Principle

60. The Panel did not take a position on whether the "precautionary principle" constituted part of the body of international law. Rather, in Canada's view, the Panel acknowledged that the "precautionary principle" was reflected in Article 5.7 of the *SPS Agreement,* and correctly held that the "precautionary principle" could not override Articles 5.1 and 5.2, or any other provision of the *SPS Agreement*. Canada also regards the issue of whether the "precautionary principle" is "built into" other provisions of the *SPS Agreement* as irrelevant in this appeal. Moreover, the European Communities has not explained what is meant by the "precautionary principle" having been "built into" other provisions of the *SPS Agreement*, and how this could in any way affect the conclusions of the Panel. The

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[44]Adopted 23 May 1997, WT/DS33/AB/R.

[45]Canada's appellee's submission, para. 59.

"precautionary principle" should be characterized as the "precautionary approach" because it has not yet become part of public international law. Canada considers the precautionary approach or concept as an *emerging* principle of international law, which may in the future crystallize into one of the "general principles of law recognized by civilized nations", within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*.

3. Objective Assessment of the Facts

61. Canada submits that many of the claims made by the European Communities in its appellant's submission purport to be claims relating to errors of law but are in reality claims alleging errors of fact. The Appellate Body made it clear in its Report in *European Communities - Bananas*[46], that factual findings are, pursuant to Article 17.6 of the DSU, beyond review by the Appellate Body.

4. Temporal Application of the *SPS Agreement*

62. Canada argues that the distinction drawn by the European Communities between provisions of the *SPS Agreement* that include the terms "maintain" or "apply", and others that do not, is not sustainable. This dichotomy presented by the European Communities would mean that measures in existence on 1 January 1995 are indefinitely exempt from the disciplines of Articles 5.1 and 5.5, but it is hardly credible that the Members intended to exempt them. Other covered agreements contain specific provisions dealing with temporal issues, therefore, non-application of provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, would have been dealt with expressly in the text of the *SPS Agreement*. In any event, the EC measures at issue in this dispute include EC Directives 96/22/EC and 96/23/EC, which were adopted after the *WTO Agreement* entered into force.

5. Article 3.1

63. Canada maintains that the EC's argument that Article 3.1 does not constitute a "general obligation", but is one of three options available to Members when Codex recommendations exist, is incorrect. Article 3.1 sets out a positive obligation for Members to base their SPS measures on international standards, guidelines or recommendations. The words of Article 3.1 do not describe

[46]Adopted 25 September 1997, WT/DS27/AB/R.

three "options". If the drafters of the agreement had intended such a meaning, they would have said so. Canada supports the Panel's conclusion that the terms "conform to" and "based on" are "co-extensive". Even if the Appellate Body accepts the view that "conforms to" is narrower in scope than "based on", Article 3.1 does not present a second "option", as argued by the European Communities. A measure that "conforms to" an international standard would also be "based on" that standard.

6. Article 3.3

64. The key element of the footnote to Article 3.3 is that it requires an examination and evaluation of available scientific information. Since the *SPS Agreement* defines a risk assessment as: "the *evaluation* of the potential for adverse effects on human ... health ...", the "examination and evaluation of scientific information" in the footnote to Article 3.3 refers to a risk assessment. A Member cannot, in Canada's view, determine that the relevant international standards are not sufficient to achieve its appropriate level of sanitary protection unless the Member does an evaluation of that risk (i.e. a risk assessment), taking into account available scientific evidence.

7. Article 5.1

65. Canada considers that the Panel's interpretation of Article 5.1 accords with the ordinary meaning of the words in their context. If a measure is "founded on" a risk assessment then there must be some evidence that the measure was built upon that foundation. Such a requirement would not amount to "freezing the scientific record", since the Panel made clear that it was looking for evidence that a risk assessment was taken into account when the EC measures were established *or at any later point in time*. In Canada's view, the Panel's reading of Article 5.1 is sound, and accords with the basic obligations set out in Article 2.2 that a measure must not be maintained without sufficient scientific evidence. If the scientific conclusions reflected in the EC measures do not conform with any of those reached in the risk assessments, then the scientific foundation for the measure clearly does not come from those risk assessments.

66. Canada submits that in defining what is a risk assessment, the European Communities focuses on the word "potential" to the exclusion of "evaluation". In doing so, the European Communities has stopped the process at identifying an adverse effect without carrying out the evaluation of the risk, i.e. performing a risk assessment.

67. At the oral hearing, when asked about the need for a separate risk assessment of each individual substance, Canada opined that one can use characteristics of chemical families as a starting point for exploring whether something might pose a hazard, but it is then necessary to go on and do a full evaluation of that chemical in order to determine whether it in fact poses a hazard.

8. Article 5.5

68. According to Canada, the scope of "different situations" referred to in Article 5.5 is at least as broad as the Panel found. The limited scope suggested by the European Communities conflicts with the ordinary meaning of "different situations". Canada also submits that in the light of the object and purpose of the *SPS Agreement* and the context of Article 5.5, there is no reason to limit the scope of comparison between levels of protection for human health. In Canada's view, the Panel correctly found that the European Communities had not justified the distinctions in its purported levels of protection. The Panel did not "confine" the range of factors to be taken into consideration; the Panel considered all the arguments the European Communities had provided, but found them wanting. Canada contests the argument of the European Communities that the significance of the difference in levels of protection is no guide to the significance of trade effects. No measure could be more trade restrictive than an import ban.

9. Procedural Issues

69. Canada submits that all of the procedural rulings made by the Panel were fair to all the parties, did not result in any prejudice or injustice, and were within the Panel's jurisdiction and discretion. In particular, Canada believes that the Panel acted within its jurisdiction in making comparisons and findings with respect to the levels of protection for endogenous natural hormones, even if those precise arguments on Article 5.5 of the *SPS Agreement* were not made by Canada or the United States. Article 11 of the DSU does not limit the mandate of the Panel by compelling it to use only the arguments made by the parties. A panel is not prevented from making an objective finding that does not correspond to either party's argument.

70. Concerning the Panel's decision to consult experts in their individual capacities, rather than as an expert review group, Canada submits that the process chosen by the Panel ensured that all the views of the experts advising the Panel were brought to the Panel's attention. Far from prejudicing the European Communities, this process gave the European Communities an opportunity to elicit evidence

to support its arguments from any of the Panel's experts. While Article 11.2 of the *SPS Agreement* provides that in disputes involving scientific or technical issues, a Panel should seek advice from experts chosen by the Panel in consultation with the parties to the dispute, this provision does not require the Panel to accept all expert advice without scrutiny. Canada submits that, to the contrary, the Panel had no authority to delegate its fact-finding duty to the experts in such a manner.

71. It is also submitted by Canada that the objection of the European Communities to the nationality of the experts selected to assist the Panel is without merit. Canada is unaware that the European Communities raised any such objection during the Panel's selection of experts. In Canada's view, by suggesting an expert who was a national of one of its Member States, the European Communities waived its right to object to the other scientists on the basis of their nationality. The Panel's decisions on "extended third party rights" were proper exercises of the Panel's discretion, and are not inconsistent with the DSU. The European Communities made references to materials that it had placed before the US Panel, but did not provide those materials in the Canada Panel proceeding. Thus, according to Canada, rather than prejudice the EC case, the Panel allowed all the submissions by the European Communities before the US Panel to be considered by the Canada Panel. Canada maintains that the decision of the Panel to convene a joint meeting of the experts was also within the discretion of the Panel. The European Communities has failed to demonstrate that it suffered any substantive prejudice as a result of this decision. In Canada's view, pursuant to Article 11 of the *SPS Agreement,* the Panel was entitled to seek advice from experts chosen by the Panel in consultation with the parties, but was under no obligation to convene a meeting with the experts, either severally or jointly.

D. *Claims of Error by the United States - Appellant*

1. Article 2.2

72. In its capacity as appellant, the United States submits that the Panel erred because, having made all of the findings necessary to find that the EC measure was inconsistent with Article 2.2, it did not take the final step and declare the import ban to be inconsistent with Article 2.2.[47] Article 2.2 requires the European Communities to have sufficient scientific evidence to support its measure. Since the Panel methodically listed and reviewed all of the scientific evidence presented by the European Communities, and in respect of each piece of evidence made a factual finding that the evidence did

[47]US Panel Report, para. 8.271.

not support the EC measure, the United States submits that the Panel should have come to the legal conclusion that the EC import prohibition is maintained without sufficient scientific evidence. In the view of the United States, there was no need for the Panel to determine exactly how much scientific evidence is "sufficient" for purposes of Article 2.2. The Panel found that the European Communities had presented no evidence to support its ban; "no evidence" cannot be considered to meet the threshold of "sufficient evidence".

73. In justifying why it made no finding under Article 2.2, the Panel stated that Articles 3 and 5 provide for more specific obligations than the "basic rights and obligations" set out in Article 2. According to the United States, Articles 3 and 5 of the *SPS Agreement* do not necessarily provide for more specific rights and obligations than all of the "basic rights and obligations" set out in Article 2. Neither Article 3 nor Article 5 says how much evidence is necessary to support an SPS measure. Article 2.2 establishes that quantum of evidence in requiring that measures not be maintained "without sufficient scientific evidence". The United States submits, therefore, that nothing in the text of Articles 2, 3 or 5 indicate that all of the obligations in Article 2 are subsumed under the provisions of Articles 3 and 5.

2. Article 5.6

74. It is urged by the United States that the Panel erred[48] in failing to make a finding under Article 5.6 of the *SPS Agreement*, and that the Panel's findings on Article 5.5 are sufficient to establish that the EC ban is inconsistent with Article 5.6 of the *SPS Agreement*. The United States notes that the European Communities prohibits the use of the natural hormones to promote growth, while having no limits on the residues of these exact same substances either naturally-present or used for therapeutic or zootechnical purposes. Since the European Communities accepts the residues of these naturally-occurring hormones in meat as safe, then the EC ban is, in the view of the United States, more trade restrictive than required.

