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WTO Dispute Watch

Disputes of 2010

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WTO Dispute Watch
Disputes of 2010

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WTO Dispute Watch

Disputes of 2010

This WTO Dispute Watch, Disputes of 2010 is the second in our annual series of publications on the rulings and recommendations issued by the Panel and Appellate Body of the World Trade Organization. Each WTO Dispute Watch explains and examines these reports adopted by the Dispute Settlement Body (DSB) of the World Trade Organization in 2010.

The WTO reports discussed in this publication are available on the website of the WTO, at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. The texts of the WTO Agreements discussed in the publication are available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

Our previous publications are:

1. WTO Dispute Watch, Disputes of 2009, Vol.1, No.1

Foreword

I am delighted that Centre for WTO Studies is bringing up the second edition of its annual "Dispute Watch". The first edition of the "Dispute Watch" was well received and appreciated by the researchers as well academia. This unique series offers the reader a comprehensive analysis, on a case-by-case basis the jurisprudence of the WTO. Each case study contains: details of the case in question and important jurisprudential references; followed by a summary of the facts and procedure, claims of the parties, findings of the Panel, issues raised in the appeal, conclusions of the Appellate Body etc. This approach to the case-law gives the reader a complete and objective account of the reasoning of the dispute resolution mechanism, while offering a critical perspective.

An open, rule based trading system based on non-discrimination, progressive liberalisation of tariff and rule of law is essential for a stable world trade order. Through World Trade Organization a 'rule based' system has been established. This rule based system can work properly only when disputes between its members are resolved speedily and effectively. We are happy that through the Dispute Settlement Body of the WTO many long standing disputes are resolved very effectively and in time bound manner. The effective compliance of its rulings further strengthened the working of the WTO. The jurisprudence in trade law led by the WTO Dispute Settlement Body is evolving as an effective strengthening mechanism of WTO itself.

I compliment the Centre for WTO Studies for this effort. At the same time, I congratulate the editor for bringing the second edition of this important publication.

K. T. Chacko
Director
Indian Institute of Foreign Trade

Editor's Note

The year 2010 was a year of great significance for the Dispute Settlement Body (DSB) of the WTO. Overall in 2010 DSB adopted and issued nine Panel reports and one Appellate Body reports. A number of other milestones were reached in terms of the use of dispute settlement process, settlement of several long standing disputes and amendments to the Appellate Body Working Procedures. At the same time little or no new progress appeared to have been made by periodic special sessions of the DSB in its more than decade long effort to review and make "improvements and clarifications" of the rules and procedures in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

WTO Members filed a total of 17 new disputes in 2010, compared with 14 in 2009. However, the number of new disputes in recent years is lower than the early years of the last decade, with a peak of 37 disputes filed in 2002. In all 6 panels were established in 2010, which is less than that in 2009. The total number of on-going disputes was almost 40 per cent higher in 2010 than in 2009. The number of on-going disputes peaked at 23 during the summer of 2010. A majority of panels established in 2010 was composed by the Director General of the WTO. The number of panel reports and arbitration awards circulated to Members rose from a historic low of 6 in 2009 to 9 in 2010.

Trade remedies dominated the DSB agenda for the year 2010. A majority of the consultation requests, panels established and reports circulated in 2010 were related to trade remedies -antidumping, countervailing duties and safeguards. There were three new "zeroing" cases in 2010: US Shrimp from Vietnam; US Anti-dumping Measures Involving Products from Korea; and US — Carrier Bags from Thailand. In the US - Tyres case, China brought its first challenge under the China-specific safeguard restrictions under China's Protocol of Accession.

Relatively new subjects like renewable energy and wind power equipment found their way onto the WTO dispute settlement mechanism, in cases brought by Japan against Canada and by the United States against China. We also witnessed the establishment of the first WTO panel dealing with a tobacco-control measure in

Indonesia's case against the United States. Unlike previous tobacco cases, this addresses a ban on cigarettes containing certain additives including clove. We also saw cases dealing with the interpretation of agreements that have had little attention in the past. The Thailand–Cigarettes dispute addressed several novel interpretation issues under the Customs Valuation Agreement. In EC- IT Products, a Panel Report that was not appealed, the Information Technology Agreement (ITA) made its DSB debut.

We also saw the return of familiar issues, such as a case dealing with claims of tax discrimination and alcoholic beverages. Three SPS cases, significant generally for their complexity, occupied panel's time in 2010. These were Australia- Apples, US- Poultry from China, and Korea—Bovine Meat. The year 2010 was "par for the course" in that all the panels established in 2010 involved goods. The year went into the record books as the year in which the Panel Report in one of the biggest WTO cases to date was circulated i.e. "Airbus" case. This complex dispute involves allegations of some 300 separate instances of alleged subsidization by the EU and its Member States over a period of almost forty years. The Panel Report was appealed on July 2010 and virtually monopolized the attention of the Appellate Body for several months, causing it to make special arrangements with WTO Members to delay consideration of appeals in several other cases.

Of the 17 new requests for consultations, the United States was the only multiple requesting party, launching 4 of the requests. Both China and the Dominican Republic were on the receiving end in 4 requests (although the 4 requests to the Dominican Republic relate to the same matter). The EU received 3 requests and the United States, 2. In terms of the 6 panels established in 2010, the United States was respondent in 4 panels; the EU and the Philippines were each respondent in the other 2. Including these 6, there were 11 active panels at the end of 2010: the United States was respondent in 7 of those cases and China, the EU, Korea, and the Philippines were each respondent in 1 case. Complainants included 3 each from the EU and Mexico, and 1 case brought by each of Brazil, Canada, China, the EU, Indonesia, Korea, Vietnam and the United States.

The year 2010 was a busy year for developing countries in the DSB. In fact, the majority of the cases initiated in 2010 were brought by developing countries only. El Salvador and Vietnam each brought their first case as complainant. El Salvador was one of four developing country Members from Central America to bring a safeguards case on bags and tubular fabric against the Dominican Republic. Vietnam brought a dumping case on shrimp against the United States. Peru

requested consultations against Argentina regarding antidumping duties on fasteners and chains. We also saw the circulation of the Panel Report in Thailand — Cigarettes, involving two Asian developing countries. Further, in 2010 there were more developing countries than developed countries involved as 'third parties'. In 2010 we also saw some "newcomers" in the DSB arena. Ukraine requested the establishment of a panel against Armenia, a first for both countries. At the end of 2010, this dispute had not moved beyond the first request for panel establishment.

The United States and the EU still top the charts in terms of being the most frequent users of the WTO dispute settlement system, both as complainants and respondents. Canada, Brazil, India and Mexico were frequent complainants, while India and China have defended numerous cases.

By the end of 2010, 419 disputes had been filed since the creation of World Trade Organization in 1995. 128 disputes went to a panel or the Appellate Body. The most active users of the system as complainant being the United States (97), the European Union (82), Canada (33), Brazil (25), Mexico (21) and India (19). Facilitating the evolution of WTO rules had been the unprecedented level of recourse by Members to the new disputes procedures. Overwhelmingly, the most intractable disputes had concerned the 117 disputes over implementation of Dispute Settlement Body (DSB) recommendations. Over 34 cases had concerned recourse to Article 21.5 on implementation of DSB decisions and 21 cases of recourse to Article 22 on retaliation.

Authorization by the DSB to suspend concessions has been relatively rare. The DSB has granted suspension in only nine disputes thus far. We saw two examples in 2010 of suspension of proceedings. Both cases involved arbitrations under Article 22.6 of the DSU, where the United States objected to the level of suspension of concessions proposed by the European Union in one zeroing case and by Japan in another zeroing case.

Disputes on goods continue to be the most common disputes brought before the WTO. As of the end of 2010, only 28 did not involve goods. In other words, since the establishment of the WTO in 1995 until the end of 2010, about 94% of disputes involved goods, while only about 6% did not.

Three panel reports were adopted by the DSB without these were appealed. Three remaining Panel reports were appealed during 2010. Thus, three out of the

six panel reports for which the 60-day deadline expired in 2010 were appealed, yielding an appeal rate for the year of 50%.

Composition of the Appellate Body in 2010

The Appellate Body of the WTO is a standing body composed of seven members appointed by the Dispute Settlement Body for a term of four years with the possibility of being reappointed once for another four-year term.

Composition of the Appellate Body 1 January to 31 December 2010

Name	Nationality	Term(s) of office
Lilia R. Bautista	Philippines	2007-2011
Jennifer Hillman	United States	2007-2011
Shotaro Oshima	Japan	2008-2012
Ricardo Ramirez-Hernandez	Mexico	2009-2013
David Unterhalter	South Africa	2006-2009 2009-2013
Peter Van den Bossche	Belgium	2009-2013
Yuejiao Zhang	China	2008-2012

Pursuant to Rule 5(1) of the Working Procedures, David Unterhalter served as Chairman of the Appellate Body from 11 December 2009 to 16 December 2010. Appellate Body Members elected Lilia Bautista to serve a Chair of the Appellate Body commencing on 17 December 2010.

In accordance with Article 17.7 of the DSU the Appellate Body received legal and administrative support from the Appellate Body Secretariat. The Appellate Body Secretariat currently comprises a Director and a team of ten lawyers, one administrative assistant, and three support staff. Werner Zdouc has been the Director of the Appellate Body Secretariat since 2006.

Appeals made to the Appellate Body in 2010

Under Rule 20(1) of the Working Procedures, an appeal is commenced by

giving notice in writing to the DSB and filing a Notice of Appeal with the Appellate Body Secretariat. Rule 23(1) of the Working Procedures allows a party to the dispute other than the initial appellant to join the appeal, or appeal on the basis of other alleged errors, by filing a Notice of Other Appeal within 5 days of the filing of the Notice of Appeal. Three appeals were filed 2010. Two of the appeals included an "other appeal". All three appeals related to original proceedings.

Appeals filed in 2010

Panel reports appealed	Date of appeal	Appellant[1]	Document number	Other appellant[2]	Document number
Australia - Apples	31 Aug 2010	Australia	WT/ DS367/13 and Corr.1	New Zealand	WT/ DS367/14
EC and certain member States – Large Civil Aircraft	21 July 2010	European Union	WT/ DS316/12	United States	WT/ DS316/13
US-Anti Dumping and Counter-vailing Duties (China)	1 Dec 2010	China	WT/ DS379/6	— -	— -

[1] Pursuant to Rule 20 of the Working Procedures.
[2] Pursuant to Rule 23(1) of the Working Procedures.

Appellate Body Reports issued in 2010

One Appellate Body report was circulated during 2010. As of the end of 2010, the Appellate Body had circulated a total of 101 reports. There were two appeals in progress at the end of 2010.

Case Title	Document number	Date circulated	Date adopted by the DSB	WTO Agreements covered
Australia - Apples	WT/DS367/ AB/R	29 Nov 2010	17 Dec 2010	SPS Agreement

The Editor is thankful to Mr. Rajeev Kher, Additional Secretary, Department of Commerce, Government of India, Head and Professor Abhijit Das, Professors Shashank Priya and Madhukar Sinha of the Centre for WTO Studies for their comments on this work. Finally, the secretarial support provided by Miss Asha Rawat is greatly acknowledged.

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Abbreviations

Abbreviation	Description
AAA	Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act
ALOP	Appropriate Level of Protection
ALCM	Apple leafcurling midge
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
APHIS	Animal and Plant Health Inspection Service
BISD	Basic Instruments and Selected Documents
BCI	Business Confidential Information
CCA	Central Competent Authority
DSB	Dispute Settlement Body
DSU	Understanding on Rules and procedures Governing the Settlement of Disputes
FSIS	Food Safety and Inspection Service
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
IRAITA	Import Risk AnalysisThe Information Technology Agreement
HS	Harmonized Commodity Description and Coding System
MRSPNME	Maximum Retail Selling PriceNon Market Economy
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the DSB on 3 December 1996, WT/DSB/RC/1

SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS	Sanitary and phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SOCB	State owned commercial Bank
SOE	State Owned Enterprise
TTM	Thailand Tobacco Monopoly
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
USC	United States Code
USITC	United States International Trade Commission
USCFR	US Code of Federal Regulation
USDOC	US Department of Commerce
USDA	US Department of Agriculture
US PPIA	Poultry Products Inspection Act
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties, Vienna, 23 May 1969
Working Procedures	Working Procedures of Appellate Review, WT/AB/WP/5, 4 January 2005 (the provisions of which apply to appeals initiated prior to 15 September 2010); and Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010(the provisions of which apply to appeals initiated on or after 15 September 2010)
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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I. Amendments to the Working Procedures for Appellate Review

The latest amendments to the Working Procedures for Appellate Review came into effect on 15 September 2010 and are applicable to appeals initiated on or after that date. A consolidated version of the Working Procedures incorporating these amendments was circulated on 16 August 2010. The amendments modify the deadlines for written submissions during an appeal and provide for the filing and service of written submissions in electronic form.

The Working Procedures for Appellate Review was first adopted on 16 February 1996 pursuant to Article 17.9 of the DSU, which provides for the Appellate Body to draw up its working procedures in consultation with the Chairman of the DSB and the Director-General. Rule 32(2) of the Working Procedures specifies that the same procedures apply in the event of amendments to those working procedures. In 2010, the Appellate Body amended the Working Procedures for the fifth time[3] since their adoption in 1996. A consolidated version of the Working Procedures incorporating these amendments can be found as WTO document WT/AB/WP/6.

In the context of the latest amendments, the Appellate Body had initially proposed three amendments, which were communicated to the Chairman of the Dispute Settlement Body by letter of 16 December 2009 and were subsequently circulated to all WTO Members as document WT/AB/WP/W/10.

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[3] The first two amendments, adopted in 1997 and 2002, respectively, related to the term of office of the Chairman of the Appellate Body. The third, adopted in 2003, concerned enhancement of third party participation at the oral hearing. Finally, in 2005, the Appellate Body adopted changes to certain defined terms, appellant submission deadlines, multiple appeal deadlines, as well as rules regarding notices of appeals, clerical errors, and oral hearings.

The first proposed amendment provided that an appellant's written submission would be filed when an appeal is commenced, namely, on the same day as the filing of a Notice of Appeal, rather than seven days after an appeal is commenced, as was provided under the Working Procedures effective at the time of the proposal. The deadlines for the Notice of Other Appeal, written submissions, and third-party notifications would be advanced accordingly, and third participants' submissions would be due three days after, instead of on the same day as, appellees' submissions. The purpose of this amendment was to allow the Appellate Body and the WTO Members to focus on the substance of the issues raised in an appeal as early as possible, thereby facilitating a more efficient use of time during the 90-day period.

The second proposed amendment explicitly authorized, subject to certain conditions, parties and third parties to file documents with the Appellate Body, and serve documents on other parties and third parties, by electronic mail. The Appellate Body considered that the proposed amendment reflected the practice developed in recent years and would assist participants and third participants in the filing process and better accord with their actual working practices. This proposal would also have allowed parties and third parties to file paper copies of their submissions the day after, rather than on the same day as, the filing of the electronic version.

The third proposed amendment would have introduced a procedure for consolidating appellate proceedings where two or more disputes share a high degree of commonality and are closely related in time. This proposed amendment was intended to maximize the efficient use of limited time and resources by codifying the practice of consolidating appellate proceedings before a single Division when appeals of separate, but similar, Panel reports are filed at or around the same time.

With regard to the deadlines for filing documents and for the oral hearing, the following amendments had been adopted. First, Rules 21(1), 23(1), and 23(3) were amended to provide that the appellant's submission will be due on the same day as the filing of the Notice of Appeal, and that the Notice of Other Appeal and the other appellant's submission will be due 5 days after the filing of the Notice of Appeal. The Appellate Body thus adopted, without modification, its proposal to eliminate the seven-day period between the filing of the Notice of Appeal and the appellant's submission.

Second, Rules 22(1) and 23(4) were amended to provide that an appellee's submission will be due 18 days after the filing of the Notice of Appeal, thus maintaining the time-period between the appellant's submission and the appellees' submissions that had been provided under the Working Procedures. This represented a modification of the initial proposal that the appellees' submissions be due 15 days after the filing of the Notice of Appeal. In making this modification, the Appellate Body took into account certain WTO Members' expressed preference that there be no reduction in the time period between the filing of the appellant's submission and the filing of the appellee's submission, as well as the overall objective of enhancing the efficient use of the limited time available in appellate proceedings for all participants.

Third, Rules 24(1) and 24(2) had been amended to provide that third participant' submissions and notifications will be due 21 days after the filing of the Notice of Appeal, that is, 3 days after the deadline for the filing of the appellee's submission. This amendment thus maintained the staggered deadlines initially proposed by the Appellate Body between the filing of the appellees' submissions and the third participants' submissions. The Appellate Body explained that the staggered deadlines would enable third participants that file written submissions to comment on the positions of all participants, rather than only on those of appellants and other appellants. The Appellate Body also agreed with the observation made by several Members that such a staggered deadline could contribute to a more efficient oral hearing. The Appellate Body emphasized, however, that the amendment would not result in any reduced opportunity for third participants to make oral statements and respond to questions at the oral hearing.

Fourth, Rule 27(1) was amended to provide that oral hearings will, as a general rule, be held between 30 and 45 days after the filing of the Notice of Appeal. The Appellate Body adopted this range of dates to accommodate the amended deadlines for written submissions.

Finally, Annex I of the Working Procedures was also amended to reflect the new timetable for the filing of written documents and for the holding of oral hearings in both general and prohibited subsidies appeals.