75. The United States also notes that the European Communities prohibits the use of the three synthetic hormones at issue, while permitting the use of similar hormones (the three natural hormones) for therapeutic and zootechnical purposes as well as the use of carbadox, another synthetic compound,

[48]US Panel Report, para. 8.247.

for growth promotion purposes. In the view of the United States, the European Communities has, in each instance, chosen the most trade restrictive approach (a ban on trade) with respect to the six hormones for growth promotion purposes. The United States argues that the European Communities could permit residues of these hormones used for growth promotion purposes at the same levels that it permits for other purposes and still achieve its level of protection. The fact that the European Communities permits these levels for these other purposes demonstrates that similarly treating residues from growth promotion would be reasonably available to the European Communities and would be technically and economically feasible. Permitting these levels for growth promotion purposes would also be significantly less trade restrictive than the current EC ban.

76. The Panel found that "no scientific evidence is available which concludes that an identifiable risk arises from the use of any of the hormones at issue for growth promotion purposes in accordance with good practice."[49] In the view of the United States, this finding is sufficient in itself to establish that the EC ban is inconsistent with Article 5.6. If there is no identifiable risk from the use of these hormones for growth promotion in accordance with good practice, then the EC ban cannot be necessary to achieve a level of protection from an identified risk. The ban is then, by definition, more trade restrictive than required to achieve the appropriate level of sanitary protection by the European Communities.

E. *Claims of Error by Canada - Appellant*

1. Article 5.6

77. Canada states that its appeal is designed to safeguard its right to rely on its arguments presented to the Panel with respect to Article 5.6, in the event that the Appellate Body decides to modify or reverse the Panel's findings with respect to Articles 3.1, 5.1 or 5.5 of the *SPS Agreement*. Canada asserts that the EC measures are inconsistent with Article 5.6 of the *SPS Agreement*. Canada submits that according to the wording of paragraph 5 of Annex A, Article 5.5 and the object and purpose of the *SPS Agreement*, if there is no scientific evidence of an identifiable risk, there is no basis on which to adopt a measure to achieve a level of sanitary protection under the *SPS Agreement*, except as provided in Article 5.7.

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[49]US Panel Report, para. 8.134.

78. In Canada's view, if a Member could adopt a level of protection and implement a sanitary measure even if it did not provide scientific evidence of an identifiable risk, no effect could be given to the obligation contained in Article 5 to base measures on an assessment of risks. This approach would undermine the wording and object and purpose of the *SPS Agreement*. Canada notes that the Panel found that the European Communities had not provided any scientific evidence of an identifiable risk related to the hormones at issue when used for growth promotion purposes in accordance with good practice.[50] If there is no scientific evidence of an identifiable risk, and therefore no basis on which to adopt a measure to achieve a level of sanitary protection under the *SPS Agreement*, except for Article 5.7, then by definition, no SPS measure could be adopted that would not be more trade restrictive than required. In Canada's conclusion, applying the Panel's findings with respect to the six hormones at issue to the requirements of Article 5.6, the EC measures are more trade restrictive than required, and inconsistent with Article 5.6.

F. *Arguments by the European Communities - Appellee*

1. Article 2.2

79. The European Communities questions whether the statement of the Panel regarding Article 2.2 amounts to an issue of law covered in the Panel Report or a legal interpretation developed by the Panel in the sense of Article 17.6 of the DSU. Although the Panel declined to rule on Article 2.2 because of a legal interpretation reached by the Panel regarding the relationship between Articles 2 and 5 of the *SPS Agreement*, the refusal by the Panel to rule on Article 2.2 places this statement outside the scope of appellate review. The Panel did not address the substantive requirements of Article 2.2, and has not made the necessary findings on whether the scientific evidence submitted by the European Communities is sufficient. The European Communities agrees with the United States that nothing in the text of Articles 2, 3 and 5 of the *SPS Agreement* indicates that all of the obligations set out in Article 2 are subsumed under the provisions of Articles 3 and 5. From the factual, procedural and substantive points of view, the questions that need to be considered under Article 2.2 are different from those examined by the Panel under Articles 3.1, 5.1, 5.2 and 5.5 of the *SPS Agreement*. It appears to the European Communities that there is no "sufficient basis" in the Panel Report for the Appellate Body to rule on the claims of the United States in respect of Article 2.2. Moreover, the United States bases its claims on certain paragraphs of the Panel Report that are founded on a manifest

[50]Canada Panel Report, paras. 8.165 and 8.264.

misunderstanding or clear distortion of the facts, or inadequate reasoning by the Panel, as explained by the European Communities in its own appeal.

80. The European Communities submits that, should the Appellate Body examine the applicability of Article 2.2 of the *SPS Agreement,* it should also examine the applicability of Article 5.7, which is expressly referred to in Article 2.2. The European Communities believes that its measures are consistent with Article 2.2 of the *SPS Agreement.*

81. The European Communities observes that in its appeal, the United States does not discuss what constitutes "sufficient" scientific evidence. Since the concepts of "risk" and "risk assessment" in the *SPS Agreement* are not quantitative, but qualitative concepts, the word "sufficient" also cannot be taken to refer to the quantitative, but rather to the qualitative, aspects of the scientific evidence used by the regulatory authorities of a Member. The use of the words "scientific principles" in the same Article reinforces the view that Article 2.2 and the *SPS Agreement* in general do not require sanitary measures to be "based on" the "best" scientific evidence or the "weight" of available scientific evidence. The European Communities submits, therefore, that the real question is not whether the sanitary measure is "based on" the "best" science or the "preponderance" of science or whether there is conflicting science. Rather, the question is only whether the government maintaining a measure has a scientific basis for that measure.

2. Article 5.6

82. The European Communities also questions whether the statements of the Panel regarding Article 5.6 amount to an issue of law covered in the Panel Report or a legal interpretation developed by the Panel, for purposes of Article 17.6 of the DSU. Although the Panel's refusal to rule on Article 5.6 rests on a certain view of the Panel regarding the relationship between Articles 2 and 5 of the *SPS Agreement*, such a refusal places the matter outside the scope of appellate review. The European Communities submits that the Panel did not apply the substantive requirements of Article 5.6, and did not make the necessary factual findings that: first, the EC measures are more trade restrictive than required to achieve the EC's level of protection; secondly, there is another measure reasonably available taking into account technical and economic feasibility; and thirdly, this other measure both achieves the EC's level of sanitary protection and is significantly less trade restrictive. Finally, the European Communities argues that Canada and the United States base their claims on certain paragraphs

of the Panel Report that are founded on a manifest misunderstanding or clear distortion of the facts or inadequate reasoning by the Panel, as the European Communities has explained in its appeal.

83. The European Communities is convinced that the EC measures are consistent with Article 5.6 of the *SPS Agreement*. According to the European Communities, the objective is to ensure that consumers are not exposed to any residues of hormones used for growth promotion purposes. The European Communities acknowledges that some hormones are present naturally and cannot be avoided. It also acknowledges that some hormones are administered to cattle for therapeutic and zootechnical purposes, purposes which are unavoidable and beneficial. However, the European Communities has decided that the exposure of its population to hormones above this level should be avoided, and that in particular, there should be a zero level of tolerance for hormones used for growth promotion purposes.

84. The European Communities has considered some possible alternatives to the prohibition of imports of bovine meat containing residues of hormones administered for growth promotion: first, the application of Maximum Residue Limits ("MRLs") to such meat; second, the application of some kind of control to all imports of meat to determine whether hormones had been administered for growth promotion purposes; and third, reliance on the exporters labelling their meat to indicate whether hormones had been administered for growth promotion purposes. According to the European Communities, however, none of the above alternative measures would achieve the specified level of protection.

G. *Arguments by the Third Participants*

1. Australia

85. Australia considers that the Panel erred in law in its general interpretations concerning the burden of proof under the *SPS Agreement*[51], and supports the arguments put forward by the European Communities. However, it is also contended by Australia that paragraphs 8.54 and 8.58 of the Canada Panel Report and paragraphs 8.51 and 8.55 of the US Panel Report present correct interpretations of the burden of proof and that the Panel has, in general, followed these correct interpretations in its legal reasoning and findings.

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[51]US Panel Report, paras. 8.52-8.54; Canada Panel Report, paras. 8.55-8.57.

86. The conclusion reached by the Panel with regard to the temporal application of the *SPS Agreement* is also supported by Australia. However, Australia also recognizes the concerns raised by the European Communities and agrees that there is nothing in the *SPS Agreement* that could be interpreted to mean that measures already in place at the time the *SPS Agreement* came into force are necessarily inconsistent simply because the "preparatory and procedural obligations" provided in Article 5 may not have been met. On the other hand, Australia admits that nothing in the *SPS Agreement* suggests that such measures can escape application of key provisions, such as Articles 5.1 and 5.2.

87. The Panel's interpretation that the *SPS Agreement* "equates" the terms "conform to" and "based on" ignores, in Australia's view, the ordinary meaning of these terms in their context and fails to give effect to all the terms of the *SPS Agreement*. The Panel has ignored the significant fact that the *SPS Agreement* uses the expression "conform to" in both Article 3.2 and Article 2.4, i.e. in the two situations where rebuttable presumptions are established that certain measures are consistent with the *SPS Agreement* and/or the GATT 1994. Australia believes that the issue of whether a particular measure is "based on" an international standard, or "conforms to" such a standard, is something which can only be determined on a case-by-case basis.

88. The Panel failed to give effect to all the terms of the *SPS Agreement* by its treatment of the two options provided in Article 3.3. According to Australia, the Panel has ignored the differences in the wording of the two options, and their explicit identification as alternatives by the use of the word "or" in Article 3.3. This interpretation has resulted in the Panel concluding that both alternatives mean that a measure can only be justified under Article 3.3 if it meets the requirements of Article 5. In Australia's view, while a Member's determination under the first of these options must be "based on" an examination and evaluation of available scientific information "in conformity with" the relevant provisions of the *SPS Agreement*, there remains an important distinction between the two options which the Panel failed to recognize.

89. Australia also considers as erroneous the Panel's interpretation of "risk", specifically its use of the term "identifiable risk", which has no basis in the text of the *SPS Agreement*. What the Panel is required to examine under Articles 5.1 and 5.2 is whether the EC measure is "based on" a risk assessment, and not whether there was an "identifiable risk".

90. In discussing whether there is a need for a separate risk assessment for each individual substance, Australia draws particular attention to the wording of Article 5.1 providing for a risk assessment "as

appropriate to the circumstances". This wording expressly recognizes that what constitutes an appropriate risk assessment may differ from case to case. In the view of Australia, the determination of whether a risk assessment is required for a particular individual substance should therefore be made on a case-by-case basis. The Panel recognized that in order to find an SPS measure inconsistent with Article 5.5 all elements of this provision need to be present[52] but the Panel, nevertheless, gave undue weight, in the view of Australia, to the significance of the distinction in the levels of protection. The Panel's reference to the Appellate Body Report in *Japan - Alcoholic Beverages*[53] concerning the requirements of Article III:2 of the GATT 1994 was misleading and inappropriate.

91. Although Australia supports the view of the United States that the EC measures are inconsistent with Article 2.2 of the *SPS Agreement*, Australia does not believe there was any need for the Panel to make such a finding.

2. New Zealand

92. New Zealand refers to its third party submission to the Panel relating to Articles 2.2 and 5.6. New Zealand submits that since the Panel found that there was no scientific evidence that indicated that an identifiable risk arises from the use of any of the hormones at issue when used for growth promotion purposes in accordance with good practice, the Appellate Body should consider the applicability of Articles 2.2 and 5.6 of the *SPS Agreement* to the import ban.

3. Norway

93. Norway stresses that the *SPS Agreement* does not contain obligations to harmonize different levels of protection. The right of every Member to set its own level of protection is, according to Norway, an inherent right that has always been accepted by the GATT and now by the *WTO Agreement*. In the view of Norway, Members have a variety of options when deciding on their appropriate level of protection. They may decide to adopt a more lenient approach or a more stringent approach. Member A may decide to have a (close to) zero tolerance for deaths related to the usage of certain substances, while Member B accepts one death per million per year. This is entirely for Member A and Member

[52]US Panel Report, para. 8.174; Canada Panel Report, para. 8.177.

[53]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

B to decide. When, thereafter, each Member chooses the measure necessary to achieve its level of protection, that measure must comply with the basic obligations of Articles 2, 3 and 5 of the *SPS Agreement*. As long as the existence of a risk is established, the WTO is only concerned with the justification of the measure the Member chooses to apply to achieve the level of protection it has deemed appropriate. According to Norway, there is no requirement on that Member to come to the same conclusions concerning the evaluation of the available scientific evidence that other Members or international organizations may have reached.

94. On the issue of burden of proof, Norway argues that the Panel erred when it described Article 3.1 as the general rule, thus imposing an obligation on Members to harmonize their SPS measures. Article 3.1 clearly states that harmonization is merely an objective or option, by using the words "... on as wide a basis as possible". The "exceptions" to this objective are not limited to situations covered by Article 3.3. There are others, as can be seen from the words "... except as otherwise provided for in this Agreement, and in particular in paragraph 3". Norway submits that instead of designating one paragraph of Article 3 as a general rule and others as exceptions, the Panel should have read Article 3 within the context of Articles 2.2 and 2.3. In the view of Norway, where the SPS measure is identical for domestic and imported products, the general rule -- as with all obligations -- is that the complainant must present a *prima facie* case of violation. The requirement in Article 2.2 that measures be "necessary" does not alter the above. SPS measures are not exceptional measures, and the burden of proving that a measure is not necessary rests in the first instance with the complainant.

95. In respect of Article 5.5, Norway submits that it is the level of protection that is at issue, rather than the measure, which must "conform to" other parts of the *SPS Agreement*. It is for the complainant to prove that a decision on different levels of protection violates Article 5.5.

III. Issues Raised in this Appeal

96. This appeal raises the following legal issues:

(a) Whether the Panel correctly allocated the burden of proof in this case;

(b) Whether the Panel applied the appropriate standard of review under the *SPS Agreement*;

(c) Whether, or to what extent, the precautionary principle is relevant in the interpretation of the *SPS Agreement*;

(d) Whether the provisions of the *SPS Agreement* apply to measures enacted before the date of entry into force of the *WTO Agreement*;

(e) Whether the Panel made an objective assessment of the facts pursuant to Article 11 of the DSU;

(f) Whether the Panel acted within the scope of its authority in its selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties;

(g) Whether the Panel correctly interpreted Articles 3.1 and 3.3 of the *SPS Agreement*;

(h) Whether the EC measures are "based on" a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*;

(i) Whether the Panel correctly interpreted and applied Article 5.5 of the *SPS Agreement*; and

(j) Whether the Panel appropriately exercised "judicial economy" in not making findings on the consistency of the EC measures with Article 2.2 and Article 5.6 of the *SPS Agreement*.

IV. Allocating the Burden of Proof in Proceedings Under the *SPS Agreement*

97. The first general issue that we must address relates to the allocation of the burden of proof in proceedings under the *SPS Agreement*. The Panel appropriately describes this issue as one "of particular importance"[54], in view of the nature of disputes under that Agreement. Such disputes may raise multiple and complex issues of fact.

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[54]US Panel Report, para. 8.48; Canada Panel Report, para. 8.51.

98. The Panel begins its analysis by setting out the general allocation of the burden of proof between the contending parties in any proceedings under the *SPS Agreement*. The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*[55], which the Panel invokes and which embodies a rule applicable in any adversarial proceedings.

99. The Panel, however, proceeds to make a general, unqualified, interpretative ruling that the *SPS Agreement* allocates the "evidentiary burden" to the Member imposing an SPS measure. To support this general statement, which renders the Panel's reference to our own ruling in *United States - Shirts and Blouses* little more than lip-service, the Panel first points to:

> ... the wording of many of the provisions contained in [the SPS] Agreement and in particular the first three words thereof: "*Members shall ensure* that ..." (e.g. Articles 2.2, 2.3, 5.1 and 5.6 of the SPS Agreement).[56]

100. The Panel next quotes Article 5.8 of the *SPS Agreement*, while parenthetically noting that this Article "relates more to transparency than to any requirement of legal justification".[57] Article 5.8 provides:

> When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

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[55]Adopted 23 May 1997, WT/DS33/AB/R, p. 14.

[56]US Panel Report, para. 8.52; Canada Panel Report, para. 8.55.

[57]US Panel Report, para. 8.53; Canada Panel Report, para. 8.56.

101. Lastly, the Panel seeks support for its general interpretative ruling in Article 3.2 of the *SPS Agreement*, which establishes a presumption of consistency with relevant provisions of that Agreement and of the GATT 1994 for measures that conform to international standards, guidelines and recommendations. From this presumption, the Panel extracts a reverse inference that if a measure does *not* conform to international standards, the Member imposing such a measure must bear the burden of proof in any complaint of inconsistency with a provision of the *SPS Agreement*.[58]

102. We find the general interpretative ruling of the Panel to be bereft of basis in the *SPS Agreement* and must, accordingly, reverse that ruling. It does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health ..."[59], and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 of the *SPS Agreement* does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry the burden of proving on a *prima facie* basis that the measure involved is not consistent with the *SPS Agreement*. The Panel's last reason involves, quite simply, a *non-sequitur*. The converse or *a contrario* presumption created by the Panel does not arise. The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.

103. In initiating its discussion on the requirements of Articles 3.1 and 3.3 of the *SPS Agreement*, the Panel turns once more to allocating the burden of proof between the complaining parties and the defending party. The Panel states:

> One purpose of the SPS Agreement, as explicitly recognized in the preamble, is to promote the use of international standards, guidelines and recommendations. To that end, Article 3.1 imposes an obligation

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[58]US Panel Report, para. 8.54; Canada Panel Report, para. 8.57.

[59]*SPS Agreement*, Article 2.2.

> on all Members to base their sanitary measures on international standards except as otherwise provided for in the SPS Agreement, and in particular in Article 3.3 thereof. In this sense, Article 3.3 provides an *exception* to the general obligation contained in Article 3.1. Article 3.2, in turn, specifies that the complaining party has the burden of overcoming a presumption of consistency with the SPS Agreement in the case of a measure based on international standards. It thereby suggests by implication that when a measure is not so based, the burden is on the respondent to show that the measure is justified under the exceptions provided for in Article 3.3.
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> We find, therefore, that once the complaining party provides a *prima facie* case (i) that there is an international standard with respect to the measure in dispute, and (ii) that the measure in dispute is *not* based on this standard, the burden of proof under Article 3.3 shifts to the defending party.[60] (underlining added)

104. The Panel relies on two interpretative points in reaching its above finding. First, the Panel posits the existence of a "general rule - exception" relationship between Article 3.1 (the general obligation) and Article 3.3 (an exception)[61] and applies to the *SPS Agreement* what it calls "established practice under GATT 1947 and GATT 1994" to the effect that the burden of justifying a measure under Article XX of the GATT 1994 rests on the defending party.[62] It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below[63], which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the

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[60]US Panel Report, paras. 8.86 and 8.87; Canada Panel Report, paras. 8.89 and 8.90.

[61]US Panel Report, para. 8.86; Canada Panel Report, para. 8.89.