With regard to the filing and service of documents, the following amendments were adopted. First, paragraphs 1, 2, and 4 of Rule 18 were amended to provide that official versions of documents in paper form are to be submitted to the Appellate Body Secretariat by 17:00 Geneva time on the day that the document is

due. In addition, paragraph 4 of Rule 18 was amended to provide that an electronic copy of each such document should also be submitted to the Appellate Body by the same deadline. By adopting these amendments, the Appellate Body modified its initial proposal that documents sent by e-mail could be followed by paper copies thereof the next day, and that, in case of discrepancy between the electronic copy and the paper copies, only the electronic copy be taken into account by the Appellate Body. In so doing, the Appellate Body took account of the WTO Members' concerns, notably with respect to such issues as potential technical glitches, the confidentiality of emails, and difficulties in verifying the timing of emails and the identity of their senders. The Appellate Body further explained that, given that a preference was expressed for maintaining the status quo pending implementation of a secure digital dispute settlement registry that could be used to upload and download documents, it had decided to proceed with amendments that reflect current practice and are less extensive than those originally proposed.

The Appellate Body decided not to introduce the amendment regarding the consolidation of appellate proceedings. The Appellate Body reiterated its view that a more systematic approach to consolidation, including identification of the criteria to be taken into account in the determination of when consolidation would be appropriate, would benefit all potential participants in an appeal. Nonetheless, the Appellate Body noted that many WTO Members expressed a preference for maintaining the status quo. Thus, the Appellate Body stated that it would continue to take decisions on consolidation in appropriate cases on the basis of Rule 16(1), after consulting with the participants.

Finally, the above amendments necessitated that certain consequential amendments be made to the Working Procedures, including: (i) a row added to the Table set out in Annex III indicating the latest amendments to the Working Procedures and the relevant explanatory documents and DSB meeting minutes; (ii) an express reference, in the text of paragraphs 1 and 2, to the fact that there have been amendments to the Working Procedures.

II. Adopted Panel Reports

1. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT WT/DS316/R, 30th June 2010

Parties:

United States of America
European Communities

Third Parties:
Australia, Brazil, Canada, China, Japan and Korea

Factual Matrix:

On 6 October 2004, the United States requested consultations with the European Communities and certain EC member States (Germany, France, the United Kingdom, and Spain) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXIII:1 of the GATT 1994" and Articles 4, 7 and 30 of the Agreement on Subsidies and Countervailing Measures (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), with regard to measures affecting trade in large civil aircraft. The parties failed to resolve the dispute through consultations.

On 31 May 2005, the United States requested the establishment of a Panel pursuant to Article 6 of the DSU, Article XXIII: 2 of the GATT 1994, and Articles 4, 7 and 30 of the SCM Agreement (to the extent that Article 30 incorporates Article XXIII of the GATT 1994). In its request for establishment of a Panel, the United States requested that the Dispute Settlement Body initiate the procedures

provided in Annex V of the SCM Agreement pursuant to paragraph 2 of that Annex.

Product at Issue in the dispute

The parties agreed that the product at issue in this dispute was large civil aircraft, as distinguished from smaller (regional) aircraft and military aircraft. Large civil aircraft ("LCA") can generally be described as large (weighing over 15,000 kilograms) "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA were designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers. LCA are covered by tariff classification heading 8802.40 of the Harmonized System ("Airplanes and other aircraft, of an unladen weight exceeding 15,000 kg").

The design, testing, certification, production, marketing and after-delivery support of LCA is an enormously complex and expensive undertaking. LCA are presently produced only by Boeing and Airbus, which both sell a range of LCA models world-wide, to serve the range of needs of their customers, principally airlines and airplane leasing companies. Both companies engage in continued development of LCA, which requires significant up-front investments over a period of 3-5 years before any revenues are obtained from customers. Sales of LCA are relatively infrequent, but generally very large in terms of the number of aircraft and dollar amounts involved (LCA sales are made in USD), although deliveries are generally made over a period of years subsequent to the sale.

Customers choose among the various LCA models available those they conclude are most suitable for their needs, generally considering a broad variety of factors, including the physical and operating characteristics of the available models, operating costs, existing fleet, routes to be served by the aircraft, the structure of the existing fleet, and costs, with a view to minimizing costs and maximizing revenues.

The parties disagreed as to the scope of the subsidized product or products, and the scope of the like product or products, at issue in this dispute. The United States contended that the subsidies at issue in this dispute benefit the production and marketing of the full range of LCA manufactured by Airbus, and that therefore the "subsidized product" was the Airbus LCA family as a whole, and that the corresponding "like product" was the entire family of Boeing LCA. The European

Communities, on the other hand, contended there were four "families" of Airbus LCA, each constituting a separate allegedly subsidized product, and that there were three Boeing "like products" corresponding to three of the Airbus families of LCA, and no Boeing "like product" corresponding to the Airbus A380 family.

Essential Background: Corporate History of Airbus

Boeing was the sole producer of large civil aircraft until the 1960s when a consortium was formed amongst Spain's CASA, France's Aerospatiale and Germany's Deutsche Airbus to form the entity known as Airbus today. Until the creation of Airbus SAS in 2001, the Airbus companies were originally organized as a consortium. After the termination of Airbus Industries and integration of the activities of Airbus Industries resulted Airbus SAS. After the exit of Lockheed from the United States market and the merger of McDonnel Douglas and Boeing, Boeing and Airbus constituted a duopoly in the Large Civil Aircraft market. Both member states accused each other of subsidizing the LCA industry. In this dispute, the United States had challenged the Launch Aid[4] development funding as being a highly preferential financing which amounts to a specific subsidy.

- EC/EU

Following the conclusion of the Treaty of Lisbon, the European Union is now represented as the European Communities. The new Treaty of Lisbon entered into force on 1 December 2009. The European Communities was then replaced by the European Union which succeeds it and takes over all its rights and obligations. In the WTO context, this meant changing from "The European Communities" to "The European Union" – the European Union remains a Member of the WTO alongside 27 EU Member States and the Delegation of the European Union continues to represent the EU and its Member States in the WTO.

Overall, the Treaty of Lisbon does not fundamentally change the EU's institutional set-up, which is still based on its three main institutions: European Parliament, Council and European Commission. However, the Treaty of Lisbon has returned the relations between the European Parliament, the Council, and the European Commission, so that full benefit can be derived from the new arrangements under the treaty. As regards trade policy, the Lisbon Treaty has

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[4] The EC responded by stating that Launch Aid was an over-general term which was to be replaced by the use of the term Member-State Financing.

significantly enhanced the role of the European Parliament, making it a fully fledged decision-maker in this field.

- BCI/HSBI

As provided for under Annex V of the SCM Agreement the specific procedures for dispute settlement under the SCM Agreement allow for specific treatment of information obtained under it. Following the appointment of the 'Facilitator' under the provisions of Annex V of the SCM Agreement, the European Communities requested the adoption of additional procedures of the protection of confidential information. The said information was classified as Business Confidential Information ("BCI") and Highly Sensitive Business Information ("HSBI"). The information was to be protected as under procedures arrived at by the Facilitator with the parties.

In the EC-Bananas case, with respect to the handling of business confidential information, the US had requested the Panel to consider special working procedures for the same. The Panel had acquiesced with the request despite the EC's opposition to the same.[5] However, the Panel in Wheat Gluten had not adopted such procedures for private confidential information despite the communications received from the parties in respect of the procedure.[6] The parties' right to closed proceedings is contained in Paragraph 2 of Appendix 3. The same permits "interested" parties and the parties to the dispute to be present during the Panel proceedings. It has been clarified by the Panel in the US-Lead case that the scope of "interested" parties does not extend beyond the third parties who have already notified their

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5 *European Communities –Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* WT/DS27/ARB, dated 9 April 1999.

6 *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/R, adopted 19 January 2001, para. 3.2.

interest in participation in the proceedings to that of observers.[7] The debate as regards allowing public hearings is still unresolved.[8]

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[7] United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Origination in the United Kingdom, WT/DS138/R, adopted 7 June 2000.

[8] **BCI under Appellate Body:**
Canada has requested that the Appellate Body adopt the Panel's BCI Procedures and focus on balancing two competing interests – fairness and due process. Canada had identified that protection under Article 18.2 would not suffice because the information submitted in the dispute was not in the public domain and was of the nature which would entail significant commercial interest, particularly from competitors. Brazil acceded to Canada's request for procedures to protect BCI as a good faith attempt. However, the acceptance was a qualified acceptance based on the assurance that authorise personnel shall not have their access to information restricted, and secondly the scope of Business Confidential Information should be limited to business proprietary information of private parties who are not subject to confidentiality obligations of the DSU. The European Communities had argued against the "transplant" of the Business Confidential Information procedures from countervailing duty procedures from certain members of the WTO into the WTO itself. Firstly, the procedures would deny a party or a third party access to those documents which were being submitted to the Appellate Body. Secondly, there would be new rights and obligations created for the members as opposed to the principle set out in Article 3.2 of the DSU which says that rights or obligations shall not be diminished by any other source of law than the covered agreements themselves. The United States, as a third part had argued that additional procedures for protecting business confidential information is *extremely important* as a basic consideration of due process because nothing in the DSU precludes such protection and it is actually allowed for by the panel under Article 12.1 read with Appendix 3. The Appellate Body declined the request of Brazil and Canada to adopt *additional* procedures for the protection of business confidential information in the appellate proceedings. Under Article 17.9 of the DSU, the Appellate Body has the authority to draw up its own Working procedures. Furthermore, under Article 18.2 of the DSU, written submissions to the panel or the Appellate Body are treated as being confidential (though made available to the other parties in the dispute). Finally, the participants are representatives of the Member countries and are under a corresponding obligation to treat such information in a circumspect manner. The Appellate Body gave the following reasons; (i) The members of the Appellate Body and the staff are bound by Article VII' of the *Rules of Conduct* which state as follows: "Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential".

Preliminary Issues

Continuity of Benefit:

The EC noted that a large number of subsidies identified by the United States had been received years ago, by entities other than Airbus SAS. The EC noted the US claim seemed to be that the core ingredient of a serious prejudice analysis was almost always that the product at issue be subsidized, but the recipient was left undetermined.[9] The EC had argued that certain transactions had extinguished subsidies to Airbus by event of subsequent privatization. The US in response pointed out that thought a "pass-through" analysis might be relevant in the CVD context, there is no need to determine whether the subsidies are provided directly to the producers of the merchandise at issue causing adverse effects to the other members. The benefits to the industry occur over a long period of time with the identity of the recipients constantly in flux considering Airbus changed its corporate identity over time. The Panel further noted that it was not necessary to have to prove the individual pass-through effect for each subsidy.

"Like" product determination

Considering Airbus and Boeing are the only two producers of LCA in the world, the Panel was left with little choice but to make a like product determination between the two of them. While the United States contended the Airbus LCA family corresponds to the Boeing LCA family, the EC submitted that there are four families of Airbus, and though there might be three families in Boeing (based on size and seating capacity) which correspond to the first three families of Airbus, there is no "like" product for the Airbus 380 family.

"Measures" at Issue

'Launch Aid' was the nomenclature of the family of measures identified by the US as being violative under the SCM Agreement. Launch Aid was identified as financing [which] is alleged to provide benefits to companies including financing for projects that would otherwise not be commercially feasible. The scope of the

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[9] [as cited by the EC]The AB in *Canada-Aircraft* said that a benefit cannot exist in the abstract, "but must be received and enjoyed by a beneficiary or a recipient". The application of the Tokyo Round Subsidies Code was also not allowed under Article 7.2 of the DSU and further in Articles 3.2, 3.4 and 19.1 of the DSU.

measures encompassed financial and non-financial measures. Some of the finance provided stated that where the aircraft is not successful, financing need not be repaid and such assistance was provided in the form of debt forgiveness and debt assumption by the governments. Other identified financing measures included the funding given for R&D projects, equity transfusions and grants by the EC and the contributions made by the European Investment Bank to British Aerospace, Aerospatiale, Airbus Industrie, CASA, EADS (Airbus 380) and so on. The two final measures identified note that any 'other measures which result in the grant of financial contribution to Airbus' must also be included within the 'terms of measure' in an attempt by the United States to ensure that no such exclusion of consideration of measures can occur on the grounds of "specificity" or request under Article 6.2 of the DSU.

Inter-temporal Scope

Whether it is appropriate to consider LA/MSF contracts prior to 1995 under the SCM agreement – temporal scope?

o The EC submitted that LA/MSF measures before the entry of the SCM agreement could not be studied under Article 5 of the SCM agreement because they were "grandfathered" by the 1992 Agreement.

o Relevance of 1979 Tokyo Round Subsidies and Countervailing Measures Code to the matter. (Other international aircraft related agreements)

- **Temporal Scope of the SCM Agreement**

Scope of Inter-temporal application of international law [Island of Palmas Arbitration] The European Communities stated that the LA/MSF contracts for A320 and A330 and A340 should not be assessed against the SCM agreement and must be instead weighed against the standards of the Tokyo Round Subsidies Code. The United States on the other hand asserted that this contention of the EC would find no force in the WTO where the sources of law do not include the Tokyo Round Subsidies Code which is not a covered agreement. The acts should be judged in light of law contemporary with their creation and that rights acquired in a valid manner according to the law contemporaneous with their creation may be lost if not maintained in accordance with the changes in international law. The Panel however noted that the EC had misapplied the doctrine of inter-temporal application of international law. Article 5 of the SCM agreement established an

obligation on Members to not cause adverse effects to the interests of other Members through the use of subsidies from the year 1995. This applies even to subsidies which were envisaged before the year 1995.

- **Importance of other International Aircraft Related Agreements**

The EC brought to the notice of the Panel two international agreements dealing with trade in civil aircraft, the 1979 Agreement on Trade in Civil Aircraft ("the 1979 Agreement") and the 1992 Agreement concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft ("the 1992 Agreement").[10] The EC submitted that the agreements "provide essential factual background" and further evidence that aircraft production has been treated as a special case in the GATT and the WTO since the rules on subsidies were first promulgated in 1979 during the Tokyo Round of trade negotiations. The EC might have been trying to suggest that the agreements need to be regarded as interpretative tools as Mavroidis[11] suggested, and not as a source of law which needs express mention, or reference in the covered agreements. Further the EC might have utilised these agreements to demonstrate subsequent state practice relating to the subsidies agreement. The Agreements as a "source of law" were also considered by the Panel.

Launch Aid

Was Launch Aid a subsidy within the meaning of Article 1 of the SCM agreement?

The United States challenged not only every grant under the Launch Aid programme, but also the entirety of the program.

I. 10 **LAUNCH AID:**
The application of the Tokyo Round Subsidies Code was also not allowed under Article 7.2 of the DSU and further in Articles 3.2, 3.4 and 19.1 of the DSU.

11 See generally, Petros C. Mavroidis, No Outsourcing of Law? WTO Law as practiced by WTO Courts, the American Journal of International law, Vol. 102, No. 3 (Jul. 2008), pp. 421-475.

1. Whether the Launch Aid that Airbus received for the A380, A340-500/600 and the A330-200 were prohibited export subsidies?

According to the United States the steps to prove that a particular subsidy is an export subsidy is that there is a subsidy under Article 1.1 of the SCM agreement, that there is existence of actual or anticipated exportation or export earnings. Hence there must be the grant of a subsidy that is tied to, actual or anticipate export earnings. The EC argued that the entire framework on which the US based its analysis was flawed. While dealing with A380, A 340-500, A 330-220, the US argued that there was subsidization under Article 1.1 of the SCM agreement. It was provided because the governments know Airbus was developing the A 380 primarily for the export market. Launch Aid payment had a repayment clause which is tied to the sales of the aircraft. [Where sales are not met, the repayment of aid is forgiven or indefinitely postponed]. The EC argued that mere anticipation, consideration or motivation that there might be exports does not actually constitute a contingency.

With respect to USD 1,700 million LA/MSF measure for A350 it was found Existence of a clear and identifiable commitment to provide Launch Aid/ Member State Financing not proven. The Panel found these terms were subject to negotiation, and were not back loaded, success-dependent and below market-interest terms.[12]

The United States argued that each of the individual LA/MSF contracts involved a financial contribution which was either in the form of direct transfer of funds or a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM agreement. The United States cited Canada-Aircraft and US Lead and Bismuth II, to enunciate what a benefit and financial contribution were – a financial contribution will confer a benefit on a recipient within the

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[12] Article 14(c) of the SCM agreement – *Loan Guarantee* calculation for the purpose of countervailing duty terms. The benefit of a loan guarantee is measures as the difference in the amount that a recipient pays for a loan guaranteed by the government and a comparable commercial loan absent the loan guarantee. It was found that there was insufficient evidence submitted by the United States to come to this conclusion. [Article 1.1(b) of the SCM agreement– when does a financial contribution confer a benefit?]] The panel considered whether a 'benefit' had actually been conferred; it cited *Canada Air-craft* in citing that a financial contribution will only confer a benefit or an advantage where the terms are more advantageous than those which would have been available to the recipient in the market

meaning of Article 1.1(b) of the SCM agreement when provided on terms better than those available to the same recipient in the market. The United States stated that the loan available through the LA/MSF contracts were available at substantially below what the market would demand for financing with similar characteristics. Particularly, the United States noted that there was a transfer of "substantial risks" or "extremely high risks" associated with LCA development from Airbus to EC member states and the same was not reflected in the level of interest rates charged for this financing. Furthermore the loan characteristics are described as being success-dependent, unsecured and back-loaded. Hence Airbus, according to the United States receives financing with no down-side risk.

The European Communities on the other hand while expostulating on the notion of "benefit" cited the 1992 Agreement (Article 4). According to EC, this 1992 agreement was an instrument of international law applicable between the parties as under Article 31 (3)(c) of the VCLT. The EC specifically connoted that the domestic support rendered through Member-state-financing was acceptable under the terms of Article 4 of the 1992 agreement and therefore did not confer a benefit upon Airbus within the meaning of Article 1.1(b) of the SCM agreement. The Panel while considering this stance of the EC went on to actually consider the terms of Article 4 of the 1992 agreement – the Panel however expressed not being aware as to "inform" the meaning of the word "benefit" through Article 4. Furthermore the EC submitted that with respect to the Large Civil Aircraft industry it was futile to consider "perfect" market conditions. Instead the methodology to be resorted to was to test the reasonableness of the forecast number of sales over which repayments are intended to secure the rate of return agreed to.