[62]US Panel Report, footnote 288; Canada Panel Report, footnote 393.

[63]Paras. 169-172 of this Report.

ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation. It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.[64]

105. Secondly, the Panel relies upon the reverse presumption or implication it discovered in Article 3.2 of the *SPS Agreement*. As already noted, we have been unable to find any basis for that implication or presumption.[65]

106. We believe, therefore, and so hold that the Panel erred in law both in its two interpretative points and its finding set out in paragraphs 8.86 and 8.87 of the US Panel Report and paragraphs 8.89 and 8.90 of the Canada Panel Report (quoted above).[66]

107. The legal interpretations developed and the findings set out above by the Panel appear to have been applied, *inter alia*, in the following paragraphs that have also been appealed by the European Communities:

> We recall the conclusions we reached above on burden of proof, in particular that the European Communities has, with respect to its measures which deviate from international standards, the burden of proving the existence of a risk assessment (and, derived therefrom, an identifiable risk) on which the EC measures in dispute are based. It is not, in this dispute, for the United States to prove that there is *no* risk.[67]
>
> ...
>
> We finally recall our findings reached above on the specific burden of proof under Article 3.3. In particular, we found that the burden of proving that the requirements imposed by Article 3.3 (*inter alia*, consistency with Article 5) are met, in order to justify a sanitary measure which deviates from an international standard, rests with the Member imposing that measure. Since the EC measures examined

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[64]Appellate Body Report, *United States - Shirts and Blouses*, adopted 23 May 1997, WT/DS33/AB/R, p. 14.

[65]Para. 102 of this Report.

[66]See para. 103 of this Report.

[67]US Panel Report, para. 8.151; Canada Panel Report, para. 8.154.

> in this section (relating to all hormones in dispute other than MGA) are not based on existing international standards and need to be justified under the exceptions provided for in Article 3.3, the European Communities bears the burden of proving that the determination and application of its level of protection is consistent with Articles 5.4 to 5.6.[68]

108. To the extent that the Panel[69] purports to absolve the United States and Canada from the necessity of establishing a *prima facie* case showing the absence of the risk assessment required by Article 5.1, and the failure of the European Communities to comply with the requirements of Article 3.3, and to impose upon the European Communities the burden of proving the existence of such risk assessment and the consistency of its measures with Articles 5.4, 5.5 and 5.6 *without regard to whether or not the complaining parties had already established their prima facie case*, we consider and so hold that the Panel once more erred in law.

109. In accordance with our ruling in *United States - Shirts and Blouses*[70], the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel, i.e., Articles 3.1, 3.3, 5.1 and 5.5. Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.[71]

V. The Standard of Review Applicable in Proceedings Under the *SPS Agreement*

110. The European Communities appeals from certain findings of the Panel[72] upon the ground that the Panel failed to apply an appropriate standard of review in assessing certain acts of, and scientific

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[68]US Panel Report, para. 8.165; Canada Panel Report, para. 8.168.

[69]US Panel Report, paras. 8.151 and 8.165; Canada Panel Report, paras. 8.154 and 8.168.

[70]Adopted 23 May 1997, WT/DS33/AB/R, pp. 14-16.

[71]Our finding that the Panel erred in allocating the burden of proof generally to the Member imposing the measure, however, does not deal with the quite separate issue of whether the United States and Canada actually made a *prima facie* case of violation of each of the following Articles of the *SPS Agreement:* 3.1, 3.3, 5.1 and 5.5. See in this respect, footnote 180 of this Report.

[72]US Panel Report, paras. 8.124, 8.127, 8.133, 8.134, 8.145, 8.146, 8.194, 8.199, 8.213 and 8.255; Canada Panel Report, paras. 8.127, 8.130, 8.136, 8.137, 8.148, 8.149, 8.197, 8.202, 8.216 and 8.258.

evidentiary material submitted by, the European Communities.[73] The European Communities claimed, more specifically, that:

> ... the panel erred in law in not according deference to the following elements of the EC measures:
>
> - the EC's decision to set and apply a level of sanitary protection higher than that recommended by Codex Alimentarius for the risks arising from the use of these hormones for growth promotion;
>
> - the EC's scientific assessment and management of the risk from the hormones at issue; and
>
> - the EC's adherence to the precautionary principle and its aversion to accepting any increased carcinogenic risk.
>
> The panel also erred in law because it:
>
> - assigned a high probative value to the scientific views presented by some of the five scientific experts chosen by it (and to the views of the technical expert appointed by Codex Alimentarius);
>
> - disregarded in effect or distorted the scientific evidence presented by the EC and its scientific advisors, and systematically considered the scientific views of the panel-appointed experts or even a minority of those experts, of higher probative value than the scientific evidence presented by the EC scientists;
>
> - based its legal interpretations and findings on a number of critical issues on the majority of scientific views presented by its own appointed experts, instead of limiting itself to examining whether the scientific evidence presented by the EC was based on "*scientific principles*" (as required by Article 2:2 [of the *SPS Agreement*]).[74]

111. In the view of the European Communities, the principal alternative approaches to the problem of formulating the "proper standard of review" so far as panels are concerned are two-fold. The first is designated as "*de novo* review". This standard of review would allow a panel complete freedom to come to a different view than the competent authority of the Member whose act or determination

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[73]EC's appellant's submission, para. 140.

[74]EC's appellant's submission, para. 139.

is being reviewed. A panel would have to "verify whether the determination by the national authority was 'correct' both factually and procedurally".[75] The second is described as "deference". Under a "deference" standard, a panel, in the submission of the European Communities, should not seek to redo the investigation conducted by the national authority but instead examine whether the "procedure" required by the relevant WTO rules had been followed.[76]

112. Clearly referring only to an appropriate standard of review of *factual* determinations by the domestic authorities of a Member, the European Communities submits that the principle of deference has been embodied in Article 17.6(i) of the *Anti-Dumping Agreement*, which reads as follows:

> 17.6 In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

113. The European Communities further urges that the above-quoted standard, which it describes as a "deferential 'reasonableness' standard"[77] is applicable in "all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants"[78], and should have been applied by the Panel in the present case.

114. The first point that must be made in this connection, is that the *SPS Agreement* itself is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member. Nor are there provisions in the DSU or any of the covered agreements (other than the *Anti-Dumping Agreement*) prescribing a particular standard of review. Only Article 17.6(i) of the *Anti-Dumping Agreement* has language on the standard of review to be employed by panels engaged in the "assessment of the facts of the matter". We find no indication in the *SPS Agreement* of an intent on the part of

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[75]EC's appellant's submission, para. 122.

[76]EC's appellant's submission, para. 123.

[77]EC's appellant's submission, para. 128.

[78]EC's appellant's submission, para. 127.

the Members to adopt or incorporate into that Agreement the standard set out in Article 17.6(i) of the *Anti-Dumping Agreement*. Textually, Article 17.6(i) is specific to the *Anti-Dumping Agreement*.[79]

115. The standard of review appropriately applicable in proceedings under the *SPS Agreement*, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.[80] To adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.

116. We do not mean, however, to suggest that there is at present no standard of review applicable to the determination and assessment of the facts in proceedings under the *SPS Agreement* or under other covered agreements. In our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements. Article 11 reads thus:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered

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[79]On the other hand, as suggested by the United States, we must note the *Decision on the Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, which states:

> *Ministers*,
>
> *Decide* as follows:
>
> The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application. (underlining added)

This Ministerial Decision evidences that the Ministers were aware that Article 17.6 of the *Anti-Dumping Agreement* was applicable only in respect of that Agreement.

[80]See, for example, S.P. Croley and J.H. Jackson, "WTO Dispute Panel Deference to National Government Decisions, The Misplaced Analogy to the U.S.Chevron Standard-of-Review Doctrine", in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer, 1997) 185, p. 189; P.A. Akakwam, "The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations" (1996), 5:2 *Minnesota Journal of Global Trade* 277, pp. 295-296.

> agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution". (underlining added)

117. So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake *de novo* review[81], wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU".[82]

118. In so far as legal questions are concerned - that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement - a standard not found in the text of the *SPS Agreement* itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law.[83] It may be noted that the European Communities refrained from suggesting that Article 17.6 of the *Anti-Dumping Agreement* in its entirety was applicable to the present case. Nevertheless, it is appropriate to stress that here again Article 11 of the DSU is directly on point, requiring a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...".

119. We consider, therefore, that the issue of failure to apply an appropriate standard of review, raised by the European Communities, resolves itself into the issue of whether or not the Panel, in making the above and other findings referred to and appealed by the European Communities, had made an "objective assessment of the matter before it, including *an objective assessment of the facts* ...". This particular issue is addressed (in substantial detail) below.[84] Here, however, we uphold the findings

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[81]Panel Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/R; Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, adopted 27 April 1993, BISD 40S/205; Panel Report, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, ADP/87; and Panel Report, *United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted 3 June 1987, BISD 34S/194.

[82]Panel Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/R, para. 7.10

[83]DSU, Article 3.2.

[84]Paras. 131-144 of this Report.

of the Panel appealed by the European Communities upon the ground of failure to apply either a "deferential reasonableness standard" or the standard of review set out in Article 17.6(i) of the *Anti-Dumping Agreement*.