The Panel's analysis

Panel admitted that LCA development has significant start-up costs. The contractual framework is either (i) inter-governmental agreements implemented through individual national-level contracts or other legal instruments entered into by EC States in favour of Airbus in its territory and (ii) individual contracts between the relevant EC member State government and the Airbus entity in its territory. The Panel decided to conclude if a LA/MSF confers a benefit by examining whether the cost of the challenged LA/MSF contracts to Airbus is less than the cost that Airbus would have been faced with had it sought financing on the same or similar terms from the market. The Panel decided to study the rates of return that would be asked by a market-based lender for financing on the same or similar terms and conditions. The Panel finally tabulated the LA/MSF rate of return with the market

rate of return and came out with a differential rate. The United States noted that all the LA/MSF contributions given at zero rate of interest do not seek a commercial rate of return, leading to the conclusion that there is a conferral of benefit. Though the Panel agreed with the US argument, the European Communities brought up an interesting argument to highlight the specific nature of the Large Civil Aircraft industry. The EC said that it would be difficult to quantify the obligations which Airbus has to the different governments by purely considering the interest rates alone. Indeed, in the EC contended that some of the LA-MSF measures might contain public policy obligations and that it is futile to compare such a loan with a commercial value. The Panel however, followed the WTO principles of burden of proof and concluded that where a party advanced a particular notion in support of its argument it had the concurrent obligation to prove it as well. The Panel found that the lack of evidence in combination with the absence of even suggesting a particular quantitative or qualitative methodology with which to assess the "public policy" obligations in the LA/MSF contracts had resulted in the EC failing to prove its case.

The "Specific" nature of the LA/MSF subsidies

The United States submitted that pursuant to Article 2 of the SCM agreement every subsidy conferred on Airbus is specific because it finds its origin in a specific contract between the relevant EC member State and Airbus. The subsidies grant were limited to 'certain enterprises' within the meaning of Article 2.1(a) of the SCM agreement. Hence, the Panel agreed with the United States.

The basic issue was whether LA/MSF can be said to be a programme or a measure which can be the subject of scrutiny by the Panel given the fact it is not explicitly written anywhere?

The Panel required the United States to demonstrate that the unwritten LA/MSF programme is attributable to governments of France, Germany, Spain and the UK. The United States had specifically argued that the challenged LA/MSF programme had created expectations amongst the public and the private sector. The Panel however concluded that the United States had not met the "high threshold" to establish the existence of the unwritten LA/MSF programme. The Panel then proceeded to consider whether the LA/MSF for the A380, A340-500/600 and the A330-200 constitutes a prohibited export subsidy within the meaning of Article 3 of the SCM agreement.

According to the United States a subsidy which is contingent both in law and in fact upon anticipated export performance is a prohibited export subsidy within the meaning of Article 3.1(a) of the SCM agreement. The conditions as expostulated in Canada-Aircraft involve (i) the "granting" of a subsidy, (ii) that is "tied to"; (iii) "actual or anticipated exportation or export earnings". The Panel's approach took into account the earlier declaration that the challenged LA/MSF agreements were in essence a subsidy. Then the Panel went ahead to consider whether individual programmes actually "anticipated exportation or export earnings".

The panel then went on to consider if the grant of LA/MSF was "tied to" anticipated exportation or export earnings within the meaning of footnote 4 of the SCM agreement.

The Panel finally concluded that the German, Spanish and UK A 380 contracts were prohibited export subsidies with the meaning of Article 3.1(a) and footnote 4 of the SCM agreement. Then the Panel proceeded to examine whether the LA/MSF measures were contingent in law upon anticipated export performance.

European Investment Bank Loans

The Panel first considered whether the 12 loans provided by the European Investment Bank (EIB) were specific subsidies within Article 1 and 2 of the SCM agreement. Of the twelve loans identified the EC noted that certain loans granted between 1988 and 1993 were outside the temporal scope of the SCM Agreement and that the loans which had been granted to earlier bodies prior to the establishment of Airbus SAS could not be said to have "passed through" to Airbus SAS. Further the EC stated that some of the loans had been paid for, meaning they were no more "existing measures".

With respect to the loan which had already been paid up, the Panel considered the Appellate Body's statement in US-Upland Cotton where they had observed that there could be a time-lag between payment of a subsidy and any consequential adverse effects. The United States had argued that a subsidized loan could continue to cause adverse effects the same way that a subsidy grant could continue to provide a benefit or cause adverse effects after being granted. The EC had adopted the argument that subsidised loans cannot cause adverse effects beyond the date on which they have been fully repaid and hence Article 5 of the SCM agreement. The Panel did not agree with this submission of the EC. The Panel after citing Indonesia Autos on the effect of a subsidy which might have been expired or be granted in

the future still impacting the calculation of an 'adverse effects' claim resulted in the Panel observing that the same might also apply to the subsidised loans granted by the EIB.

The Panel then considered whether the 2002 finance contract between EIB and EABS displayed the existence of a financial contribution in the form a loan within the meaning of Article 1.1(a)(1)(i), the Panel found the 2002 finance contract evidenced the existence of a potential direct transfer of funds within the meaning of Article 1.1(a)(1)(i).

2002 EIB loan to EADs for A 380	Panel decided it was a subsidy under Article 1.1 of the SCM agreement because it conferred a benefit within the meaning of Article 1.1 (b) of the SCM agreement.	The interest rate charged by the EIB was less than the market rate taking into account comparable financing.EADS were not required to pay commitment fees.
1992 loan to Aerospatiale for the A 330/A340	Panel decided it was a subsidy under Article 1.1 of the SCM agreement because it conferred a benefit within the meaning of Article 1.1 (b) of the SCM agreement.	It was granted at an interest rate To the cost of borrowing for the French government thereby being more advantageous than the interest rate available though comparable financing.The interest rate terms did not include a risk premium.
1998 loan to Aerospatiable, 1993 loan to Aerospatiable for Super Transporteur and so on..	Panel decided it was a subsidy under Article 1.1 of the SCM agreement because it conferred a benefit within the meaning of Article 1.1 (b) of the SCM agreement.	It was granted at an interest rate To the cost of borrowing for the French government thereby being more advantageous than the interest rate available though comparable financing.The interest rate terms did not include a risk premium.
1991 loan to British Aerospace for A330/ A340, 1990 loan to CASA for A 320 and A 330/340	Panel decided it was a subsidy under Article 1.1 of the SCM agreement because it conferred a benefit within the meaning of Article 1.1 (b) of the SCM agreement.	It was granted at an interest rate To the cost of borrowing for the French government thereby being more advantageous than the interest rate available though comparable financing.The interest rate terms did not include a risk premium.

Whether the EIB loan subsidies were specific under the meaning of Article 2 of the SCM Agreement?

Citing US-Upland Cotton, the Panel observed that the concept of specificity under Article 2.1 of the SCM agreement requires the analysis of whether a subsidy is broadly available throughout the economy so as to not benefit a particular limited group of producers of certain products. The United States had sought to satisfy this definition of 'specificity' by substantiating that the EIB loans are granted following individual negotiations and that they are granted on a discretionary basis and the terms are not pre-determined or crystallised and they occur on a case-by-case basis.

The 'specificity' requirement under Article 2.1(a) focuses on whether the granting authority or the legislation explicitly limits access to the subsidy to certain enterprises. In determining whether the EIB did this, the Panel studied the lending operations of the EIB. On considering the scope of the word 'explicit' the Panel noted that it meant that the limitation would have to be utterly unambiguous in nature.

Furthermore, the US stated that the Eligibility Guidelines of the EIB Statute set out the steps the EIB follows to exercise its discretion to provide loans. The Panel also disagreed with the Panel's interpretation of specificity in Japan-DRAMS. The Panel noted that the decision laid down in Japan-DRAMS might lead to the mistaken conclusion that all exercises of discretion by a funding authority would result in there being a finding of "specificity". The Panel further noted that where there is the appearance of non-specificity, there is need for an analysis if the grant of the subsidy is actually -de-facto specific under Article 2.1(c) of the SCM agreement. The Panel finally concluded that the restructuring measures undertaken in Japan-DRAMS were in essence substantially different from the financial contributions made by the EIB. The Panel noted that though there was an 'element of discretion' in the EIB loans, the contractual terms and conditions are largely prescribed by the EIB's standard contract templates.

An alternate argument taken up by the United States was to prove specificity in the grant of a particular subsidy by differentiating the terms of a specific grant by differentiation it from the terms and conditions of loans granted to other recipients under the same program. Here, the United States also referred to the systemic question of grant of information with respect to the subsidy grant regime as specifically provided for under the Annex V process. Here, the United States

submitted that the failure to provide information was to be observed as being the fault of the European Communities and to accordingly permit the Panel to draw adverse inferences owing to it constitution, an instance of non-cooperation under paragraph 7 of Annex V. The Panel however did not agree with this argument by noting that even if the loan subsidies to Airbus were provided on terms and conditions outside the parameters of the EIB's lending programme, they would not render them specific under Article 2.1(a) because the exercise of discretion in this regard does not illustrate any difference in exclusivity in the grant of subsidies and only that the EIB could exercise its discretion to grant loans on particular terms and conditions to Airbus. Hence, the Panel decided to focus on the 2.1(c) analysis of subsidies to find out if the grant of discretion in the grant of loans would have rendered the decisions specific, de-facto. The United States submitted that Airbus was the predominant user of the EIB's subsidy programme and the funding amounts were 'disproportionately large' – the 'disproportionately large' quantum was to be assessed keeping in mind the "baseline" against which the same ought to be measured. The United States notes that there are no baselines against which to measure the propriety or engage in a quantitative comparison considering there is no particular subsidy programme is existence, hence the United State offered that there might be other ways to assess the caterogisation of subsidies by the granting association.

In para.7.888 the Panel considered certain important aspects of when a loan conferred by the EIB or any other multilateral finance institutions like the Asian Development Bank, the International Finance Corporation etcetra would constitute subsidies within the meaning of the SCM agreement. The Panel noted that the extent to which a loan provided by any of the funding institutions would be stated to amount to being the provision of a subsidy would obviously be a question which can be answered in light of the facts of the impugned subsidy. The Panel further discussed the issue upon the issue as to whether such an entity could in essence be considered to be a government or any public body within the territory of the Member for the purpose of consideration under Article 1.1(a)(1). Furthermore considering that the provision of financial assistance is possibly the mandate of these organizations, not every case of support could be subsidization as may be prohibited or actionable under the SCM agreement.

The Panel on consideration of the salient features of the 'other' loans granted to Airbus observed that they conferred a benefit under the meaning of Article 1.1(b) of the SCM Agreement because they were granted in part or totally on below-market interest rate terms and the EIB had not charged the relevant Airbus

entity a risk premium. Generally the Panel considered the features of the loan such as commitment fees or non-utilization fees. The Panel while considering the arguments of the United States with respect to demonstrating that the 2002 EIB loan to EADS also conferred a benefit because the EIB did not charge non-utilization fees or that the other eleven challenged loans conferred a benefit because the EIB did not charge the entity either commitment fees or non-utilization fees, observed the arguments were baseless. The EUR 700 million credit line was also observed to not confer a benefit upon Airbus and therefore constitute a subsidy within the meaning of Article 1 of the SCM agreement.

Baseline Determination for Article 6.1(c) finding

	Baseline Determination	Arguments by the US	Article 2.1(c) and "specificity"
2002 loan to EADS	All EIB lending under the research and development objective for the "Innovation 2000 initiation"	The EUR 700 million credit line to EADS was granted under this. The Innovation 2000 initiation was described as being focused on one, of five economic sectors: "development of SMEs and entrepreneurship"; "diffusion of innovation"; "research and development"; "icts" and "human capital formation".	The credit line to EADs was the single largest provided to any one company between 2000 to 2006 bringing to the fore that the EADS was the predominant user of the programme and making the loan "specific" under Article 2.1 (c).
Loans granted to Airbus between 1988 and 1993		The two economic sectors that the EIB focused its lending activities on were "energy and infrastructure" and "industry, services and agriculture".	EIB loans to Airbus were disproportionately large within the meaning of 2.1(c).

Of relevance is the fact that a "programme" is said to exist where a subsidy programme has been found to exist where there are factors[13] which connote that a series of subsidies are circumscribed in way so as to clearly identify that they are a planned series of subsidies.

The Panel finally concluded that the United States had failed to establish that each of the 12 challenged EIB loans were subsidies which were specific under either Article 2.1(a) and Article 2.1(c) of the SCM agreement. They engaged in an analysis of whether the Airbus entities had been entitled to "disproportionately large" and "predominant use" could be identified.

Infrastructure and Infrastructure-Related Grants

When does the provision of goods or services in the form of infrastructure constitute the provision of infrastructure which is "other than general infrastructure" within the meaning of Article 1.(1)(a)(1)(iii) was addressed as being a question of access to users on a non-discriminatory basis by the United States and as an alternative line of argument the United States submitted that the infrastructure-related measures provided by German authorities in Hamburg, Nordenham and Bremen, by French authorities in Touloose and so on were specific subsidies under the meaning of Articles 1.1 and 2 of the SCM agreement. The United States pointed out certain specific buildings, airports and roads as being more than just "general infrastructure" as under Article 1.1(a)(1)(iii), and that there was no financial contribution as asserted by the United States who had submitted that each of the measures was a financial contribution within the meaning of Article of 1.1.(1)(i) or (iii) of the SCM agreement. With respect to those measures which were just grants the EC did not contest that they were either financial contributions or that they rendered a benefit, instead the EC generally argued that they were not specific.[14]

With respect to ZAC Aeroconstellation site, the Panel's approach was to first consider whether the improvements to access roads, the provision of the site and the underpasses beneath the taxiways were measures of general infrastructure. Then the Panel assessed whether the financial contribution represented by the

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[13] (i) designation by the granting authority of a series of subsidies as a programme; (ii) a common set of objectives and (iii) dedicated funding.

[14] Para 7.1013

measure, whether there was a benefit and a consideration of the appropriate benchmark for comparison in assessing the question.

While considering the question of general infrastructure, the Panel noted that though the development of industrial sites such as the ZAC Aeroconstellation might benefit the society as a whole, it does not indicate the same falls under the umbrella of being general infrastructure. Though the French authorities might be said to be pursuing public interest in undertaking the development of the Aeroconstellation site, the same cannot constitute general infrastructure. The Panel observed that public expenditure of funds frequently involves public interest concerns, but where the target, or beneficiary is always a single entity or a group of entities the Panel limited the application of the term general infrastructure to it. Similarly, the fact that there is a large public interest being served by a particular grant does not alter that the same is conferring a benefit in the sense described by Article 1.1(b) of the SCM agreement.

Infrastructure grant	EC submissions	The General Infrastructure argument	Benefit under Article 1.1(b) of the SCM Agreement	Specificity under Article 2.1(a) of the Agreement
Muhlenberger Loch development	The reclamation and development of industrial land is a typical task performed by public authorities as providers of general infrastructure.		There was a benefit because there was no market rate of return.	

Infrastructure grant	EC submissions	The General Infrastructure argument	Benefit under Article 1.1(b) of the SCM Agreement	Specificity under Article 2.1(a) of the Agreement
ZAC Aeroconstellation site	The EC stated that the provision of this was a measure of general infrastructure.	The Panel observed that the ZAC Aeroconstellation site and the construction of EIG facilties was undertaken to enable Airbus to situate an A380 final assembly line in an advantageous location in France. The panel did not allow the general infrastructure argument in this regard.	There was a benefit because there was no market rate of return.	Specificity was identified because Airbus was the main beneficiary as also because the ZAC was defined with a view to be a site for aeronautics-related activities.
Provision of Roads RD 901, 902 and 963 under ZAC Aeroconstellation site.	The US noted that these roads were being identified and used specifically by Airbus. The EC replied to this by stating that improvements to the roads in the area had been under consideration long before the decision to develop the site had occurred.	The panel observed that the road improvements actually constituted the provision of general infrastructure within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.		

Infrastructure grant	EC submissions	The General Infrastructure argument	Benefit under Article 1.1(b) of the SCM Agreement	Specificity under Article 2.1(a) of the Agreement
Regional Grants[German Government in Nordenham and German Land of Lower Saxony]		Prima Facie case made owing to EC not refuting the claim made.		EC – under Article 2.2 of the SCM Agreement a subsidy which is limited to certain enterprises within a designated geographical region within the jurisdiction of the granting authority shall be specific. The United States had initially put form that all regional aid schemes were specific irrespective of whether they applied to certain enterprises in the designated regions.

German government's transfer of its ownership share in Deutsche Airbus to the Daimler Group - Specific subsidy to Airbus

There occurred a restructuring of Deutsche Airbus in the late 1980s. The question was whether this constituted a specific subsidy to Airbus.

United States arguments

The United States argued that the acquisition by KfW of 20 percent of the shares of Deutsche Airbus constituted a "financial contribution" by the German Government in the form of "direct transfer of funds" within the meaning of

Article 1.1(a)(1)(i) of the SCM Agreement. The US categorised this as a direct equity infusion and stated that it conferred a financial contribution. The US cited Article 14(1)(a) to connote that where a government's decision to provide equity to a company may become open to contest is where the decision is inconsistent with the usual investment practice of private investors in the Member's territory. Basing this argument as the stronghold of its submission the United States then proceeded to prove that the equity infusion in Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany.

The United States argued that both the acquisition by KfW of the 20 percent interest in Deutsche Airbus and the subsequent sale of that interest to Deutsche Airbus's parent MBB were specific subsidies. The Panel had on consideration of additional factual information as adduced by the EC and the US concluded that the 1992 transfer of KfW's equity interest in Deutsche Airbus to MBB was not "free of charge" as alleged by the United States. Still the Panel concluded that KfW's 1989 acquisition of a 20 percent equity interest in Deustche Airbus was a specific subsidy to Airbus SAS. Similarly, the Panel also found that the 1992 transfer by KfW of its 20% equity interest in Deustsche Airbus to MBB was a subsidy to Airbus because it involved a financial contribution in the form of direct transfer of funds and the consideration was less than the market value of the shares.

DEBT forgiveness by German Government

The German Government subsidized Airbus by forgiving at least DM 7.7 billion of Deutsche Airbus' government debt. The Panel on consideration of the 1998 settlement by the German government of all Deutsche Airbus' outstanding repayment obligations to the German government in exchange for a payment of DM 1.75 billion is a financial contribution in the form of a "direct transfer of funds". However the Panel concluded that the same did not necessarily point out that they financial contribution conferred a "benefit" on Deustche Airbus within the meaning of Article 1.1(b) of the SCM Agreement.

Whether the Equity Infusion that the French Government provided to Aerospatiale were specific subsidies?

The United States had observed that four capital contributions made by the French Government to Aerospatiale between the years 1987 and 1994 were specific subsidies to Airbus. The first factor examined by the Panel was the effect of the "pass-through' analysis. The EC argued that the United States had failed to establish

that the four capital contributions made by the French Government to Aerospatiable between 1987 and 1994 are subsidies to Airbus SAS because the United States had not demonstrated how the benefit conferred by the respective financial contributions provided to Aerospatiable passed through to Airbus SAS. The Panel however, concluded that if it was established that any of the financial contributions were said to confer a benefit on the Airbus Industrie Consortium they would not require the United States to have to establish that the benefit would have "passed-through" from Aerospatiable to Airbus Industrie or to Airbus SAS. In order to assess whether the capital contributions made by the French Government to Aerospatiale conferred a benefit, it was necessary to evaluate as to whether the terms on which the capital contributions were provided to Aerospatiale were more favourable than what would have been ordinarily available to it. Though there is no explicit guidance on making such determination, the United States had suggested a standard for the examination by suggesting that it should be compared with against the choice which an individual private investor would have made in the same case. The United States argued that Airbus had not been "equity worthy" at that point of time or capable of attracting investment capital from a private investor thereby connoting that the French Government's decision to provide such investment capital was inconsistent with the usual investment practice of private investors. Hence the Panel stated that the burden of proof that the United States would have to comply with was in making the determination that no other private investor would have found Aerospatiale investment-worthy.

1998 transfer of the French Government's 45.76 percent interest in Dassault Aviation to Aerospatiale

The Panel concluded that the 1998 transfer of the French Government's interest was a financial contribution. After having concluded that a private investor would not have made the same decision to invest in Aerospatiale by transferring interest in Dassault Aviation led the Panel to conclude the same was equivalent to the Panel conferring a benefit on Aerospatiale within the meaning of Article 1.1(b) of the SCM Agreement.

The Panel finally found that the French Government's transfer of its 45.76 percent equity interest in Dassault Aviation to Aerospatiale was a "direct transfer of funds" comparable to an equity infusion, the same conferred a benefit and the same was specific as considered by Article 2 of the SCM Agreement.

Research and Technological Development Funding that the EC and member states provide to Airbus were specific subsidies

The United States had identified multiple cases of funding measures in the form of grants which were to be used in research and technological development and assailed the same as being subsidies. The issue of drawing adverse inferences was discussed in detail in the context of the United States frequently advocating their usage against the European Communities with respect to the EC aiding the information gathering exercise under paragraph 7, Annex V of the SCM agreement. The EC had raised a preliminary objection regarding the research grants allocated to the earlier formed and dissolved corporate entities. In para 7.147 the Panel noted that it was not required for the United States to demonstrate that the "pass through" from the Airbus SAS of benefits had occurred through the Airbus Idustrie consortium. A large amount of information relating to numerical data was deemed to be confidential hence; the numerical were identified through asteric marks.

While dealing with the grants under the Second Framework Programme, the Panel noted that it could draw adverse inferences "from instances of non-cooperation by any party involved in the information-gathering process."

With respect to the grants under the German Federal Programme, the EC stated that a government practice in stating that there is a commitment of funds without actual disbursement of the funds is not a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM agreement.

The United States had alleged that the challenged R&T measures constituted a subsidy within the meaning of Article 1 of the SCM agreement because there was a "financial contribution" which conferred a "benefit" on Airbus as under Article 1.1 of the SCM agreement. A grant, according to the United States is supposed to confer a benefit because, as the Panel stated in United States-Cotton, a benefit is supposed to "place(s) the recipient in a better position than the recipient otherwise would have been in the marketplace".

The R&T measures so long as they were grants involving direct transfers of funds or loans fall within the definition of a "financial contribution" under Article 1.1(a)(1)(i) of the SCM agreement. On the question of benefit, though the EC did not contest most of the United States' allegations, it disputed whether the United States had established that Airbus received any benefit from the Spanish Government. The grounds of the contention were that consistent with the

Appellate Body's views in Canada-Aircraft, the United States must demonstrate the existence of a benefit to Airbus by undertaking "some kind of comparison" between the loans obtained by Airbus and comparable loans in the marketplace. On consideration of evidence on the repayment period and the loan amount, the Panel found that a prima facie case had been proven that the PROFIT loans conferred a benefit upon Airbus.

The second limb of the analysis focussed on whether the R&TD subsidies are specific within the meaning of Article 2 of the SCM agreement. The United States simply submitted that the R&TD subsidies are specific to the Airbus or aeronautics industry. This contention was disputed by the EC only with respect to the Spanish government PROFIT programme and the UK Technology programme. The arguments largely centred around the fact that the relevant Framework Programmes are not specific because they were not limited to any particular enterprise, industry or group of enterprises or industries.

	Programme Objectives	Programme Implementation
Second Framework Programme	Established by Council Decision 87/516/Euratom EEC of 28 September 1987 to strengthen the scientific and technological basis if EC industry. 22 activities are identified in Annex I of the decision.	The BRITE/EURAM programme implemented the objectives of the Second Framework Programme; it treated the aeronautics research area differently. One it was a particular sector of economic activity, secondly, it is implemented through rules and procedures which accord a stronger degree of control by the EC member States and there is a shorter time limit for reviewing the results of financing provided to projects in the aeronautics research area.
Third Framework Programme	Established by Council Decision 90/221/Euratom, EEC of 23 April 1990 which also identified 15 activities under six headings.	The IMT 1991 programme also had only the aeronautics research area as the one which specifically targeted a particular sector of economic activity.
Fourth Framework Programme	Established by Decision 1110/94/EC giving effect to the strategic research and technological development mandate and objectives set out.	The aeronautic sector was the only one to have been allocated a specific amount – ECU 230.5 million.

The Panel noted that the singular factor tying all of the Framework Programmes was that their establishment and implementation might have been provided under separate legal instruments, but they constituted one single legal regime pursuant to which the European Commission granted the subsidies to Airbus. The essential question to be resolved remained as to whether the "granting authority" under each of the relevant legal regimes limited access to the subsidies at issue to "certain enterprises". The Panel concluded that the R&TD subsidies were specific within the meaning of Article 2.1(a) of the SCM agreement.

On a similar consideration however, the panel noted that though there was an aeronautics focus to PROFIT I and PROFIT II, they could not be said to be limited to "certain enterprises". Hence there was no specificity found under Article 2.1(a) of the SCM agreement for the Spanish PROFIT programmes. However, the United States had requested some information during the Annex V proves. The EC had provided no information at that point of time to facilitate finding on whether the loans received by Airbus under PROFIT were specific within the meaning of Article 2.1(c) of the SCM agreement. The EC had argued the PROFIT loans were outside the terms of reference of the present dispute. As a response to the panels questions the EC submitted information which the Panel found to be unsatisfactory. The Panel noted in para. 7.1579 that the United States required this information in order to have a credible starting point on which to base the assessment as to whether the subsidies at issue were specific within the meaning of Article 2.1(c). Furthermore, the publicly available information did not suffice to properly assess the finding as to whether the subsidies at issue were specific. The Panel in para 7.1580 found that the Panel would draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process. Hence, the Panel found the challenged subsidies under PROFIT I and II were specific under Article 2.1(c) of the SCM agreement.

While considering the grants under the UK Technology programme, the United States contended that owing to the fact they were awarded through calls for proposals limited to aeronautics-related technologies they were specific under Article 2 of the SCM agreement. The Panel however found otherwise following consideration that the grants at issue were not provided pursuant to competition limited to aeronautics-related activities. Hence, the subsidies were found to not be specific within the meaning of Article 2.1(a) of the SCM agreement.

	United States	EC	Panel [specifically on Paragraph 7 of Annex V]
Second Framework Programme			EC did not contest the publicly available information found by the US. Adverse inferences not drawn.
Third Framework Programme	Publicly available information shows EC funded 27 aeronautics-related researches where Airbus had participated in 18.	The EC identified a certain numerical figure for the Airbus participation.	Though the panel identified discrepancies with the information submitted by both parties, the panel did not conclude that the situation warranted the drawing of adverse inferences.
Fourth Framework Programme	EC funded 135 aeronautics-related research projects giving 245 EUR million to all participating entities.		Not drawn. Final figure decided on the basis of publicly available information.
Fifth Framework Programme	On the basis of publicly available information, the US stated the EC had allocated EUR 700 million.	The funding data was from original source documents and contracts – the EC said the figure was substantially lesser.	Adverse information not drawn. Use of 'average amount of funding' etc.
Sixth Framework Programme	On the basis of publicly available information, EUR 840 million was used to fund aeronautics-related research projects.	Funds were only committed to Airbus, and not disbursed under the LuFo II programme.	Refused to accept the US assertion that all the funding must be allocated to Airbus.

	United States	EC	Panel [specifically on Paragraph 7 of Annex V]
German Federal Government Grants [LuFo I, LuFo II, LuFo III],Spanish Government, UK Government	The United States noted that even "potential direct transfer of funds" as well as actual direct transfers of funds are covered under Article 1 of the SCM Agreement.		Panel agreed with the US submission that Airbus was provided with a "potential direct transfer of funds" in the form of a commitment to transfer some money under the LuFO III programme.

Adverse Effects

Airbus was initially a consortium of separate companies in France, Germany and Spain in 1970. British Aerospace, a UK company joined the consortium in 1979. In 2001, EADS was formed through a merger of the consortium companies. From 2001 to 2004, the four partners in the consortium were routed into subsidiaries that were under the control of Airbus SAS.

In the 1960s the three manufacturers of Large Civil Aircraft in the United States were Lockheed, McDonnel Douglas and Boeing – these three manufacturers accounted for the vast majority of Large Civil Aircraft in the global market.[15] Lockheed quit the industry in 1985, and McDonnell Douglas merged with Boeing in 1997 in 1997. Airbus had entered the industry in the European Union in the year 1974. Hence, the only two participants in the Large Civil Aircraft market today are Airbus and Boeing.

The United States asserted that subsidies to Airbus cause adverse effects to its interests as enunciated in Articles 5(a) and (c) of the SCM Agreement. The EC had submitted that even if the existence of subsidies could be proved there would de minimis and could not be said to actually cause adverse effects. Furthermore with respect to a large number of subsidies which had been given earlier, the EC

[15] Para. 7.1620

further submitted that the beneficial effects had been felt in the past, not amounting to current, present adverse effects.

Specifically, the issue in the dispute was whether the use of subsidies by EC, France, Germany, Spain and the United Kingdom causes or threatens to cause

- "injury" to the United States' industry producing LCA;
- "serious prejudice" to United States' interest in that the effect of the subsidies is to (i) displace or impede imports of United States' LCA into the EC market or (ii) to displace or impede imports of United States' LCA into the EC market or (iii) significant price undercutting by European Communities Large Civil Aircraft when compared with the price of United States' Large Civil Aircraft in the same market, significant price suppression, price depression and lost sales in the same market within the meaning of Articles 6.3(a), (b) and (c) of the SCM Agreement.

"Like Product"

The SCM Agreement deals with the issue of "like product" as " [A] product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[16]

The first issue which was contended upon was whether the entire Airbus family was the "like" product for the corresponding Boeing family and injury could be assessed on those grounds or whether as the EC submitted, there were four families in Airbus, three of which had counterparts in Boeing, but one family which had

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[16] The case of *US-Softwood Lumber V* was cited in order to adduce that the like product provision in Article 2.6 of the Anti-Dumping Agreement states that the "like product" is defined with reference to the "product under consideration". The panel had rejected the consideration that every product under consideration must be "like" every other item within it. However of relevance is Canada's analysis of the same issue. Canada cited *Japan-Alcoholic Beverages II* in order to submit "likeness" is analogous to an accordion and what is considered to be "like" may be narrower or broader depending on the particular provision at issue and the context and the circumstances that prevail in any given case to which the provision may apply.

no "like" product (Airbus A380, Boeing 747). Therefore the EC submitted that there could be no adverse effects caused to either product.

The United States had submitted that the entire family of Airbus large civil aircraft corresponded to the family of Boeing large civil aircraft. The United States submitted that Airbus had relentlessly attempted to compete with the United States LCA producers by using subsidies. The United States submitted that it was a better strategic decision to attempt to achieve unity within the different models with a 'high degree of commonality' in operational aspects so as to make it easier for the consumers to maintain and also to achieve production efficiency.

The EC cited Article 11 of the DSU as laying down the obligation for the Panel to assess whether the 'universe' of subsidized products should be treated as a single subsidized product or multiple subsidized products. Furthermore, under Articles 5 and 6 of the SCM agreement, such combination of multiple subsidized products into one product is a question which can be resolved by considering whether the products compete in the same market. Hence the pertinent question boils down to a scrutiny of not just their physical and performance characteristics by their economic substitutability. The EC submitted that if the products which are compared are so unlike each other they cannot compete for the same sales or orders, then to consider them to be like products would be a flaw. The EC submitted that there are five distinctive product markets of Airbus and Boeing large civil aircraft based on seating capacity: (1) the single-aisle 100-200 seat market, encompassing the Airbus A320 family and the Boeing 737 NG family; (2) the 200-300 seat market which is composed of by the Airbus 330 family and the Airbus A350XWB-800 and the competing Boeing 767 and 787 families; (3) the 300-400 seat market which has the participants Airbus 340 and the A350XWM-900/1000 and the competing Boeing 777 family; (4) the 400-500 seat market which contains only the Boeing 747 as the sole participant and the 500+ seat market with only the A380 as the sole participant.[17]

The United States stated that it was futile to divide the aircraft market on the basis of seating capacity and other differentiations between the large civil aircraft models as the EC had submitted because competition was not based on this type of market segmentation.

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[17] Why state that 400-500 cannot be compared with a lesser or larger margin???

The Panel concluded that the analysis of adverse effects was to be calculated on the basis of only one subsidized product. Before coming to this conclusion the Panel first considered whether it had a duty under Article 11 of the DSU to interfere with the claimant's mode of classifying a "like product" – furthermore the Panel on a consideration of the obligations under Article 5 and 6 of the SCM agreement further concluded there was no obligation to conclude that there were different families of like products as submitted by the European Communities.

The Panel firstly noted that purely physical characteristics and seating capacity were not the only ways of differentiating between the different models in the large civil aircraft industry. The Panel referred to the European Communities competition law analysis of the McDonnel Douglas and Boeing merger which took into consideration the shape of the models as opposed to the seating capacity. Furthermore the Panel also noted that there were cases where Airbus 380 ended up competing with the other models in Boeing and both the buyers and the producers were in no way limited by the seating capacity. The Panel agreed with the United States that the importance of "commonality" led to a determination that both producers and the consumers thought it in their best interests to treat the entire Airbus set of products as a "family" rather than splitting the products.

The Panel considered the approach in Indonesia-Autos which had specifically dealt with physical characteristics of cars with "characteristics closely resembling" those of Timor as opposed to the analysis in US-Softwood Lumber V and found that the approach in US-Softwood Lumber V had not been precluded by Indonesia –Autos which had later mentioned that nowhere in the SCM agreement was there a pre-emption from consideration of criteria other than just physical characteristics. The Panel in this case included brand loyalty, customer perceptions and suitability for use amongst these characteristics.

Appropriate Period of Determination

The second issue the parties disagreed on was the appropriate period for assessing present adverse effects. While the EC submitted that information prior to 2003(2001-2003) was too old and stale to continue to be relevant to the current determination, the United States had submitted information from 2001-2005 to submit the information for the adverse effects analysis. Further the EC had submitted that period following the September 11 2001 attacks had resulted in a period of low sales for the large civil aircraft and should hence constitute force majeure and had further found the legal basis for that argument in Article 6.7(c)

of the SCM agreement. The EC had stated that the information in that period would be distorter owing to the 9/11 incident. The United States further submitted that it was not for the Panel to determine the appropriate period for the determination of adverse effects but for the complaining party to determine. With respect to the September 11 attacks, the United States submitted that the downturn in the LCA market in 2001-2003 did not result from the inability of the United States industry to produce or export LCA but it was a result of customers buying solely from Airbus rather than Boeing which worsened the impact of the market downfall on Boeing.[18]

The United States had stated that there was no need to quantity the magnitude of the subsidies to demonstrate trade distortion in the Large Civil Aircraft allowing Airbus to launch aircraft and function wherein it would have been impossible without the support of such subsidies. The evidence that the United States presented in order to support its claims of serious prejudice included the range of prices in the world market, the rapidly altered market shares, and sales in third country markets.