VI. The Relevance of the Precautionary Principle in the Interpretation of the *SPS Agreement*

120. We are asked by the European Communities to reverse the finding of the Panel relating to the precautionary principle. The Panel's finding and its supporting statements are set out in the Panel Reports in the following terms:

> The European Communities also invokes the precautionary principle in support of its claim that its measures in dispute are based on a risk assessment. To the extent that this principle could be considered as part of customary international law *and* be used to interpret Articles 5.1 and 5.2 on the assessment of risks as a customary rule of interpretation of public international law (as that phrase is used in Article 3.2 of the DSU), we consider that this principle would not override the explicit wording of Articles 5.1 and 5.2 outlined above, in particular since the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement. We note, however, that the European Communities has explicitly stated in this case that it is not invoking Article 5.7.
>
> We thus find that the precautionary principle cannot override our findings made above, namely that the EC import ban of meat and meat products from animals treated with any of the five hormones at issue for growth promotion purposes, in so far as it also applies to meat and meat products from animals treated with any of these hormones *in accordance with good practice*, is, from a substantive point of view, not *based on* a risk assessment.[85] (underlining added)

121. The basic submission of the European Communities is that the precautionary principle is, or has become, "a general customary rule of international law" or at least "a general principle of law".[86] Referring more specifically to Articles 5.1 and 5.2 of the *SPS Agreement*, applying the precautionary principle means, in the view of the European Communities, that it is not necessary for *all* scientists

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[85]US Panel Report, paras. 8.157 and 8.158; Canada Panel Report, paras. 8.160 and 8.161.

[86]EC's appellant's submission, para. 91.

around the world to agree on the "possibility and magnitude" of the risk, nor for *all* or most of the WTO Members to perceive and evaluate the risk in the same way.[87] It is also stressed that Articles 5.1 and 5.2 do not prescribe a particular type of risk assessment and do not prevent Members from being cautious in their risk assessment exercise.[88] The European Communities goes on to state that its measures here at stake were precautionary in nature and satisfied the requirements of Articles 2.2 and 2.3, as well as of Articles 5.1, 5.2, 5.4, 5.5 and 5.6 of the *SPS Agreement*.[89]

122. The United States does not consider that the "precautionary principle" represents customary international law and suggests it is more an "approach" than a "principle".[90] Canada, too, takes the view that the precautionary principle has not yet been incorporated into the corpus of public international law; however, it concedes that the "precautionary approach" or "concept" is "an *emerging* principle of law" which may in the future crystallize into one of the "general principles of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*.[91]

123. The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.[92] We consider, however, that it is unnecessary, and probably

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[87]EC's appellant's submission, para. 88.

[88]EC's appellant's submission, para. 94.

[89]EC's appellant's submission, para. 98.

[90]United States' appellee's submission, para. 92.

[91]Canada's appellee's submission, para. 34.

[92]Authors like P. Sands, J. Cameron and J. Abouchar, while recognizing that the principle is still evolving, submit nevertheless that there is currently sufficient state practice to support the view that the precautionary principle is a principle of customary international law. See, for example, P. Sands, *Principles of International Environmental Law*, Vol. I (Manchester University Press 1995) p. 212; J. Cameron, "The Status of the Precautionary Principle in International Law", in J. Cameron and T. O'Riordan (eds.), *Interpreting the Precautionary Principle* (Cameron May, 1994) 262, p. 283; J.Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law* (Kluwer, 1996) 29, p. 52. Other authors argue that the precautionary principle has not yet reached the status of a principle of international law, or at least, consider such status doubtful, among other reasons, due to the fact that the principle is still subject to a great variety of interpretations. See, for example, P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, 1992), p. 98; L. Gündling, "The Status in International Law of the Precautionary Principle" (1990), 5:1,2,3 *International Journal of Estuarine and Coastal Law* 25, p. 30; A. deMestral (et. al), *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery, 1993), p. 765; D. Bodansky, in *Proceedings of the 85th Annual Meeting of the American Society of International Law* (ASIL, 1991), p. 415.

imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[93]

124. It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the *SPS Agreement*. First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*.

125. We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*.

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[93]In *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice recognized that in the field of environmental protection "... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight ...". However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabcíkovo/Nagymaros System of Locks. See, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Judgement, 25 September 1997, paras. 140, 111-114. Not yet reported in the I.C.J. Reports but available on internet at http://www.icj-cij.org/idecis.htm.

VII. Application of the *SPS Agreement* to Measures Enacted Before 1 January 1995

126. Although Directives 81/602, 88/148 and 88/299 were enacted before the entry into force of the *WTO Agreement* on 1 January 1995, the Panel held[94] that, in line with Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[95], the *SPS Agreement* should apply to the EC measures at issue because they continued to exist after 1 January 1995 and the *SPS Agreement* does not show any intention to limit its application to measures enacted after the entry into force of the *WTO Agreement*. The Panel stated that, to the contrary, several provisions of the *SPS Agreement*, and in particular Articles 2.2, 3.3, 5.6, 5.8 and 14 thereof, confirm the *SPS Agreement* does indeed apply to SPS measures which were enacted before 1 January 1995 but were maintained thereafter.[96]

127. The European Communities submits that this conclusion of the Panel is "too sweeping"[97] and that the *SPS Agreement* shows an intention to limit the temporal application of the Agreement, and in particular Articles 5.1 to 5.5 thereof, to measures enacted after the entry into force of the Agreement.

128. We addressed the issue of temporal application in our Report in *Brazil - Measures Affecting Desiccated Coconut* and concluded on the basis of Article 28 of the *Vienna Convention* that:

> Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.[98]

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the

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[94]US Panel Report, para. 8.25; Canada Panel Report, para. 8.28.

[95]Done at Vienna, 23 May 1969, 1155 UNTS 331; (1969), 8 International Legal Materials, 679.

[96]US Panel Report, para. 8.26; Canada Panel Report, para. 8.29.

[97]EC's appellant's submission, para. 264.

[98]Adopted 20 March 1997, WT/DS22/AB/R, p. 15.

SPS Agreement, or of any provision thereof, to SPS measures adopted after 1 January 1995.[99] In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both. Furthermore, other provisions of the *SPS Agreement*, such as Articles 2.2, 2.3, 3.3 and 5.6, expressly contemplate applicability to SPS measures that already existed on 1 January 1995. Finally, we observe, more generally, that Article XVI.4 of the *WTO Agreement* stipulates that:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Unlike the GATT 1947, the *WTO Agreement* was accepted definitively by Members, and therefore, there are no longer "existing legislation" exceptions (so-called "grandfather rights").[100]

129. We are aware that the applicability, as from 1 January 1995, of the requirement that an SPS measure be based on a risk assessment to the many SPS measures already in existence on that date, may impose burdens on Members. It is pertinent here to note that Article 5.1 stipulates that SPS measures must be based on a risk assessment, *as appropriate to the circumstances*, and this makes clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1.

130. We therefore affirm the finding of the Panel with regard to the temporal application of the *SPS Agreement*. We also note that the measure at issue in this appeal is, since 1 July 1997, no longer embodied in the pre-1995 Directives referred to above, but rather in Directive 96/22, which was

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[99]Note that Article 14 of the *SPS Agreement* allows the *least-developed country Members* and other *developing country Members* to delay implementation of the provisions of that Agreement for a period of *five and two years*, respectively, following the date of entry into force of the *WTO Agreement*. Developing country Members may only delay application of the provisions of that Agreement where such application is prevented by lack of technical expertise, technical infrastructure or resources. This right to *defer* application of the provisions of the *SPS Agreement* concerns, however, both SPS measures existing before the entry into force of the *WTO Agreement* and SPS measures enacted since.

[100]With the exception of the measures taken by a Member under specific mandatory legislation referred to in paragraph 3(a) of the language incorporating the GATT 1994 into the *WTO Agreement*.

elaborated and enacted *after* the entry into force of the *WTO Agreement*. None of the parties contests that the currently applicable measure is subject to the disciplines of Articles 5.1 and 5.5 of the *SPS Agreement*.

VIII. The Requirement of Objective Assessment of the Facts by a Panel Under Article 11 of the DSU

131. The European Communities claims that the Panel has disregarded or distorted the evidence submitted by the European Communities to the Panel, as well as the opinions and statements made by the scientific experts advising the Panel. It is claimed, in other words, that the Panel has failed to make an objective assessment of the facts as required by Article 11 of the DSU, and the European Communities asks us to reverse the findings so arrived at by the Panel.

132. Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question. Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.

133. The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or

misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.[101] A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.

134. It is, accordingly, incumbent upon us to examine the claims of the European Communities that the Panel here disregarded or distorted at least some of the evidence submitted to it.

A. *Evidence with Regard to MGA*

135. According to the European Communities, the Panel's finding that the experts advising the Panel have stated on several occasions that they are not aware of any publicly available scientific studies that evaluate the safety of MGA[102] is manifestly not true.[103] The Panel cited only two of its experts (Dr. Ritter and Dr. McLean) and the statements of these two scientists do not entirely support the Panel's conclusion. Furthermore, the Panel did not mention that Dr. André and Dr. Lucier, two other experts advising the Panel, had respectively said that MGA is a "real risk" and that MGA is an "extraordinarily potent progestant", that is "about 30 times more potent than progesterone and orally active".[104] We note that Dr. Ritter clearly stated with regard to MGA that he had "no information other than of a

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[101]It might be asked whether the European Communities did not merely intend to use "disregard" and "distortion" as unusually forceful synonyms for "misapprehend" or "misappreciation". It is not, however, clear that the European Communities did so intend, considering among other things the marked frequency with which "disregard" and "distortion" were used.

[102]US Panel Report, para. 8.255; Canada Panel Report, para. 8.258.

[103]EC's appellant's submission, para. 168.

[104]EC's appellant's submission, para. 170, quoting Annex to the US and Canada Panel Reports, para. 852.

proprietary nature which [he] did not use"[105] and that Dr. McLean stated he had made no comment in his submission about MGA "because there hasn't been a large amount of data package available".[106] These two statements tend to support the Panel's conclusion. It is true that the Panel does not refer to the statements by Dr. Lucier and Dr. André. However, these statements do not contradict the Panel's conclusion that there is no publicly available study on the safety of MGA. Furthermore, while the Panel could have made a reference to and an evaluation of the statements by Dr. André and Dr. Lucier concerning MGA, it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings. We do not think that the Panel's silence on the statements of Dr. André and Dr. Lucier constitutes a distortion or disregard of evidence.