The Panel considered the following factors:

Article 6.3(b) of the SCM agreement states that there should be an examination of changes in relative market shares over an appropriately representative period which should span at least one year. Though this establishes the minimum period of data to be considered, there is no guidance on the starting date or the end date for the relevant period.

The finding of adverse effects was limited to present adverse effects. However, evidence from the past may be considered to accurately assess present adverse effects. The Panel desisted from deciding the period to be considered and let it be suggested by the United States in order to effectively determine whether the same is appropriate as required under Article 11 of the DSU.

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[18] Para 7.1684

On consideration of the provisions of Article 6.7(c)[19] and the application to the 9/11 events it was observed that Article 6.7(c) applies with a serious prejudice analysis and not in defining the relevant period itself. Furthermore the Panel considered the scope of the force majeure provisions in Article 6.7(c) to assess whether the 9/11 events were eligible to be covered by the them – the Panel noted that other force majeure events may fall within the scope of Article 6.7(c) where they "substantially affect production, qualities, quantities or prices of the product available for export from the complaining Member". The Panel hence concluded that force majeure provisions as they applied to the supply of the product were related to the 6.7(c) exemption, and not as they applied to the demand for Large Civil Aircraft. Hence, the Panel refused to exclude data from the years 2001-2003 from the consideration.[20]

Critical Observations on Competition

In order to effectively analyse an adverse effects claim under 5(a) and 5(c) of the SCM Agreement, the Panel decided to lay down the conditions of competition in the large civil aircraft industry.

1. Huge front-up investments are required over a period of three to five years before any revenues are obtained from the customers.

2. Huge sunk development costs allow the incumbent firms to possess considerable competitive advantage. So also, learning effects allow the creation of economies of scale.

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[19] Article 6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist during the relevant period:

..

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities or prices of the product available for export from the complaining Member…"

[20] The panel referred to the case of *US-Upland Cotton* to recognise that there may be a time lag between the payment of a subsidy and the consequential adverse effects. Specifically where subsidies are granted to an industry over a longer period of time and they operate on long-time frames, it has been stated that there is no reason to conclude that consideration of evidence covering a shorter time period would serve the purpose. Indeed the panel noted that in *Korea-Commercial Vessels* and *US-Upland Cotton*, the panel had considered data from over six to ten years.

3. Owing to economies of scope and switching costs, airlines prefer fleet commonality.

4. Because there is a competitive duopoly between Boeing and Airbus, the United States submitted that the two producers compete head-to-head for LCA sales in a "zero sum" competition – where one producer in terms of sales if he captures a sales offer has definitely cost the same for his competitor.

5. According to the United States, demand for LCA is derived from demand for air travel services and the cost of the aircraft is only one of the determinants in consumer choice.

6. The EC referred back to the September 11 incident to highlight that the LCA industry is highly sensitive to external events and the lull which occurred after the event hindered the demand in the industry.

7. The US explained that orders are crucial for the sustenance of a new model and substantial sales can create economies of scale in due course. Furthermore derivatives and models which are closely related allow the producer to recoup costs sooner.

Whether the subsidies caused 'Serious Prejudice' to the interests of the United States?

The United States submitted that subsidies to Airbus created serious prejudice to its interests within the meaning of Articles 5(c) and 6.3(a), (b) and (c) of the SCM agreement. The approach followed for evincing these claims is similar to the one used in US-Upland Cotton wherein there was a two-step approach used. The first step observes whether the phenomenon described in the provisions of the SCM Agreement stated above is observable as a matter of fact without examining the question of causation which is then examined in the latter part of the analysis.

Alleged displacement or impedance of imports into the EC market

Under Article 6.3(a)[21] of the SCM agreement and as concluded by the Panel in Indonesia Autos, "displacement" is a situation where sales volume has declined while "impedance" is a situation where sales which could have otherwise occurred were impeded.

The method followed by the Panel in Indonesia-Autos was by evaluation sales and market share data. Similarly, in this case as well there was a thrust on market share information. Though the Panel noted that demonstrating a decrease in the market share of Boeing would suffice to prove the displacement phenomenon, in order to prove the impedance phenomenon the Panel would have to be satisfied that these sales which were claimed to be impeded would have validly occurred otherwise.

The information submitted by the United States included the market share information comparing relative positions of Airbus and Boeing in the LCA market in EC in the period 2001 to 2006 in terms of annual deliveries as well as list prices. The EC had three objections to this. The first being that the data submitted considered the LCA market in the aggregate and did not split the data obtained into a model by model analysis and the second was the period under consideration. The Panel noted that both of these contentions had been dealt with in the preliminary issues. The third objection was given weighty consideration by the Panel. The EC stated that deliveries were an inaccurate way of displaying market share and the relevant data to be considered was actually orders received. In support of this contention the EC further noted that in fields such as LCA, the deliveries sometimes take place years after the orders have been placed. The EC advocated the construal of "import" and "export" found in Article 6.3(a) and (b) to include future imports and exports. The Panel considered the meaning of "import" and "export" as per the dictionary definitions to note that the EC interpretation was inadmissible. The Panel concluded that there was no requirement to deem delivery data as being historical for the purpose of a present adverse effects claims analysis. However, the Panel did not dismiss order data as being irrelevant for consideration in the dispute and stated the same would be considered under Article 6.3(c) of the

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[21] "Article 6.3(a) of the SCM Agreement provides that "Serious prejudice in the sense of paragraph (c) of the Article 5 may arise in any case where one or several of the following apply: (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the *subsidizing Member;*".

SCM agreement. The Panel on a consideration of the data submitted by the EC and the US came to the conclusion that there was a decline in Boeing's share of LCA deliveries in the EC market over that period. This finding was to be further buttressed by the causation analysis with respect to specific subsidies granted to Airbus.

	2001	2002	2003	2004	2005	2006
Airbus	58%	62%	59%	59%	67%	67%
Boeing	42%	38%	41%	41%	33%	33%

Alleged displacement or impedance of exports from a third country market

Article 6.3(b) of the SCM agreement differs from Article 6.3(a) by gauging displacement and impedance in a third country market, or third country markets as opposed to the subsidizing members market itself. The additional element to be considered in a claim under Article 6.3(b) is substantiated in Article 6.4 of the SCM agreement. Interestingly the EC noted that Article 6.3(b) mentions the term "non-subsidized like product" as meaning that the complaining member's product should not have received any subsidy or benefited from the same. The EC advanced data in support of its premise that Boeing was a subsidized product. The United States on the other hand states that the term "non-subsidized like product" referred to the other like product which does not benefit from the same subsidies as the impugned product itself. The US further contended that an analysis would never be possible if the EC approach were to be followed in cases where a benign subsidy were being granted as opposed to a direct, targeted massive subsidy owing to the EC's reading of "non-subsidized like product".

The Panel did not agree with the United States rendering of the interpretation of Article 6.4. However, prior to such application of Article 6.4 the Panel while dealing with the relevance of this provision to claims under Article 6.3(a) cited Indonesia Autos which concluded that Article 6.4 did not apply to such a claim. The Panel however observed that the EC's reading of requiring Article 6.4 to be the exclusive basis mandated that there was to be a "clean-hands" requirement for a member wanting to advance that his products have been displaced or impeded. The Panel further addressed this question by perusing the objective of the Cartland draft of the SCM agreement whilst coming to the conclusion that the same was not a pre-requisite for the operation of Article 6.3(c) of the SCM agreement.

The US submitted data with respect to countries like Australia, China, Singapore, Korea, Brazil, Mexico and India. After considering the data submitted by the United States, the Panel declined to rule in favour of the United States and pronounce a finding on the aggregate of the third country markets a whole because there is nothing in Article 6.3(b) which mentions "the global market outside the complaining and subsidizing Members".[22] Hence the Panel on considering the data noted that on the whole Airbus had displaced sales in the markets of Australia and China, and there were a significantly large number of orders as under the Indian market. The Panel noted the figures were less compelling in the other third country markets which made it difficult to identify any more trends. Similar to the EC market itself, the analysis in the third country markets was also left to be observed as a result of the specific subsidies granted to Airbus.

Alleged Price Effects

Article 6.3(c) of the SCM Agreement noted that "serious prejudice" may arise in cases where the effect of the subsidy is significant price undercutting by the subsidized product when compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market. The meaning of the terms significant which appears twice in this provision is as noted by the Panel in US-Upland Cotton, a reference to meaning 'consequential; notable; important."

Significant Price Undercutting and Lost Sales

The evidence espoused by the United States was a series of sales campaigns where the customers ordered Airbus LCA. The United States submitted that a "lost sale" was any sale which was captured by the subsidized product instead of the product of the complaining Member. The EC in response to the figures adduced, responded that Boeing had an unsatisfactory customer –relations programme and the lost sales cannot be considered to be an effect of subsidies. The United States had further argued that a consumer will eventually monetize all the possibly non-price factors in finally concluding that a product was in event cheaper.

The Panel noted that most the United States' evidence with respect to significant price undercutting was anecdotal and not reliable for drawing solid conclusions

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[22] Para 7.1789

on price comparison. Ideally the Panel stated that evidence of price undercutting would best be served with a "comparison of prices" of the two products in question at the same level of trade and at comparable times with due account being taken of the other factors affecting price comparability.[23] However, where a direct comparison is not possible it is said that price undercutting may be demonstrated on the basis of export unit values. No conclusions were made on the basis that the overall value of Airbus' offer was more attractive than Boeing's offer to the customers and hence no conclusions on significant price undercutting were drawn.

Sales Campaigns

	US arguments	EC defence	Panel's conclusion
Easy Jet [14 October 2002, an order for 120 Airbus A 319s with options for 120]	Largest single lost sale for Boeing from 2001-2005.The price was 60% discounted. Media responses from EasyJet accounted that the difference was because of the price.	The demand for LCA had collapsed during that period of time. Hence, both LCA providers were providing 'competitive' prices.	On a consideration of HSBI, the panel noted the US was right in according the sale to a price advantage though the level of price discounting was not as bad as 60%. Furthermore non-price factors such as maintenance cost guarantees, technical dispatch reliability and residual value guarantees and training support were the "non-price factors".
Air Berlin November 2004 – 60 A320s	Media reports by Air Berlin saying that price would be the deciding factor along with delivery schedule and financing.	Boeing had pushed its prices down- had unsatisfactory customer relations.	Too much of reliance on HSBI. Conclusion drawn was that a better price had been offered by Airbus.

	US arguments	EC defence	Panel's conclusion
Czech Airlines April 20056 A319 and 6 A320 aircraft	Cited director saying that both producers of LCA met their technical specifications, but Airbus had the better price.	There was a political quagmire between Czech government and Boeing with respect to Aero Vodochody.	Panel concluded that there were a host of other factors such as political issues which might have influenced this purchase, however Airbus certainly offered the better price.
Air Asia 60 A320 and 40 LCA.	Media report.	Boeing was "arrogant" and "inflexible".	Price was still the most important consideration and Airbus offered the better price.
Iberia			Iberia considered that Airbus products were better suited to the hot, high altitude airports. Further there was commonality with the existing Airbus fleet.
South African Airways	Aggressive pricing by Airbus.		There was presence of certain other performance advantages.
Thai Airways			Decision based on availability of the aircraft at the required time.
Singapore Airlines, Emirates, Qantas			A 380 offered unique characteristics. Competitive pricing was a factor.

Significant Lost Sales

The text of Article 6.3 provides no guidance on the methodology for evaluation allegations of lost sales. This is the first dispute which dealt with allegations of lost sales to demonstrate serious prejudice under Article 6.3. The EC mentioned at the outset that significant lost sales cannot be concluded in cases where price is not the sole consideration. In para. 7.1844 the EC stated that "only if Airbus' winning price is significantly lower and that significantly power price is caused by subsidies" can the US claim prevail. The Panel however rejected these conditions finding no valid legal basis for the same. The Panel on the basis of statistics adduced on the sales to Easy Jet etcetera concluded that there were clearly lost sales. The Panel further noted that a "significant" win for Airbus would result in a "significant" loss for Boeing owing to the important learning effects and economies of scale.

Significant Price Suppression and Price Depression

The Appellate Body in US-Upland Cotton (Article 21.5), had dealt with the concepts of price suppression and price depression. "Price suppression is the situation where price are either inhibited from rising or when they do increase, it is less than what would have otherwise been". This is a phenomenon which is hard to identify. Price depression on the other hand is the situation where 'prices' are pressed down, or reduced and can easily observable.

The United States firstly raised the premise that the world market was the right market, or appropriate market for measuring the price effects of subsidies to Airbus. The period referred was 2001 -2006 and the US further submitted that there was significant price depression and significant price suppression in the world market for four models of Boeing.

The modus operandi adopted by the United States was to compare the movements of annual indexed Boeing LCA order prices and the US Aircraft manufacturers Producer Price Index and demonstrating that the fact the general industry costs have not advanced in reality and in practice as per the PPI shows that prices did not increase as they should have been. Though the Panel on the basis of the evidence advanced noted that there was some price depression, it could not conclude that the same was significant. The basis economic premise as identified in para. 7.1859 is that in any manufacturing industry there would be a commensurate increase in prices where production costs increase. While considering the case for price suppression, the "price escalation clause" of both Boeing and

Airbus was used to index LCA prices to proxy for cost inflation. The Panel on observation of the PPI noted there was significant price suppression in respect of prices for 737, 767 and 747. Furthermore the Panel noted that the issue relation to the 9/11 episode was relevant for the causation analysis.

The aforementioned conclusions of the Panel with respect to price depression, price suppression, lost sales, price undercutting and displacement and impedance in the subsidizing country's market and the third country's market are all subject to causation analysis. Hence the Panel categorised all of these conclusions as being 'observed market effects' and then proceeded to understand whether the specific subsidies were the cause of the observed market effects.

The Panel finally found that there were specific subsidies which allowed Airbus to launch LCA which it might not have managed to launch without the aid of the subsidies.

Alleged injury to the United States' LCA industry

The Panel again noted in para. 7.2054 that the case was the first where the Panel had been asked to consider adverse effects under Article 5(a) of the SCM Agreement. Article 15 of the SCM agreement deals with injury[24] and the EC suggested that a two-step analysis be concluded wherein the first step dealt with the determination of injury and the second step considered if there was a necessary causal link. The Panel concluded that the subsidized product at issue in the dispute being Airbus LCA, the assessment of the effects of subsidized imports will consider the effects of all Airbus LCA imported into the United States.

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[24] The definition of "injury" in footnote 45 states: "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provision of this Article. Article 15.1 is similar to Article 3 of the Anti-Dumping agreement in it that it stipulates generally that a determination of injury shall be based on "positive evidence" involving an "objective examination" of the volume of subsidized imports, their effects on prices in the domestic product for like products and the consequential impact of these imports on the domestic producers of such products. Article 15.5 provides that subsidized imports are through the effects of subsidies, causing injury within the meaning of this Agreement.

The EC contention was that the analysis should focus on the effect of the subsidies whereas the Panel concluded that the analysis should focus on the effects of the subsidized imports on the United States' LCA industry.

Article 15.4 of the SCM Agreement provides that an examination of injury within the meaning of Article 15 should take into account a number of factors.[25] The Panel in Article 7.2084 has stated that it is not necessary to show that all relevant factors or even a majority of them should show a decline in order to make a finding of injury[26]. The Panel on consideration of the data submitted by the United States noted the trend being that the overall performance of Boeing in the year 2006 was worse than in 2001, however, Boeing had recovered significantly after the 9/11 episode. The Panel's appreciation of the trend overall led the Panel to conclude that there was no material injury to the United States' domestic injury. Following this conclusion there would have been no need for the Panel to continue with the second step of the analysis in concluding if there is a causal link, however the Panel taking note of the chance that there could well be an appeal on this point decided to anyway complete the analysis and comment on the causal link.[27]

Threat of material injury analysis under Article 15.7

The Panel cited the analogous case under Article 3.7 of the Anti-Dumping agreement, particularly the case of Mexico-HFCS with respect to proving a 'threat of material injury analysis.' The Panel before commencing on this analysis reiterated its earlier finding that the US domestic industry was not materially injured as a result of the EC imports. Furthermore the Panel noted that such a robust industry was less likely to show a finding of being vulnerable to the standards set down in Article 15.7 of the SCM agreement. Hence, it was further concluded that a threat of material injury was not found.

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25 Sales, market share, profits, productivity, return on investments, utilization of capacity; factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, employment, wages, growth (and) ability to raise capital and investments.

26 This is in direct contrast to the anti-dumping analogy where all provisions are required to be taken into consideration without fail.

27 *Pauwelyn, J. (2007), Appeal without Remand: A Design Flaw in the World Trade Organization Dispute Settlement and How to Fix it,* ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 1, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

Recommendations

The Panel finally concluded that as under Article 4.7 of the SCM agreement, having found (some of) the measures in dispute to be a prohibited subsidy would result in recommending that the subsidising member withdraw the subsidy within 90 days. Article 7.8 of the SCM agreement deals with the impact of a finding of adverse effects, the member shall take steps to withdraw the subsidy or to remove the adverse effects.

Challenged Programme	Conclusions
Launch Aid The provision made by certain States of the EC, specifically Germany, France, the United Kingdom and Spain which permits financing for projects which would otherwise not be commercially feasible. What is important about these forms of payment is that there might be no interest or below market interest rates or a repayment obligation which is tied to sale. [Airbus A300, A310, A320, A330/340, A330-200, A340500/600, A380, and A350; Provided by France, Germany, United Kingdom, Spain]	Each of the challenged LA/MSF measures constitutes a specific subsidy within the scope of Articles 1 and 2 of the SCM Agreement. German, Spanish and UK A380 LA/MSF measures are subsidies contingent on anticipated export performance, thereby constituting prohibited export subsidies within the meaning of Articles 3.1(a) and footnote 4 of the SCM Agreement.
Infrastructure and Infrastructure-related grants.	Muhlenberger Loch site, Bremen Airport Runway; ZAC Aeroconstellation and EIG facilities, constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement.
European Investment Bank (EIB)	The challenged loans under the 2002 credit facility were not specific subsidies under Articles 1 and 2 of the SCM agreement.

Challenged Programme	Conclusions
Assumption and forgiveness by the EC and member States of debt resulting from Launch Aid [For example, debt accumulated by Deutsche Airbus was forgiven by the German government in 1997; Debt assumed by the government of Spain on behalf of CASA was not repaid.]	
Equity investment by Germany through Kreditanstalt fur Wiederaufbau in Deutsche Airbus in 1989 and subsequent return of these shares to the Daimler group in 1992; Equity infusions by French Government into Aerospatiale in 1987 and 1988; Equity infusion by state-owned French Credit Lyonnais into Aerospatiale in 1992; Equity infusion by France into Aerospatiale in 1994; Grant by French government of the 45.76% share of Dassault Aviation's capital to Aerospatiale in 1998.	The 1989 acquisition by KfW of a20 percent equity interest in Deustche Airbus and the 1992 transfer by KfW of the 20 percent equity interest in Deutsche Airbus to MBB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement. Equity infusions by the French Government and Credit Lyonnais were specific subsidies under Articles 1 and 2 of the SCM agreement.
EC funding for civil aeronautics-related R&D projects under EC Framework programs. Similarly from Germany, UK and Spain in R&D projects.	The grants under the Second, third, fourth, fifth and sixth EC framework programmes are specific subsidies within the meaning of Articles 1 and 2 of the SCM agreement. The German Government's grants under LuFo I, LuFo II, and LuFo III and French Government's grant was also found to be a specific subsidy within the meaning of Article 1 and 2 of the SCM agreement.
Any amendments, revisions, implementing or related measures to the measures described above.	"
Any other measures that involve a financial contribution by the EC or any of the member States that might benefit Airbus.	"

2. AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF APPLES FROM NEW ZEALAND, WT/DS367/R 9 August 2010

Parties:
Australia
New Zealand

Third Parties:
Chile, European Union, Japan, Pakistan, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, United States

Factual Matrix

On 31 August 2007, New Zealand requested consultations with Australia pursuant to Article XXII of GATT, 1994, Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures concerning measures imposed by Australia on the importation of apples from New Zealand. On 27 March 2007, Australia's Director of Animal and Plant Quarantine announced a new policy for the importation of apples from New Zealand. Under this policy "Importation of apples can be permitted subject to the Quarantine Act 1908, and the application of phytosanitary measures as specified in the Final import risk analysis report for apples from New Zealand, November 2006". New Zealand considered that these restrictions were inconsistent with Australia's obligations under the SPS Agreement of the WTO, and in particular Articles 2.1, 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 8 and Annex C.

European Communities, the United States and subsequently, Australia informed the DSB to join the consultations. On 6 December 2007, New Zealand requested the establishment of a panel pursuant to Article 6 of the DSU, with standard terms of reference as set out in Article 7.1 of the DSU. At its meeting on 21 January 2008, DSB established a Panel.

The Panel's terms of reference were the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by New Zealand in document WT/DS367/5, the matter referred to the

DSB by New Zealand in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

Measure at Issue in this dispute

New Zealand identified seventeen specific measures imposed in respect of three pests: fire blight, European canker and ALCM. These measures fall into two categories; those of general application and those specific to each of the three pests.

1 Fire blight

Fire blight is a plant disease caused by the bacterium Erwinia amylovora (or E. amylovora). In apple trees, fire blight infects flowers, young leaves, stems and fruits. Symptoms of infection of host plants depend on the parts infected. Infected flowers droop, wither and die, becoming dry and darkened in colour. Infected shoots and twigs wither, darken and die. As shoots and twigs wither, they bend downwards resembling a shepherd's crook. Infected leaves become curled and scorched. Infected fruit fail to develop fully, turning brown to black, and becoming mummified, frequently remaining attached to the limb. Limbs and trunks of trees may also develop cankers (sunken areas surrounded by cracked bark) which, if disease development is severe, may result in tree death.

2 European canker

European canker is a plant disease caused by the fungus Neonectria galligena (or N. galligena). The primary symptom of infected plants is the production of cankers on limbs and trunks. The fungus can infect fruit and cause lesions that develop into "fruit rots", mainly under conditions of high summer rainfall.

3 Apple leafcurling midge

The apple leafcurling midge (ALCM), or Dasineura mali, is a small fly, 1.5–2.5 mm long, with dusky wings covered in fine dark hairs. The ALCM has four life stages: adult, egg, larva (or maggot) and pupa. Both the adult male and female have wings and are able to fly. ALCM larvae feed on the unfurling young leaves of apple trees causing the leaf margins to curl or roll. This can result in reduced shoot and tree growth.

Chronology of Events in this Dispute

Australia banned the importation of New Zealand apples in 1921, following the entry and establishment of fire blight in Auckland in 1919. In 1986, 1989 and 1995 New Zealand applied for access to the Australian apple market. In each case its application was rejected. In 1996 the Australian Quarantine and Inspection Service (AQIS) commenced a risk assessment that was released in 1998. Following a new request for access to the Australian market filed by New Zealand in January 1999, the Australian Quarantine and Inspection Service (AQIS) initiated the import risk analysis for New Zealand apples which is the subject of this dispute. Biosecurity Australia (then a part of AQIS) issued a first draft of the risk analysis in October 2000. In November 2000, the Committee on Rural and Regional Affairs and Transport Legislation of the Australian Senate launched a first inquiry into the assessment of apple imports from New Zealand by Australia's quarantine agencies. The Committee's interim report, including recommendations, was delivered in July 2001.

A revised draft risk assessment was issued by Biosecurity Australia in February 2004 and was followed by a comment period. The Australian Senate Committee launched a second inquiry in March 2004. In August 2004, an Eminent Scientists Group was created to independently examine all final draft IRAs before their release and to ensure that technical submissions from stakeholders were properly taken into account. Biosecurity Australia was made a prescribed agency (financially independent from the Department of Agriculture, Fisheries and Forestry) in October 2004, and the Australian Government decided that Biosecurity Australia would review and reissue draft IRAs in progress at that time, including the one on New Zealand apples. The Australian Senate Committee's report on the importation of apples from New Zealand was issued in March 2005. After reviewing stakeholder comments, Biosecurity Australia issued another revised draft import risk analysis in December 2005, again providing a comment period. The Final IRA was issued in November 2006.

The IRA required New Zealand to prepare a documented standard operating procedure (SOP) describing the phytosanitary procedures for each quarantine pest of concern and the responsibilities of the parties. The SOP must be approved by AQIS before exports start and is subject to AQIS audits. The SOP would be based on a work plan to be developed between Australia and New Zealand. Australia and New Zealand had not been able to agree on an SOP.

The measures at issue applicable to fire blight were the requirements that: apples be sourced from areas free from fire blight disease symptoms; orchards/blocks be inspected for fire blight disease symptoms; an orchard/block inspection methodology be developed and approved; orchards/blocks be suspended for the season on the basis that any evidence of pruning or other activities carried out before the inspection could constitute an attempt to remove or hide symptoms of fire blight; orchards/blocks be suspended for the season on the basis of detection of any visual symptoms of fire blight; apples be subject to disinfection treatment in the packing house; all grading and packing equipment that comes in direct contact with apples be cleaned and disinfected immediately before each Australian packing run, and that packing houses registered for export of apples process only fruit sourced from registered orchards.

In respect of European canker the measures at issue were the requirements that: apples be sourced from export orchards/blocks free of European canker; all trees in export orchards/blocks be inspected for symptoms of European canker; all new planting stock be intensively examined and treated for European canker; orchards/blocks be suspended for the season on the basis that any evidence of pruning or other activities carried out before the inspection could constitute an attempt to remove or hide symptoms of European canker; and exports from orchards/blocks be suspended for the coming season on the basis of detection of European canker and that reinstatement would require eradication of the disease, confirmed by inspection.

The measures at issue applicable to ALCM were the requirements of inspection and treatment, including: the option of inspection of each lot on the basis of a 3000 unit sample selected at random across the whole lot, with detection of any live quarantine able arthropod resulting in appropriate treatment or rejection for export; or the alternative option of inspection of each lot on the basis of a 600 unit sample selected at random across the whole lot, plus mandatory treatment of all lots.

The general measures were: the requirement that Australian Quarantine and Inspection Service officers be involved in orchard inspections for European canker and fire blight, in direct verification of packing house procedures, and in fruit inspection and treatment; the requirement that New Zealand ensure that all orchards registered for export to Australia operate under standard commercial practices; and the requirement that packing houses provide details of the layout of premises.

Relevant International Standards, Guidelines and Recommendations

A number of provisions of the SPS Agreement make reference to "international standards, guidelines and recommendations". Annex A: 3(c) of the SPS Agreement indicates that for plant health, the relevant international standards, guidelines and recommendations are those developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC) in cooperation with regional organizations operating within the framework of the IPPC.

The IPPC is an international treaty to secure action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control. It is governed by the Commission on Phytosanitary Measures (CPM) which adopts International Standards for Phytosanitary Measures (ISPMs). The Convention has been deposited with the Director-General of the Food and Agriculture Organization of the United Nations (FAO) since its initial adoption by the Conference of FAO at its Sixth Session in 1951. The New Revised Text of the IPPC was approved in 1997. It entered into force on 2 October 2005. Both Australia and New Zealand signed and ratified the International Plant Protection Convention and are Contracting Parties to the IPPC.

IPPC standards on risk analysis: ISPM No. 2 and ISPM No. 11

ISPM No. 2 provides general guidance for pest risk analysis (PRA), whereas ISPM No. 11 establishes guidelines for conducting a risk analysis for quarantine pests. The two standards are related and present the same general framework for conducting a pest risk assessment, consisting of three stages: (i) initiation; (ii) pest risk assessment; and (iii) pest risk management. ISPM No. 2 provides detailed guidance on PRA stage one (initiation), summarizes PRA stages two (risk assessment) and three (risk management), and addresses issues generic to the entire PRA process. ISPM No. 11 addresses stages two and three in more detail for quarantine pests.

According to ISPM No. 11, the pest risk assessment process can be broadly divided into three interrelated steps:

i. pest categorization;

ii. assessment of the probability of introduction and spread; and,

iii. assessment of potential economic consequences (including environmental impact).

Pest introduction is composed of both entry and establishment. Assessing the probability of introduction requires an analysis of each of the pathways with which a pest may be associated from its origin to its establishment in the PRA area. IPSM 11 identifies the following broad issues which should be considered when evaluating the probability of introduction and spread, and provides detailed guidance under each heading:

i. Probability of the pest being associated with the pathway at origin;

ii. probability of survival during transport or storage;

iii. probability of pest surviving existing pest management procedures;

iv. probability of transfer to a suitable host;

v. probability of establishment;

vi. availability of suitable hosts, alternate hosts and vectors in the PRA area;

vii. suitability of environment;

viii. cultural practices and control measures;

ix. other characteristics of the pest affecting the probability of establishment; and,

x. probability of spread after establishment.

IPPC standards on pest free areas and areas of low pest prevalence: ISPM No. 4, ISPM No. 10 and ISPM No. 22

The IPPC defines a "pest free area" (PFA) as "[a]n area in which a specific pest does not occur as demonstrated by scientific evidence and in which, where appropriate, this condition is being officially maintained". According to ISPM No. 4, the establishment and use of a PFA by a national plant protection organization provides for the export of plants, plant products and other regulated articles from

the exporting country to the importing country without the need for application of additional phytosanitary measures when certain requirements are met. Thus, the pest free status of an area may be used as the basis for the phytosanitary certification of plants, plant products and other regulated articles with respect to the stated pest(s). It also provides, as an element in pest risk assessment, the confirmation on a scientific basis of the absence of a stated pest from an area. The PFA is then an element in the justification of phytosanitary measures taken by an importing country to protect an endangered area.

Although the term "pest free areas" encompasses a whole range of types (from an entire country which is pest free to a small area which is pest free but situated in a country where that pest is prevalent), it has been found to be convenient to discuss the requirements of PFAs by defining three categories: an entire country; an uninfested part of a country in which a limited infested area is present; an uninfested part of a country situated within a generally infested area. In each of these cases, the PFA may, as appropriate, concern all or part of several countries.

A pest free place of production is defined as a "[p]lace of production in which a specific pest does not occur as demonstrated by scientific evidence and in which, where appropriate, this condition is being officially maintained for a defined period". A pest free production site is "[a] defined portion of a place of production in which a specific pest does not occur as demonstrated by scientific evidence and in which, where appropriate, this condition is being officially maintained for a defined period and that is managed as a separate unit in the same way as a pest free place of production".

ISPM No. 10 uses the concept of "pest freedom" to allow exporting countries to provide assurance to importing countries that plants, plant products and other regulated articles are free from a specific pest or pests and meet the phytosanitary requirements of the importing country when imported from a pest free place of production. In circumstances where a defined portion of a place of production is managed as a separate unit and can be maintained pest free, it may be regarded as a pest free production site. The use of pest free places of production or pest free production sites is dependent on the use of criteria concerning the biology of the pest, the characteristics of the place of production, the operational capabilities of the producer, and the requirements and responsibilities of the national plant protection organization.

Parties' requests for findings and recommendations

New Zealand requested the Panel to find that the challenged measures were, both individually and as a whole, inconsistent with the obligations of Australia under Articles 2.2 and 2.3 (both sentences); Articles 5.1, 5.2, 5.5 (first sentence) and 5.6; Article 8; and Annex C(1)(a) of the SPS Agreement.

In response, Australia argued that:

a. Australia's measures were not inconsistent with Article 5.1 and, accordingly, with Article 2.2 of the SPS Agreement, and that they were also not inconsistent with Article 5.2 of the SPS Agreement; or, alternatively, that Australia's measures were not inconsistent with Article 2.2 of the SPS Agreement;

b. Australia's measures were not inconsistent with Article 5.6 of the SPS Agreement;

c. Australia's measures were not inconsistent with Article 5.5 of the SPS Agreement and, consequently, with Article 2.3; and,

d. New Zealand's claim under Article 8 and Annex C(1)(a) of the SPS Agreement was outside the scope of this dispute and should be dismissed by the Panel.

Arguments on Behalf of Parties

Arguments for New Zealand

a. Standard of Review:

In New Zealand's view the appropriate standard of review in this case was set out in Article 11 of the DSU of the WTO. This required the 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 relevant covered agreement". This standard of review had been applied in every WTO SPS case to date.

b. Australia's measures are inconsistent with Article 2.2:

New Zealand argued that Australia's measures for the importation of New Zealand Apples were inconsistent with Australia's obligations under Article 2.2 of the SPS Agreement. According to New Zealand Australia's measures were "maintained without sufficient scientific evidence". There was no "rational or objective" relationship between those measures and scientific evidence, and therefore they were inconsistent with Article 2.2 of the SPS Agreement. All of Australia's fire blight measures depend on the contention that mature apple fruit provide a pathway for the transmission of the disease. However, there was no evidence that fruit to be exported from New Zealand – that was, mature, symptomless apples – provide such a pathway. Rather, the scientific evidence shown that mature, symptomless apple fruit did not transmit the disease and have never done so.

New Zealand further argued that there was no scientific evidence that European canker could establish and spread in the Australian climate, given those conditions favourable to European canker, namely rainfall and moderate temperatures, were not prevalent in Australia's apple growing regions.

Finally, the Australian measures in relation to ALCM were also maintained without sufficient scientific evidence. In formulating its measures for ALCM Australia had not taken into account the scientific evidence which indicates that approximately 85 per cent of ALCM cocoons on New Zealand apple fruit were not viable because they do not contain live pupae. That fact, combined with the midge's limited lifespan and flight range, and other biological factors, renders highly improbable the sequence of events on which Australia relied to support its measures.

c. Australia's measures were inconsistent with Article 5.1:

Australia's measures were not based on a "risk assessment" within the meaning of Article 5.1 and Annex A and were therefore inconsistent with Article 5.1 of the SPS Agreement. The IRA approaches the risk assessment in a way that ascribes quantitative probability values to steps that were often no more than possibilities – in some instances the remotest of possibilities. Such an approach was inconsistent with that adopted by the Appellate Body in Australia – Salmon and EC – Hormones, which emphasized that a risk assessment must be concerned with probabilities and not just possibilities.

Australia had failed to evaluate the likelihood of entry, establishment and spread of each pest "according to the SPS measures that might be applied". The IRA determined, without analysis, that certain measures should be applied and failed to evaluate alternative measures that might have been applied instead, including a particular measure proposed by New Zealand requiring apples to be imported "retail ready".

d. Australia's measures were inconsistent with Article 5.2:

According to New Zealand, Australia's IRA had ignored relevant available scientific data while implementing its measures for evaluating risk assessment. At various points, Australia's IRA failed to give genuine consideration to the relevant scientific evidence; to the relevant processes and production methods; to the relevant inspection, sampling and testing methods; to the prevalence of the relevant diseases or pests; and to the relevant environmental conditions.

e. Australia's measures were inconsistent with Article 5.5 and Article 2.3:

Australia had established its own level of protection (ALOP) against risks to plant life or health in respect of two diseases affecting Japanese pears – brown rot and Japanese Erwinia. In those cases, imported fruit with a degree of risk equivalent to or higher than that of New Zealand apples were subject to measures substantially less restrictive than those imposed on New Zealand apples, constituting arbitrary and unjustifiable distinctions in treatment of different situations resulting in discrimination or a disguised restriction on international trade.

f. Australia's measures were inconsistent with Article 5.6:

New Zealand claimed that there were alternative measures available that would have met Australia's ALOP. In the case of fire blight and European canker, restricting trade to mature, symptomless apples would be consistent with the ruling in Japan – Apples and would meet Australia's ALOP. In the case of ALCM, inspection of a 600-unit sample would also have been a less trade restrictive alternative. Such alternative measures would achieve Australia's appropriate level of phytosanitary protection, taking into account technical and economic feasibility.

g. Australia's measures were inconsistent with Article 8 and Annex C(1)(a):

According to New Zealand the delay by Australia of almost eight years to complete its approval procedures for access for New Zealand apples was clearly "undue".

h. The weight to be given to Japan – Apples:

According to New Zealand the Panel's conclusions in Japan – Apples were reached on the basis of substantially the same scientific evidence as that considered in the context of this dispute. If the Panel were to reach the same conclusions in relation to the scientific evidence as were reached in Japan – Apples, then it would inevitably follow that Australia's fire blight measures are maintained without sufficient scientific evidence, in breach of Article 2.2 of the SPS Agreement.