136. The European Communities argues that the Panel failed to request the submission of data on MGA and contends that this failure constituted a violation of Article 11 of the DSU. However, we see nothing in Article 11 to suggest that there is an obligation on the Panel to gather data relating to MGA and that it was therefore required to request the submission of this data.

137. Furthermore, the European Communities states that the Panel arbitrarily disregarded all the information concerning MGA that the European Communities had supplied to the Panel. The information here referred to are studies and reports of the IARC on hormones, including progestins, a category of substances to which MGA is said to belong. However, we note that the Panel did not simply ignore the IARC studies and reports but rather had indicated it did not consider them to be relevant because it found that a risk assessment needs to be carried out for each individual substance.[107]

B. *Evidence with Regard to the Five Other Hormones*

138. With regard to the five other hormones in dispute, the European Communities contends that the Panel manifestly distorted the scientific evidence presented by the European Communities and eliminated dissenting scientific views of its own experts in an attempt to make the desired result fit

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[105]Annex to the US and Canada Panel Reports, para. 352.

[106]Annex to the US and Canada Panel Reports, para. 354 .

[107]US Panel Report, para. 8.257; Canada Panel Report, para. 8.260. The Panel pointed out that with respect to the five other hormones in dispute, JECFA, Codex and the European Communities itself have conducted or invoked risk assessments for each individual substance. Furthermore, the Panel referred to the paper presented at the 1995 EC Scientific Conference by J. Bridges and O. Bridges on "Hazards of Growth Promoting Agents and Strategies of Risk Assessment" (Conference Proceedings, p. 250). US Panel Report, para. 8.260; Canada Panel Report, para. 8.263.

the scientific record.[108] First, the European Communities submits[109] that the Panel incorrectly quotes some of the statements of Dr. Lucier and totally ignores other more relevant statements he made.[110] We note that the Panel did indeed quote Dr. Lucier incorrectly. The Panel wrongly interpreted Dr. Lucier's statement in paragraph 819 of the Annex as meaning that the 0 to 1 in a million risk is caused by the *total amount of oestrogens in treated meat*. It is clear that Dr. Lucier stated that this risk is caused by the small fraction of oestrogens that is *added for growth promotion purposes*. However, this mistake on the part of the Panel in interpreting Dr. Lucier's statement does not constitute a *deliberate* disregard of evidence or *gross* negligence amounting to bad faith. The Panel also failed to refer to certain other statements made by Dr. Lucier. It seems to us that these statements either merely clarify the statement discussed above or are of a general nature. The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly. The same thing may be said with regard to the claim by the European Communities that the Panel failed to quote certain statements by Dr. Ritter and Dr. McLean.[111]

139. Second, it is claimed that the Panel manifestly distorted the views of Dr. André when it said that he did not contest the statements made by the other Panel experts on the safety of the hormones in dispute.[112] To the contrary, according to the European Communities, the views expressed by Dr. André support the scientific opinions presented by the EC scientists.[113] Whether or not the views of Dr. André support the statements made by the other Panel experts or the opinions expressed by the EC scientists may be an issue of fact; it does require some technical expertise to deal with it. However, even if the Panel has interpreted the views of Dr. André incorrectly, we see no reason, and no reason was advanced, to consider this mistake as a *deliberate disregard* or *distortion* of evidence.

140. Third, it is claimed that the Panel manifestly distorted the scientific evidence by considering that the 1995 EC Scientific Conference amounted to a risk assessment in the sense of Articles 5.1-5.2. However, we note that the Panel does not state that the 1995 EC Conference amounted to a risk

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[108]EC's appellant's submission, para. 350.

[109]EC's appellant's submission, para. 347.

[110]See, in particular, footnote 331 of the US Panel Report and footnote 437 of the Canada Panel Report.

[111]See the statements of Dr. Ritter in paras. 322, 743 and 782, and the statement of Dr. McLean in para. 824, of the Annex to the US and Canada Panel Reports.

[112]See footnote 348 of the US Panel Report and footnote 455 of the Canada Panel Report.

[113]See, in particular, paras. 6.99 to 6.101 of the US Panel Report and paras. 6.98 to 6.100 of the Canada Panel Report.

assessment. The Panel includes this Conference in the listing of scientific evidence concerning the hormones at issue referred to by the European Communities.[114] With regard to the reports mentioned in this list, the Panel states that several of these reports appear to meet the minimum requirements of a risk assessment, referring to the Lamming Report and the 1988 and 1989 JECFA Reports.[115] The Panel does not, however, refer to the 1995 EC Conference. The Panel discusses the scientific conclusions to be drawn from the 1995 EC Scientific Conference but this does not amount to designating the Conference as a risk assessment.[116]

141. Fourth, the European Communities contends that the distinction made by the Panel between studies that generally relate to the hormones in dispute and studies that specifically address residues in food of these hormones when used for growth promotion purposes is a distinction devised by the Panel for the sole purpose of rejecting the relevance of the 1987 IARC Monographs in this case and amounts to a distortion of relevant scientific evidence.[117] We note, however, that the Panel did consider the 1987 IARC Monographs but held that they could not be regarded as part of a risk assessment for the hormones at issue because the Monographs do not address the carcinogenic potential of these hormones when used specifically for growth promotion purposes or with respect to residue levels comparable to those present after such use[118], or the potential for adverse effects arising from the presence *in food* of residues of the hormones in dispute or from residue levels comparable to those present in food. The Panel's distinction between general and specific studies and its treatment of the 1987 IARC Monographs does not, therefore, appear arbitrary. Furthermore, we note that the Panel concluded, in the alternative, that the Monographs have been taken into account in, and do not contradict, the other studies referred to by the European Communities, in particular the 1988 and 1989 JECFA Reports.[119] We believe that the Panel's treatment of the 1987 IARC Monographs does not amount to a distortion of evidence.

142. Fifth, the European Communities submits that the Panel made no attempt whatsoever to discuss "the scientific views and evidence presented by the other EC scientists" and therefore violated Article 11

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[114]US Panel Report. para. 8.108; Canada Panel Report, para 8.111. The 1995 EC Conference Proceedings were submitted by the European Communities itself as annexes to its first submission to the Panel in both the US and Canada proceedings.

[115]US Panel Report, para. 8.111; Canada Panel Report, para. 8.114.

[116]US Panel Report, para. 8.123; Canada Panel Report, para. 8.126.

[117]EC's appellant's submission, para. 368.

[118]US Panel Report, para. 8.127; Canada Panel Report, para. 8.130.

[119]US Panel Report, para. 8.129; Canada Panel Report, para. 8.132.

of the DSU.[120] It is our understanding that the European Communities refers here to the articles and opinions of individual scientists that are included in the Panel's list of scientific evidence referred to by the European Communities.[121] We note that, contrary to what the European Communities claims, the Panel does discuss these articles and opinions of individual scientists. The Panel Report included a summary discussion of these articles and opinions.[122] However, as the Panel explains, the scientific evidence included in these articles and opinions relates to the carcinogenic or genotoxic potential of entire categories of hormones or the hormones at issue in general; not when used specifically for growth promotion purposes or with respect to residue levels comparable to those present in meat after such use. In our opinion, the Panel's treatment of the articles and opinions of individual scientists, like its treatment of the 1987 IARC Monographs, does not amount to a distortion of evidence.

C. *Evidence with Regard to the Issue of Control*

143. With regard to the issue of control, the European Communities contends that the Panel failed to take into account the evidence submitted by the European Communities[123] and ignored statements made by some of its own experts.[124] We observe that the Panel did indeed not explicitly refer to all the evidence regarding the issue of control before it. The Panel had found that the risks related to the general problems of control should not be taken into account in risk assessment[125] and accordingly did not refer extensively to the evidence regarding the issue of control. Furthermore, we note that the Panel, subsequently and in the alternative, concluded that even if the issue of control, and the evidence relating to that issue, could be taken into account, the European Communities had not supplied *convincing*

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[120]EC's appellant's submission, para. 380.

[121]US Panel Report, para. 8.108; Canada Panel Report, para. 8.111.

[122]US Panel Report, para. 8.130; Canada Panel Report, para. 8.133. The Panel itself refers to some of the articles and opinions in paras. 4.131-4.136 and 4.180 of the US Panel Report, and paras. 4.154-4.166 of the Canada Panel Report.

[123]The European Communities contends that it submitted convincing specific evidence to the Panel that control would be more difficult under a regime where the hormones in dispute were allowed (under specific conditions of use) than under the current EC regime where the hormones in dispute are banned. It also contends that it submitted clear evidence to the Panel, specifying the risks for human health that the inadequate control of these hormones can pose and that in the United States and Canada there were instances in which the MRL's were not respected. Finally the European Communities submitted evidence relating the practical and technical difficulties that are specific to control of hormones. EC's appellant's submission, paras. 403-433.

[124]EC's appellant's submission, para. 416. The European Communities submits that, for example, Dr. André's reference to misuse in France (see para. 168 of the Annex to the US and Canada Panel Reports) and Dr. McLean's statement on the difficulty of controlling treatment of animals (see para. 474 of the Annex to the US and Canada Panel Reports) were not taken into account by the Panel.

[125]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

evidence. The Panel, it appears, excluded that evidence on the *legal ground* of non-relevancy; as will be seen later, the Panel erred in law in holding the evidence non-relevant. Nevertheless, it did examine the evidence.[126]

144. The European Communities also claims that the Panel incorrectly quoted the statements of its experts.[127] Referring to a number of specific statements[128], the Panel stated that the experts advising the Panel made clear that the potential for abuse under a regime where the hormones in dispute are allowed under specified conditions and under the current regime where they are banned, would be comparable. The European Communities submits that in the statements referred to by the Panel, the experts either explicitly stated they were speculating or added strong reservations to their opinions. After reading these statements carefully, we come to the conclusion that the Panel did not in fact represent the opinions of its experts accurately. However, this mistake does not amount to the egregious disregarding or distorting of evidence before the Panel.