Arguments of Australia

a. Standard of Review:

According to Australia, the Panel should be mindful of the appropriate standard(s) of review in its evaluation of the basis for Australia's measures. The nature of what was required of a Panel to conduct an "objective assessment of the facts" pursuant to Article 11 of the DSU varies depending on the particular provision at issue. Under the SPS Agreement, Australia submitted that a panel's jurisdictional competence was most limited in respect of its review of risk assessments, because the obligation to base SPS measures on a risk assessment means that a thorough expert evaluation of the relevant technical issues compulsorily precedes a panel's analysis of the issues.

b. Australia's measures are consistent with Article 5.1, and accordingly, with Article 2.2:

According to Australia, New Zealand misunderstood the nature of the risk assessment required by Article 5.1. Its criticism of the IRA Team's analysis of the available scientific evidence was often based on selective reliance upon particular pieces of evidence and was also based on multiple erroneous calculations and assumptions. Pursuant to the relevant provisions of the SPS Agreement, a valid assessment of phytosanitary risk must evaluate both the likelihood of entry,

establishment or spread of a pest, as well as the associated potential biological and economic consequences.

With respect to the fire light, the Final IRA Report outlined in precise detail the analysis of the IRA Team, which arrived at the conclusion that there was an identifiable risk that the causal agent of fire blight, Erwinia amylovora, could find a pathway into Australia on mature New Zealand apples and result in serious consequences.

Also regarding European canker, Australia showed that New Zealand's climate analysis was too narrow as it focuses solely on a few environmental criteria relevant to commercial apple and pear production, and it overlooks the biology of the pathogen and its wide range of hosts distributed throughout large areas of Australia. This led to incorrect predictions as to the potential distribution of European canker.

In respect of, New Zealand failed to appreciate that the mobility of the insects required the IRA Team to adjust its methodology and consider a much more complex pathway than for fire blight and European canker. New Zealand demonstrated its misunderstanding of the IRA Team's approach to assessing unrestricted risk by arguing that the IRA Team should have taken into account the affect of risk management measures in its importation analysis.

c. Australia had acted consistently with Article 5.2:

The IRA Team took into account all of the factors listed in Article 5.2, including those identified by New Zealand: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; and relevant ecological and environmental condition.

d. Alternatively, Australia's measures are nonetheless consistent with Article 2.2:

If the Panel did not accept Australia's primary submission that consistency with Article 5.1 establishes consistency under Article 2.2, Australia submitted that New Zealand had nevertheless failed to establish that Australia's measures were "maintained without sufficient scientific evidence" in violation of Article 2.2. In any event, Australia had demonstrated that, on the basis of the comprehensive

analysis of the evidence in the Final IRA Report, there was a rational and objective relationship between Australia's measures and the scientific evidence.

e. Australia's measures were consistent with Article 5.5 and Article 2.3:

New Zealand had failed to establish that Australia applies different levels of protection under Article 5.5. New Zealand's simplistic comparison of the respective measures applied in relation to New Zealand apples and Japanese nashi pears ignores the fact that the risks associated with the two products were markedly different. Therefore, the measures required to meet Australia's ALOP differ. Accordingly, the application of Australia's ALOP did not exhibit arbitrary or unjustifiable distinctions in the treatment of different situations which result in discrimination or a disguised restriction on international trade.

f. Australia's measures were consistent with Article 5.6:

New Zealand's claim under Article 5.6 rested entirely on its contention that the unrestricted risks associated with the importation of New Zealand apples were lower than the levels established in the Final IRA Report; a claim which New Zealand had failed to substantiate. New Zealand had failed to satisfy its burden under Article 5.6 to show that any of the "alternative" measures identified would achieve Australia's ALOP. Nor, in the case of ALCM, had New Zealand shown that the "alternative" measure would be significantly less trade restrictive. New Zealand had also failed to identify any alternatives to the general measures.

g. New Zealand's claim under Article 8 and Annex C(1)(a) was outside the Panel's terms of reference:

In its preliminary ruling, the Panel concluded that the scope of this dispute was confined to the 17 measures specifically listed in New Zealand's panel request, which did not include the IRA process. New Zealand's claim that Australia was in breach of Article 8 and Annex C(1)(a) was therefore outside the scope of this dispute.

h. This dispute was not a re-run of Japan – Apples: Japan

Apples were not a risk assessment and were not scientific evidence. Moreover, there were significant differences between the two sets of circumstances, including

the pests at issue, appropriate level of protection, climatic conditions, potential host plants, and the volume and mode of trade.

Analysis by the Panel

Australia's Concerns with the Expert Selection and Consultation Process

Selection of Experts

a. The Panel's selection of only one ALCM expert:

Neither Article 13 of the DSU, nor Article 11.2 the SPS Agreement, nor the Panel's Working Procedures[28] specify the number of experts to be selected. Accordingly, it was within the Panel's authority to decide on the number of experts according to the specific circumstances of the dispute, the necessary expertise and the constraints faced. In addition, the Panel is bound by Article 3.3 of the DSU to seek a prompt settlement of the dispute. The Panel had extensively consulted the Parties throughout the selection process and therefore they concluded that there was absolutely no need to delay it further. In the Panel's view, further delaying the selection process would have been inappropriate, as it would have hindered the objective of seeking a prompt settlement of the dispute, contrary to Article 3.3 of the DSU and the expressed interest of both Parties. In the light of the above, the Panel decided to seek the advice of only one expert on ALCM, rather than two, as in the case of the two other pests and the issue of pest risk assessment.

b. The alleged connection of the ALCM expert with the complainant:

The Panel concluded that nothing in the objection raised by Australia gave any indication of real or perceived conflicts of interest or any other situation that would have affected the expert's independence and impartiality.

Consultation of Experts

a. Questions posed to the experts were different from the draft provided by the Parties:

The Panel concluded that there was no evidence to support Australia's assertion

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[28] Working Procedures, 26 March 2008

that posing some specific questions to the experts had prejudiced Australia's position in these proceedings.

b. Prevention of Panel from considering information provided by third parties or experts:

To the extent that a specific issue raised by a Third Party was properly within the Panel's terms of reference, and that New Zealand had submitted its arguments and articulated its complaint with respect of the specific claim, the Panel rejected Australia's proposition that it was prevented from addressing that issue in the written questions posed to the experts. To the same extent, the Panel also rejected Australia's proposition that it is prevented from considering information provided by the scientific experts in response to the Panel's questions. The Panel found no evidence that due process has been negatively affected for any of these two reasons.

c. Consideration of opinion expressed by the experts outside their scope of expertise:

There was no indication that the Panel posed questions to the experts that would have required specialist expertise and experience in areas outside of their respective expertise.

Whether the Measures Identified By New Zealand Were Challengeable Under the SPS Agreement.

Purpose of the 16 measures

The Panel assessed the purpose of the 16 measures to verify whether they correspond to subparagraphs (a) of Annex A (1) of the SPS Agreement, which define "sanitary and "phytosanitary measure". The purpose set out in subparagraph (a) of Annex A(1) of the SPS Agreement was "to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease carrying organisms or disease causing organisms." The Panel concluded that all the 16 measures were related to managing risks arising from the entry, establishment and spread of pests.

Form and Nature of the 16 measures

The form element was referred to in the second paragraph as 'laws, decrees,

and regulations'. The nature of measures qualifying as SPS measures was also addressed in the second paragraph to be requirements and procedures, including inter alia, end product criteria; processes and production methods; testing inspection, certification and approval procedures, etc. The Panel concluded that the 16 measures at issue, both as a whole and individually, constituted SPS measures within the meaning of Annex A(1).

New Zealand's Claims Under Articles 2.2 , 5.1, and 5.2 of the SPS Agreement.

Standard of Review

The Panel concluded that it would review Australia's IRA, considering its scientific basis and reasoning in the light of the alleged flaws that had been identified by New Zealand, in order to determine whether New Zealand has articulated a prima facie case that the IRA was not a proper risk assessment within the meaning of Article 5.1 of the SPS Agreement.

Requirements under fire blight

a. Alleged overestimation of the likelihood that fireblight was present in the source orchards:

The IRA estimated the likelihood that Erwinia amylovora was present in the source orchards in New Zealand was 1(100 %). The analysis was based on the consideration that "Erwinia amylovora was detected in New Zealand both from orchards with fire blight symptoms...and those without symptoms." However the Panel concluded that the IRA's estimation that Erwinia amylovora would always be present in the source orchards in New Zealand was not sufficiently supported by the scientific evidence that the IRA relied upon and, accordingly, is not coherent and objective.

b. Alleged overestimation of the likelihood that fruit coming from an infected orchard is also infected:

The Panel found that it was not clear from the IRA how the results of the different studies were aggregated in order to arrive at an estimation of a probability range for this importation step, nor the reasons why, in drawing this estimation, less weight was given to studies that found lower frequencies of contamination with fire blight. The Panel therefore, concluded that the IRA's estimation of the

likelihood that fruit coming from an infected or infested orchard was infected or infested with Erwinia amylovora is not coherent and objective.

c. Alleged overestimation of the likelihood that clean fruit from infected orchards is contaminated during picking and transport to the packing house:

The experts consulted by the Panel expressed doubts regarding the reliability of the one per cent figure and the IRA's underlying assumptions. The 1 per cent figure would not be realistic, because when present in an orchard fire blight will not be uniformly distributed. Therefore, the Panel found that the IRA's estimation of the likelihood that clean fruit from infected or infested orchards was contaminated with Erwinia amylovora during picking and transport to the packing house did not rely on adequate scientific evidence and, accordingly, is not coherent and objective.

d. Alleged overestimation of the likelihood that infected fruit remains infected after routine processing procedures in the packing house:

In light of the evidence given by Australia it was found that the IRA contained sufficient scientific evidence to support its conclusion that routine procedures that occur in New Zealand packing houses may reduce the bacterial population in the apple fruit but would not totally eliminate the bacteria. According to the Panel New Zealand did not make a case that the IRA's estimation of the likelihood that Erwinia amylovora survives routine processing procedures in the packing house is exaggerated and did not rely on adequate scientific evidence.

e. Alleged overestimation of the likelihood that clean fruit is contaminated during processing in the packing house:

The Panel found that there was no indication in the IRA of how the results of the various scientific studies were taken into account in arriving at an estimation of a probability range for this importation step. Therefore, the Panel found that the IRA's estimation of the likelihood that clean fruit was contaminated by Erwinia amylovora durng processing in the packing house was not coherent and objective.

f. Alleged overestimation of the likelihood that infected fruit remains infected during pallentization, quality inspection, containerization and transportation to Australia:

The Panel noted that the discussion between the parties regarding the IRA's estimation on importation of this step replicates the earlier discussion on cold storage in the context of importation step (d). Therefore the Panel concluded that the IRA contains sufficient scientific evidence to support its conclusion that, although some reduction in numbers of bacteria and number of infested fruit would be expected during transportation of apples in containers from New Zealand to Australia, bacteria could survive on fruit for periods longer than 10 days.

g. Alleged overestimation of the likelihood that clean fruit will become contaminated during palletization, quality inspection, containerization and transportation:

The quantitative range assigned by the IRA for the likelihood of the event represented by this importation step corresponds to the IRA's definition of "negligible" (i.e., "the event would almost certainly not occur"). The Panel decided that it will turn later, in the context of New Zealand's allegations regarding the IRA's alleged methodological flaws, to the issue of whether the IRA's choice of a probability interval of zero to one in one million for events with a "negligible" likelihood of occurring is in itself supported by adequate scientific evidence and is, accordingly, coherent and objective.

h. Estimation of the likelihood that infected or infested fruit remains infected or infested after on-arrival minimum border procedures:

The Panel agreed with Australia and noted that New Zealand had not called into question the IRA's estimation of the likelihood of the event represented by this particular importation step. Therefore, there was no reason to believe that such estimation was not coherent and objective in the light of the scenario addressed by the IRA.

i. Alleged overestimation of the likelihood that an imported apple is infected or infested; resulting from the sum of the proportions associated with individual importation pathways:

The IRA had not attempt to find justification for the estimated overall

probability of importation, other than the aggregation of the different individual likelihoods represented by each importation step. Therefore the Panel concluded that the IRA's estimation of the overall probability of importation does not rely on adequate scientific evidence and, accordingly, was not coherent and objective.

j. IRA's analysis of the probability of entry, establishment and spread of fire blight:

Under it proximity analysis the IRA assesses the proportion of utility points near host plants susceptible to the pest in each exposure group. Even though on the basis of expert advice the Panel felt that IRA offers little explanation for its reasoning regarding the estimation of different proximity values, it concluded that New Zealand had not made a prima facie case that the IRA's discussion on utility points and estimated proximity ratings for the combination of each utility point with exposure groups (proximity values) was not objectively justifiable.

Under its exposure analysis, the IRA assessed the likelihood of transfer of the pathogen from infested or infected apples (waste) to a susceptible host plant. According to the IRA, an analysis of key steps in the sequence of events that would need to occur for successful exposure includes a consideration of factors such as viability of the pest, survival mechanism of the pest, transfer mechanism of the pest, inoculum dose, host receptivity and environmental factors. The Panel considered each of these factors in turn. It was noted the scientific evidence cited in the IRA supports the viability and the survival conclusions. Both conclusions, however, rest on the assumption that there would be some bacterial populations on mature apples from New Zealand. Additionally, both conclusions must be qualified by the caveat that any bacterial populations would decrease over time and unlikely to be able to multiply. The IRA's conclusions on the transfer mechanisms were not supported by scientific evidence, most especially for the proposed mechanical transmission mechanism. The browsing insect mechanism, while not totally unreasonable, seems to correspond to a highly unlikely scenario. The IRA's conclusions on inoculum dose and host receptivity were supported by evidence and seem generally coherent; although the first fails to recognize the importance of the number of bacteria for the likelihood of initiating an infection and the second tends to exaggerate the number of potential host plants and does not take into account the discontinuity in the receptivity of host plants. Finally, the IRA's conclusions on environmental conditions seem generally coherent. In the light of the shortcomings and qualifications that affect a number of sections of the IRA's conclusions on exposure, the Panel concluded that overall these

conclusions did not rely on adequate scientific evidence and, accordingly, were not coherent and objective.

The IRA's discussion on the minimum population needed for establishment reflects an assumption that had already been addressed by the Panel, regarding the alleged capacity of such low bacterial populations to initiate an infection. It was found by the Panel not to be supported by scientific evidence nor based on a coherent and objective reasoning.

IRA's discussion on the different factors regarding the probability of spread had not been contested by New Zealand. This included, for example, the general description of the suitability of the natural and/or managed environment, part of the discussion on natural barriers, the intended use of the commodity and the potential natural enemies of the pest. Accordingly, the IRA's conclusions regarding the probability of spread seemed generally coherent.

In the light of the above, the Panel found that New Zealand had not successfully made a prima facie case that the IRA's estimation of the likelihood that Erwinia amylovora survives routine processing procedures in the packing house (importation step d); and that Erwinia amylovora survives palletization, quality inspection, containerization and transportation to Australia (importation step f), were exaggerated, and that these estimations did not rely on adequate scientific evidence or are not coherent and objective. The Panel further found that the IRA's conclusion that the likelihood that clean fruit was contaminated by Erwinia amylovora during palletization, quality inspection, containerization and transportation (importation step g) is negliglible appears to be coherent and objective. The Panel found additionally that New Zealand had not made a prima facie case that the IRA's discussion on utility points and estimates of proximity ratings for the combination of each utility point with exposure groups (proximity values), or that the IRA's conclusions regarding the probability of spread, did not rely on adequate scientific evidence or were not coherent and objective.

The Panel found, however, that the IRA's estimation that Erwinia amylovora would be always present in the source orchards in new Zealand (importation step a); that fruit coming from an infected or infested orchard was infected or infested with Erwinia amylovora (importation step b); that clean fruit from infected or infested orchards was contaminated with Erwinia amylovora during picking and transport to the packing house (importation step c); and that clean fruit was

contaminated by Erwinia amylovora during processing in the packing house (importation step d); did not find sufficient support in the scientific evidence relied upon and, accordingly, were not coherent and objective. In the light of these findings and the absence of any separate justification and evidence in the IRA regarding the estimated overall likelihood of importation, the Panel found additionally that the IRA's estimation of the overall probability of importation was not supported by adequate scientific evidence and, accordingly, was not coherent and objective.