D. *Evidence on Article 5.5*

145. The European Communities claims that in finding that the difference in its levels of protection in respect of five of the hormones at issue and in respect of carbadox and olaquindox is arbitrary or unjustifiable[129], the Panel did not take into account the evidence before it.[130] We note that the Panel considered in detail each of the arguments and related evidence referred to by the European Communities on this particular point.[131] Although the Panel did not agree with the arguments advanced by the European Communities, we do not believe that in doing so, the Panel arbitrarily ignored or manifestly distorted the evidence before it. We deal with these arguments below in some detail.[132]

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[126]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

[127]EC's appellant's submission, para. 419.

[128]US Panel Report, footnote 362; Canada Panel Report, footnote 469.

[129]US Panel Report, para. 8.238; Canada Panel Report, para. 8.241.

[130]The European Communities argues that it had advanced six reasons why this distinction is not arbitrary or unjustifiable but the Panel rejected all these reasons, and in doing so, it failed to take into account the evidence before it. The reasons advanced by the European Communities were the following: first, that carbadox and olaquindox are not hormones and have a different mode of action; second, that carbadox and olaquindox act as growth promoters by combating the development of bacteria; third, that carbadox and olaquindox are only available in prepared feedstuffs in predetermined dosages; fourth, that there are no alternatives to carbadox and olaquindox; fifth, that carbadox cannot be abused; and sixth, that carbadox is used in very small quantities and is hardly absorbed. EC's appellant's submission, paras. 529-548.

[131]US Panel Report, paras. 8.231-8.238; Canada Panel Report, paras. 8.234-8.240.

[132]See paras. 227-235 of this Report.

IX. Certain Procedures Adopted by the Panel

A. *The Selection and Use of Experts*

146. The European Communities considers that in its selection and use of experts, the Panel has violated Article 11.2 of the *SPS Agreement* and Articles 11, 13.2 and Appendix 4 of the DSU.[133] We note that the Panel decided to request the opinion of experts on certain scientific and other technical matters raised by the parties to the dispute, and rather than establishing an experts review group, the Panel considered it more useful to leave open the possibility of receiving a range of opinions from the experts in their individual capacity. The Panel stresses, among other things, that:

> We considered, however, that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU limits our right to seek information from *individual* experts as provided for in Article 11.2, first sentence, of the SPS Agreement and Articles 13.1 and 13.2, first sentence, of the DSU.[134]

147. We agree with the Panel. Both Article 11.2 of the *SPS Agreement* and Article 13 of the DSU enable panels to seek information and advice as they deem appropriate in a particular case. Article 11.2 of the *SPS Agreement* states:

> In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group. (underlining added)

Article 13 of the DSU provides, in relevant part:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate ...
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to the dispute, a panel *may* request an advisory report in writing from an experts review group ... (underlining added)

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[133]EC's appellant's submission, para. 587.

[134]US Panel Report, para. 8.7; Canada Panel Report, para. 8.7.

We find that in disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement,* nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.

148. Both Article 11.2 of the *SPS Agreement* and Article 13.2 of the DSU require panels to consult with the parties to the dispute during the selection of the experts. However, it is not claimed by any of the participants in this appeal that the Panel did not consult with them when appointing the experts. Moreover, it is uncontested that the experts have been selected in accordance with procedures on which all the participants have previously agreed.[135] It is similarly uncontested that, among the experts consulted by the Panel, there are nationals from each of the parties to the dispute. The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings.

149. We conclude, therefore, that in its selection and use of experts, the Panel has not acted inconsistently with Articles 11, 13.2 and Appendix 4 of the DSU and Article 11.2 of the *SPS Agreement*.

B. *Additional Third Party Rights to the United States and Canada*

150. The European Communities contends that, notwithstanding its protest that these decisions affected its rights of defence, the Panel took a number of decisions granting additional third party rights to Canada and the United States which are not justified by Article 9.3 of the DSU, are inconsistent with Articles 7.1, 7.2, 18.2 and 10.3 thereof, and were not granted to the other third parties.[136] We recall that the European Communities refers to the following decisions of the Panel: first, to hold a joint meeting with scientific experts; second, to give access to all of the information submitted in the United States' proceeding to Canada; third, to give access to all of the information submitted in the Canadian proceeding to the United States; and fourth, to invite the United States to observe and make a statement at the second substantive meeting in the proceeding initiated by Canada.

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[135]US Panel Report, paras. 6.1-6.10; Canada Panel Report, paras. 6.1-6.9.

[136]EC's appellant's submission, paras. 605 and 612.

151. Article 9.3 of the DSU reads as follows:

> If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

After examining the procedural course of the two disputes, we consider that four aspects should be underlined. First, both proceedings dealt with the same matter. Second, all the parties to both disputes agreed that the same panelists would serve on both proceedings. Third, although the proceeding initiated by Canada started several months after the proceeding started by the United States, the Panel managed to finish the Panel Reports at the same time. Fourth, given the fact that the same panelists were conducting two proceedings dealing with the same matter, neither Canada nor the United States were ordinary third parties in each other's complaint.

152. With respect to the decision of the Panel to hold a joint meeting with scientific experts, the Panel explains as follows:

> Prior to our meeting with scientific experts, we decided to hold that meeting jointly for both this Panel, requested by Canada, and the parallel panel requested by the United States. This decision stemmed from the similarities of the two cases (the same EC measures are at issue and both cases are dealt with by the same panel members), our decision to use the same scientific experts in both cases and the fact that we had already decided to invite Canada and the United States to participate in the meeting with scientific experts in each of the two cases. In addition, we considered that, from a practical perspective, there was a need to avoid repetition of arguments and/or questions at our meetings with the scientific experts. The European Communities objected to this decision arguing that one joint meeting with experts, instead of two separate meetings, was likely to affect its procedural rights of defence. Where it made precise claims of prejudice to its rights of defence, we took corrective action.[137]

We consider the explanation of the Panel quite reasonable, and its decision to hold a joint meeting with the scientific experts consistent with the letter and spirit of Article 9.3 of the DSU. Clearly, it would be an uneconomical use of time and resources to force the Panel to hold two successive but separate meetings gathering the same group of experts twice, expressing their views twice regarding

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[137]Canada Panel Report, para. 8.18. See also US Panel Report, para. 8.14.

the same scientific and technical matters related to the same contested EC measures. We do not believe that the Panel has erred by addressing the EC procedural objections only where the European Communities could make a precise claim of prejudice. It is evident to us that a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it.[138]

153. The decision of the Panel to use and provide all information to the parties in both disputes was taken in view of its previous decision to hold a joint meeting with the experts.[139] The European Communities asserts that it cannot see how providing information in one of the proceedings to a party in the other helps to harmonize timetables.[140] We can see a relation between timetable harmonization within the meaning of Article 9.3 of the DSU and economy of effort. In disputes where the evaluation of scientific data and opinions plays a significant role, the panel that is established later can benefit from the information gathered in the context of the proceedings of the panel established earlier. Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding.[141] Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU. Indeed, as noted earlier, despite the fact that the Canadian proceeding was initiated several months later than that of the United States, the Panel managed to finish both Panel Reports at the same time.

154. Regarding the participation of the United States in the second substantive meeting of the Panel requested by Canada, the Panel states:

> This decision was, *inter alia*, based on the fact that our second meeting was held the day after our joint meeting with the scientific experts and that the parties to this dispute would, therefore, most likely comment on, and draw conclusions from, the evidence submitted by these experts to be considered in both cases. Since in the panel requested by the

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[138]Furthermore, the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.

[139]US Panel Report, para. 8.15; Canada Panel Report, para. 8.19.

[140]EC's appellant's submission, para. 610.

[141]Moreover, in the proceeding initiated by Canada, the European Communities made references to materials that it had previously submitted in the proceeding initiated by the United States. Canada's appellee's submission, para. 216.

> United States the second meeting was held before the joint meeting with scientific experts, we considered it appropriate, in order to safeguard the rights of the United States in the proceeding it requested, to grant the United States the opportunity to observe our second meeting in this case and to make a brief statement at the end of that meeting.[142]

The explanation of the Panel appears reasonable to us. If the Panel had not given the United States an opportunity to participate in the second substantive meeting of the proceedings initiated by Canada, the United States would not have had the same degree of opportunity to comment on the views expressed by the scientific experts that the European Communities and Canada enjoyed. Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. In this regard, we note that in *European Communities - Bananas*[143], the panel considered that particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU. We conclude that, in the case before us, circumstances justified the Panel's decision to allow the United States to participate in the second substantive meeting of the proceedings initiated by Canada.

C. *The Difference Between Legal Claims and Arguments*

155. Arguing that panels are not entitled to make findings beyond what has been requested by the parties, the European Communities asserts that the Panel has erred by basing the main part of its reasoning on Article 5.5 of the *SPS Agreement* on a claim that the complainants had not made.[144] According to the European Communities, the complainants did not complain of a supposed difference of treatment between artificially added or exogenous natural and synthetic hormones when used for growth promotion purposes compared with the naturally present endogenous hormones in untreated meat and other foods (such as milk, cabbage, broccoli or eggs). The European Communities states that nowhere in the sections of the Panel Reports summarising the arguments on Article 5.5 is there any mention of such an argument.

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[142]Canada Panel Report, para. 8.20.

[143]Adopted 25 September 1997, WT/DS27/AB/R.

[144]EC's appellant's submission, paras. 495 and 594.

156. Considering that in the request for the establishment of a panel in the proceeding initiated by the United States[145], as well as in the proceeding started by Canada[146], both complainants have included a claim that the EC ban is inconsistent with Article 5 of the *SPS Agreement,* we believe that the objection of the European Communities overlooks the distinction between legal claims made by the complainant and arguments used by that complainant to sustain its legal claims. In *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* we said:

> We stated ... in *Brazil - Desiccated Coconut* that all claims must be included in the request for establishment of a panel in order to come within the panel's terms of reference, based on the practice of panels under the GATT 1947 and the Tokyo Round Codes. That past practice required that a claim had to be included in the documents referred to, or contained in, in the terms of reference in order to form part of the "matter" referred to a panel for consideration. Following both this past practice and the provisions of the DSU, in *European Communities - Bananas*, we observed that there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties as a case proceeds.[147] (footnotes omitted)

Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute. Given that in this particular case both complainants claimed that the EC measures were inconsistent with Article 5.5 of the *SPS Agreement*, we conclude that the Panel did not make any legal finding beyond those requested by the parties.

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[145]WT/DS26/6, 25 April 1996.

[146]WT/DS48/5, 17 September 1996.

[147]Adopted 16 January 1998, WT/DS50/AB/R, para. 88.

X. The Interpretation of Articles 3.1 and 3.3 of the *SPS Agreement*

157. The European Communities appeals from the conclusion of the Panel that the European Communities, by maintaining SPS measures which are not based on existing international standards without justification under Article 3.3 of the *SPS Agreement*, has acted inconsistently with the requirements contained in Article 3.1 of that Agreement.

158. It will be seen below that the Panel is actually saying that the European Communities acted inconsistently with the requirements of both Articles 3.1 and 3.3 of the *SPS Agreement*, a position that flows from the Panel's view of a supposed "general rule - exception" relationship between Articles 3.1 and 3.3, a view we have indicated we do not share.[148]

159. The above conclusion of the Panel has three components: first, international standards, guidelines and recommendations exist in respect of meat and meat products derived from cattle to which five of the hormones involved have been administered for growth promotion purposes; secondly, the EC measures involved here are not based on the relevant international standards, guidelines and recommendations developed by Codex, because such measures are not in conformity with those standards, guidelines and recommendations; and thirdly, the EC measures are "not justified under", that is, do not comply with the requirements of Article 3.3. *En route* to its above-mentioned conclusion, the Panel developed three legal interpretations, which have all been appealed by the European Communities and which need to be addressed: the first relates to the meaning of "based on" as used in Article 3.1; the second is concerned with the relationship between Articles 3.1, 3.2 and 3.3 of the *SPS Agreement*; and the third relates to the requirements of Article 3.3 of the *SPS Agreement*. As may be expected, the Panel's three interpretations are intertwined.

A. *The Meaning of "Based On" as Used in Article 3.1 of the SPS Agreement*

160. Article 3.1 provides:

> To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

[148]See paras. 104 and 106 of this Report.

161. Addressing the meaning of "based on", the Panel constructs the following interpretations:

> The SPS Agreement does not explicitly define the words *based on* as used in Article 3.1. However, Article 3.2, which introduces a presumption of consistency with both the SPS Agreement and GATT for sanitary measures which *conform to* international standards, equates measures *based on* international standards with measures which *conform to* such standards. Article 3.3, in turn, explicitly relates the definition of sanitary measures *based on* international standards to the level of sanitary protection achieved by these measures. Article 3.3 stipulates the conditions to be met for a Member to enact or maintain certain sanitary measures which are *not* based on international standards. It applies more specifically to measures "which result in a *higher level* of sanitary ... protection than would be achieved by measures based on the relevant international standards" or measures "which result in a *level* of sanitary ... protection *different* from that which would be achieved by measures based on international standards". One of the determining factors in deciding whether a measure is *based on* an international standard is, therefore, the level of protection that measure achieves. According to Article 3.3 all measures which *are* based on a given international standard should in principle achieve the *same* level of sanitary protection. Therefore, if an international standard reflects a specific level of sanitary protection and a sanitary measure implies a *different* level, that measure cannot be considered to be *based on* the international standard.
>
> We find, therefore, that for a sanitary measure to be *based on* an international standard in accordance with Article 3.1, that *measure* needs to reflect the same level of sanitary protection as the *standard*. In this dispute a comparison thus needs to be made between the level of protection reflected in the EC measures in dispute and that reflected in the Codex standards for each of the five hormones at issue.[149] (underlining added)

162. We read the Panel's interpretation that Article 3.2 "equates" measures "based on" international standards with measures which "conform to" such standards, as signifying that "based on" and "conform to" are identical in meaning. The Panel is thus saying that, henceforth, SPS measures of Members *must* "conform to" Codex standards, guidelines and recommendations.

163. We are unable to accept this interpretation of the Panel. In the first place, the ordinary meaning of "based on" is quite different from the plain or natural import of "conform to". A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is

[149]US Panel Report, paras. 8.72 and 8.73; Canada Panel Report, paras. 8.75 and 8.76.

supported by" the latter.[150] In contrast, much more is required before one thing may be regarded as "conform[ing] to" another: the former must "comply with", "yield or show compliance" with the latter. The reference of "conform to" is to "correspondence in form or manner", to "compliance with" or "acquiescence", to "follow[ing] in form or nature".[151] A measure that "conforms to" and incorporates a Codex standard is, of course, "based on" that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.

164. In the second place, "based on" and "conform to" are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses "based on", while Article 2.4 employs "conform to". Article 3.1 requires the Members to "base" their SPS measures on international standards; however, Article 3.2 speaks of measures which "conform to" international standards. Article 3.3 once again refers to measures "based on" international standards. The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.[152] Canada has suggested the use of different terms was "accidental" in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice.

165. In the third place, the object and purpose of Article 3 run counter to the Panel's interpretation. That purpose, Article 3.1 states, is "[t]o harmonize [SPS] measures on as wide a basis as possible ...". The preamble of the *SPS Agreement* also records that the Members "[d]esir[e] to *further the use of harmonized [SPS] measures between Members* on the basis of international standards, guidelines and recommendations developed by the relevant international organizations ...". (emphasis added) Article 12.1 created a Committee on Sanitary and Phytosanitary Measures and gave it the task, *inter alia*, of "furtherance of its objectives, in particular with respect to harmonization" and (in Article 12.2) to "encourage the use of international standards, guidelines and recommendations by all Members". It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*. To read Article 3.1 as requiring

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[150]L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.

[151]L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 477.

[152]Appellate Body Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 17.

Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature[153]) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations.[154] To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary.

166. Accordingly, we disagree with the Panel's interpretation that "based on" means the same thing as "conform to".

167. After having erroneously "equated" measures "based on" an international standard with measures that "conform to" that standard[155], the Panel proceeds to Article 3.3. According to the Panel, Article 3.3 "explicitly relates" the "definition of sanitary measures *based on* international standards to the level of sanitary protection achieved by those measures". The Panel then interprets Article 3.3 as saying that "all measures which are based on a given international standard should *in principle* achieve the

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[153]US Panel Report, para. 8.59; Canada Panel Report, para. 8.62.

[154]The interpretative principle of *in dubio mitius*, widely recognized in international law as a "supplementary means of interpretation", has been expressed in the following terms:

> "The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."

R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman, 1992), p. 1278. The relevant case law includes: *Nuclear Tests Case (Australia v. France)*, (1974), I.C.J. Reports, p. 267 (International Court of Justice); *Access of Polish War Vessels to the Port of Danzig* (1931) PCIJ Rep., Series A/B, No.43, p. 142 (Permanent Court of International Justice); *USA-France Air Transport Services Arbitration* (1963), 38 International Law Reports 243 (Arbitral Tribunal); *De Pascale Claim* (1961), 40 International Law Reports 250 (Italian - United States Conciliation Commission). See also: I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 631; C. Rousseau, *Droit International Public*, Vol. I (1990), p. 273; D. Carreau, *Droit International*, 4th ed. (Editions A. Pedone, 1994), p. 142; M. Díez de Velasco, *Instituciones de Derecho Internacional Público*, 9th ed., Vol. I (Editorial Tecnos, 1991), pp. 163-164; and B. Conforti, *Diritto Internazionale*, 3rd ed. (Editoriale Scientifica, 1987), pp. 99-100.

[155]US Panel Report, para. 8.72; Canada Panel Report, para. 8.75.

same level of sanitary protection", and argues *a contrario* that "if a sanitary measure implies a *different* level (from that reflected in an international standard), that measure cannot be considered to be *based on* the international standard". The Panel concludes that, under Article 3.1, "for a sanitary measure to be *based on* an international standard ..., that *measure* needs to reflect the same level of sanitary protection as the *standard*".[156]

168. It appears to us that the Panel reads much more into Article 3.3 than can be reasonably supported by the actual text of Article 3.3. Moreover, the Panel's entire analysis rests on its flawed premise that "based on", as used in Articles 3.1 and 3.3, means the same thing as "conform to" as used in Article 3.2. As already noted, we are compelled to reject this premise as an error in law. The correctness of the rest of the Panel's intricate interpretation and examination of the consequences of the Panel's litmus test, however, have to be left for another day and another case.

B. *Relationship Between Articles 3.1, 3.2 and 3.3 of the SPS Agreement*

169. We turn to the relationship between Articles 3.1, 3.2 and 3.3 of the *SPS Agreement*. As observed earlier, the Panel assimilated Articles 3.1 and 3.2 to one another, designating the product as the "general rule", and contraposed that product to Article 3.3 which denoted the "exception". This view appears to us an erroneous representation of the differing situations that may arise under Article 3, that is, where a relevant international standard, guideline or recommendation exists.

170. Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.

171. Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member

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[156]US Panel Report, para. 8.73; Canada Panel Report, para. 8.76.