The Panel further noted that a significant part of the IRA's discussions on exposure, establishment and spread of fire blight, rested on a number of assumptions and qualifications. As noted above, some of these assumptions and qualifications were not convincing, which leads to reasonable doubts about the evaluation made by the risk assessor. The IRA had not properly considered a number of factors that could have a major impact on the assessment of this particular risk. Accordingly, the Panel found that the reasoning articulated in Australia's IRA, with respect to the likelihood of entry, establishment and spread of fire blight, including the IRA's estimation of the value for the respective probabilities, did not rely on adequate scientific evidence and, accordingly, was not coherent and objective.

k. Potential biological and economic consequences associated with fire blight:

The Panel did not consider it as its role to reassess the impact scores assigned by the IRA to specific criteria and propose different scores. According to the experts consulted by the Panel, the IRA had a tendency to overestimate the severity of the consequences of fire blight in certain aspects. This overestimation affects in particular two of the criteria, which in the IRA were assigned the most severe scores of "F" and "E" (plant life or health and domestic trade or industry, respectively). Therefore, the Panel concluded that the IRA's evaluation of the potential consequences associated with the entry, establishment or spread of fire blight into Australia did not rely on adequate scientific evidence and, accordingly, was not coherent and objective.

l. Overall conclusions with respect to the requirements regarding fire blight:

With respect to the above analysis done by the Panel it concluded that Australia's

requirements regarding fire blight on New Zealand apples were inconsistent with Articles 5.1 and 5.2 of the SPS Agreement.

m. Alleged methodological flaws identified by New Zealand:

The Panel examined New Zealand's arguments regarding the methodological flaws in the IRA. The Panel held that since there was little indication in the IRA on how the numerical probability values were assigned to the "negligible" category, such values were not properly justified in the IRA and would tend to overestimate the probability of entry, establishment and spread of the pests at issue. It was also noted that the use of a uniform distribution to model the likelihood of "negligible" events, in combination with the assignment of a high maximum level for the respective probability interval that was not adequately justified, would tend to overestimate the likelihood of such "negligible" events. Lastly, the Panel concluded its analysis by holding that it was not convinced by New Zealand's objections regarding an alleged overestimation of such projected volume of trade.

Requirements regarding European Canker

a. Alleged overestimation of the likelihood that fruit coming from an infected orchard is also infected:

The IRA did not contain adequate scientific evidence that would allow an estimation of the frequency of apple infection and latency in New Zealand or elsewhere. Moreover, the studies on fruit infection cited in the IRA were based on research conducted in areas or periods with frequent summer rainfalls at harvest. The IRA failed to properly take into account the existence of climatological conditions in New Zealand that would be necessary for inoculum production, dissemination and infection. Accordingly, the Panel found that the IRA's estimation of the likelihood that fruit coming from an infected or infested orchard was infected or infested with Neonectria galligena was not sufficiently supported by the scientific evidence that the IRA relied upon and, therefore, was not coherent and objective.

b. Alleged overestimation of the likelihood that clean fruit from infected orchards is contaminated during picking and transport to the packing houses:

According to the IRA, the estimated range allowed for a small number of fruit to be contaminated but recognized that conditions in most areas of New Zealand

during the harvesting season are not favorable for spore production. This analysis was based on an assumption that Neonectria galligena spores could be transferred to clean fruit. The Panel concluded that the IRA did not contain scientific evidence regarding the possibility that latently infected but symptomless fruit could develop rot and generate Neonectria galligena spores, which could then be transferred to clean fruit. There was also no indication in the IRA of the existence of climatological conditions in New Zealand that were necessary for inoculum production, dissemination and infection of clean fruit during picking and transport to the packing house.

c. Alleged overestimation of the likelihood that infected or infested fruit remains infected or infested after routine processing procedures in the packing house:

According to the IRA, the estimated range largely reflected the fact that internal and latent infections were unlikely to be visible and none of the processes in the packing house are likely to substantially reduce infections. With respect to the small effect that processes in the packing house would have on the number of latently infected fruits, the IRA's discussion seems generally coherent and supported by the scientific evidence cited. The IRA, however, failed to take into account the effect that store conditions and the duration of storage would have on the likelihood that Neonectria galligena survives routine processing procedures in the packing house. Accordingly, the Panel concluded that the IRA's estimation of the likelihood that Neonectria galligena survived routine processing procedures in the packing house was not objectively justifiable.

d. Alleged overestimation of the likelihood that clean fruit is contaminated during processing in the packing house:

According to the IRA, the estimated range allowed for the presence of a small number of spores in the packing processes that could contaminate fruit. It was noted by the Panel that the IRA concluded that given the extremely small likelihood of fruit being infested/infected with N. galligena, the probability of surface spores being present on fruit and contaminating the dump water was similarly extremely small. Therefore the Panel concluded that there was no support in the IRA for the estimation made for the likelihood of this importation step neither in the scientific evidence cited in the IRA, nor on the IRA's discussion in this regard.

e. Alleged overestimation of the likelihood that infected or infested fruit remains infected or infested during palletization, quality inspection, containerization and transportation to Australia:

The IRA estimated the likelihood that Neonectria galligena survives palletization, quality inspection, containerization and transportation to Australia as 1 (100 per cent). The experts explained that these post-harvest processes could affect survival of the external inoculum, epiphytically contaminating the fruit surface, which might be negligible. Then a value of 1 would be unacceptable. Therefore the Panel concluded that the IRA's estimation of the likelihood that Neonectria galligena survives palletization, quality inspection, containerization and transportation to Australia was not sufficiently supported by the scientific evidence that the IRA relied upon and, accordingly, is not coherent and objective.

f. Alleged overestimation of the likelihood that clean fruit is contaminated during palletization, quality inspection, containerization and transportation:

The Panel held that after defining the likelihood of the event associated with this importation step as negligible, the IRA did not provide any scientific evidence to support its choice of estimation.

g. Alleged overestimation of the likelihood that an imported apple is infected or infested resulting from the sum of the proportions associated with individual importation pathways:

On the basis of the advice of the experts the Panel noted that the overall value for the likelihood of importation falls out of the range that could be considered legitimate on the basis of general knowledge regarding European canker.

h. IRA's analysis of the probability of entry, establishment and spread:

With regards to proximity the Panel was not convinced by the prima facie case made by the New Zealand that the IRA's discussion on utility points and estimated proximity ratings for the combination of each utility point with exposure groups (proximity values) was not objectively justifiable.

The Panel found that the IRA's reasoning with respect to several of the factors taken into account in its exposure analysis for European canker was either not

based on scientific evidence or not based on a coherent and objective reasoning. Also the 'exposure value' quoted, assuming it was credible to deduce such a factor, seemed to make assumptions regarding the year-round availability of infection sites, and that all discarded apples discharge spores all year, which were not correct.

In its analysis of establishment the Panel found that IRA's assessment was seriously flawed as it relied on scientifically unsupported assertions and did not take into consideration certain crucial information necessary to make such an analysis.

The IRA derived its conclusions regarding the probability of spread from a comparative assessment of those factors in the source country and 'PRA area' considered pertinent to the expansion of the geographical distribution of a pest. However the Panel noted that the IRA failed to take into account that the climatological conditions necessary for spread of the disease, in terms of the appropriate combination of cool temperatures and wetness, were unlikely to be present in Australia, particularly during summer and early fall, the most critical periods for infection.

Finally it was concluded that the IRA tends to exaggerate the risk, for example, by not taking into account that any epyphitical fungal populations would likely be small and diminishing and that the number of latently infected apples would also diminish over time, by not considering the climatic conditions that are necessary for inoculum production, dissemination and infection, and by assuming that inoculum for infection and infection sites would be always available.

i. Potential biological and economic consequences associated with European canker:

The Panel reiterated its earlier conclusions of fireblight in the case of European Canker as well.

j. Overall conclusions with respect to the requirements regarding European canker:

The Panel concluded that with respect to its analysis of the likelihood of entry, establishment and spread of European canker, and of the potential consequences associated with the entry, establishment or spread of European

canker into Australia, Australia's IRA was not a proper risk assessment within the meaning of Article 5.1 and paragraph 4 of Annex A of the SPS Agreement.

Requirements regarding ALCM

a. Available data on viability of ALCM cocoons:

The experts noted that the data on viability rates was crucial; in order to estimate the likelihood that picked apple fruit is infested with ALCM. The Panel concluded that New Zealand had made a prima facie case, not rebutted by Australia, that the data on occupancy and viability of ALCM in cocoons on New Zealand apples was not adequately taken into account. Also, there was no indication in Australia's IRA of how the exercise of expert judgment could have cured this.

b. Effect of parasitism on viability of ALCM inside occupied cocoons:

The sources of data on the possible effects of parasitism by Platygaster demades in Australia's IRA were very sparse and did not seem to have been adequately taken into account. With respect to this point, there was no indication in Australia's IRA that the exercise of expert judgment could have cured the fact that the limited data was not adequately taken into account. As a result, the Panel concluded that the IRA's reasoning regarding the viability of ALCM in the light of the possible incidence of parasitism by the wasp Platygaster demades was not objectively justifiable.

c. Flight range for ALCM:

It was the opinion of the Panel that there was insufficient scientific evidence that would have allowed Australia to reach a definitive conclusion on the precise flight range for ALCM. In any event, in the light of the limited information there was, the lack of a precise flight range for ALCM did not necessarily call into question the IRA's reasoning regarding whether orchards surrounding wholesale pack houses might be located at a distance that is within the flying range of ALCM. Australia's assertion that a flight range of 30-50 metres for a mated female ALCM would be ample in many cases between an orchard packing houses co-located within an apple orchard, seemed reasonable.

d. Period of emergence:

The experts had noted that the overall effect of this broad range of ALCM

development stages was a prolonged period of emergence of viable individuals. There was no evidence in the IRA regarding the time necessary for ALCM to emerge after apples had been removed from cold storage. They opined that Australia's assertion that some adults could emerge as soon as the appropriate triggers were encountered by the pupae may be correct, but was not supported by sufficient evidence as result, the Panel found that the IRA's reasoning regarding the likelihood of transfer of ALCM in the light of the protracted emergence of ALCM was not objectively justifiable.

e. Climatic conditions for spread of ALCM in India:

The expert opinion claims that overall, the vast bulk of the territory of Australia had an unsuitable climate for apple leaf curling midge. Also, Australia's IRA did not adequately consider the issue of the existence of climatic conditions necessary for establishment and spread of ALCM in Australia and the geographic range of these conditions. Therefore, the Panel concluded that the IRA's reasoning regarding the likelihood of establishment and spread of ALCM in Australia, in the light of the existence of necessary climatic conditions and geographic range of these conditions, was not objectively justifiable.

f. Mode of Trade:

The Panel concluded that Australia's IRA did not adequately reflect how the mode of trade of New Zealand apples imported into Australia was taken into account. If many or most apples were imported from New Zealand "retail-ready", ready packed in small packages, that were handled at urban wholesalers, as they presumably would be, this mode of trade should have a significant effect on the risk assessment.

g. Conclusions regarding the IRA's estimation for the likelihood of entry, establishment and spread of ALCM:

The Panel concluded that the reasoning articulated in Australia's IRA, with respect to the likelihood of entry, establishment and spread of ALCM, contains flaws which were enough to create reasonable doubts about the evaluation made by the risk assessor. The IRA had not properly considered a number of factors that could have a major impact on the assessment of this particular risk.

h. Potential biological and economic consequences associated with ALCM:

As noted in the case of other two diseases the Panel reiterated the same conclusions.

i. Overall conclusions with respect to requirements regarding ALCM:

The Panel concluded that, with respect to its analysis of the likelihood of entry, establishment and spread of ALCM, and of the potential consequences associated with the entry, establishment or spread of ALCM into Australia, Australia's IRA was not a proper risk assessment within the meaning of Article 5.1 and paragraph 4 of Annex A of the SPS Agreement.

General Measures

Considering the link in the IRA between the "general" measures identified by New Zealand and the specific requirements regarding fire blight, European canker and ALCM, as well as the lack of any separate justification for these "general" measures in the IRA, the Panel concluded that with respect to these "general" measures too, Australia's IRA was not a proper risk assessment within the meaning of Article 5.1 and paragraph 4 of Annex A of the SPS Agreement. In imposing these "general" measures the IRA had failed to take into account factors such as the available scientific evidence, the relevant processes and production methods in New Zealand and Australia, and the actual prevalence of fire blight, European canker and relevant environmental conditions for ALCM, as required by Article 5.2 of the SPS Agreement.

General Conclusion

For the reasons stated above, the Panel had found that Australia's requirements regarding fire blight, European canker and ALCM, as well as the requirements identified by New Zealand as "general" measures that were linked to all three pests at issue in the present dispute, were inconsistent with Articles 5.1, 5.2 and 2.2 of the SPS Agreement.

New Zealand's Claim under Article 5.5 of the SPS Agreement

Threshold issue raised by Australia

New Zealand's Article 5.5 claim was based on a comparison of the ALOP and measures applied by Australia to fire blight (Erwinia amylovora) and European canker (Neonectria galligena) in New Zealand apples, and to Japanese Erwinia and brown rot (Monilinia fructigena) in Japanese nashi pears. Australia raised a threshold issue in regard to this claim. Australia argued that, because New Zealand did not identify Japanese nashi pears as the comparator product until its first written submission, due process was prejudiced and the preparation of Australia's defence was negatively affected. The Panel accepted that Australia could not fully develop its defence merely based on New Zealand's panel request. Nevertheless, Australia could have begun preparing its defence based on the Panel request, and there was no evidence that Australia's ability to defend itself was prejudiced in this dispute. The Panel confirmed its rejection of the threshold issue raised by Australia with regard to New Zealand's Article 5.5 claim.

Elements of Article 5.5 of the SPS Agreement

a. The first element:

The Panel referenced the first element of the Article 5.5 test as distinctions in levels of protection for different situations, and analyzed two aspects of this first element: (i) different situations; and (ii) difference in levels of protection.[29]

The first aspect of the first element of the three-pronged test under Article 5.5 involved, whether the situations identified by New Zealand were different but comparable. For the purpose of the comparability test and in the circumstances of this dispute, the question addressed by the Panel was whether Japanese Erwinia in Japanese nashi pears entails any risk for Australia at all. The Panel concluded that Erwinia amylovora in New Zealand apples and Japanese Erwinia in Japanese nashi pears involve a risk of similar diseases, and therefore fulfill the condition of the comparability test established by the Appellate Body in Australia.[30] With

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[29] Panel Report on *Australia – Salmon P-174, DSR 1998: VIII, 3410, at 3640, see also panel report on EC-Hormoness (US) Para 8.176 and Panel Report on EC-Hormones (Canada) Para 8.179.*

[30] Ibid

respect to European Canker, the Panel noted that ever since it's May 1989 Quarantine Circular Memorandum for Japanese nashi pears, Australia had been applying, or at least proposing, measures against the risk of brown rot. Accordingly, like European canker in New Zealand apples, brown rot in Japanese nashi pears also posed a risk. This, in addition to the basic similarity of the two diseases, allowed the Panel to conclude that the situations involving European canker (Neonectria galligena) in New Zealand apples and brown rot (Monilinia fructigena) in Japanese nashi pears were comparable.

The second aspect of the first element of the Article 5.5 test was the appropriate level of protection in these different, but, comparable situations. Since it involved assessing whether Australia applies measures to achieve its generically stated ALOP in a way that leads to arbitrary or unjustifiable distinctions in the *de facto* ALOP applied in the situations that had been found to be comparable, which overlaps with the second element requirement, therefore the Panel refrained from discussing it under the first element.

b. The second element :

Under the second element, the Panel assessed arbitrariness in the distinctions by comparing the risks involved in the comparable situations and the measures applied by Australia against such risks. However, analysis of the seven risks with respect to European canker and Japanese Erwinia presented a mixed picture. In light of the Parties' arguments and the evidence on record, some factors, namely— the facility of transmission and the range of host plants, point towards a higher risk associated with brown rot. Some others, namely volumes of trade and presence in export areas, imply a higher risk of European canker in New Zealand apples. In regard to existing controls, there appeared to be no major difference between the two situations. Two factors — potential biological and economic consequences and the presence of the pests in Australia, appear to be inconclusive with regard to the risk of the comparable situations.

The Panel noted that since three of the risk factors regarding Erwinia amylovora and Japanese Erwinia argued by the Parties point towards a higher risk profile of Erwinia amylovora and with regard to the fourth risk factor there seemed to be no difference between the two situations, the Panel finds that New Zealand has not demonstrated that Japanese Erwinia in Japanese nashi pears and Erwinia amylovora in New Zealand apples had similar overall risk profiles.

The Panel's conclusion on New Zealand's Article 5.5 Claim

The Panel found with regard to both pairs of comparator situations advanced by New Zealand that New Zealand did not demonstrate the second and the first elements of the three-pronged Article 5.5 test.

New Zealand's claim under Article 2.3 of the SPS Agreement

The Panel noted that New Zealand's claim under Article 2.3 was entirely dependent on its claim under Article 5.5 of the SPS Agreement. Since the Panel had dismissed New Zealand's Article 5.5 claim, it also had to dismiss New Zealand's consequential Article 2.3 claim.

New Zealand's claim under Article 5.6 of the SPS Agreement

Under the three-pronged test of Article 5.6, the complainant needed to demonstrate that another, alternative measure:

i. was reasonably available taking into account technical and economic feasibility;

ii. achieved the Member's appropriate level of sanitary or phytosanitary protection; and

iii. was significantly less restrictive to trade than the SPS measure contested.

Measures at issue regarding fire blight and European canker

Alternative measure regarding fire blight and European canker identified by New Zealand:

For the eight fire blight measures (Measures 1-8) and four European canker measures (Measures 9-11 and 13) at issue, New Zealand's first written submission referenced one alternative measure, and argued that it would fulfill the three cumulative conditions of the Article 5.6 test. It was the restriction of imports to apple fruit that are mature and symptomless. The Panel thereon proceeded to assess whether this single alternative measure properly identified and adequately argued by New Zealand for fire blight and European canker fulfilled the three cumulative conditions of the Article 5.6 test.

a. Whether restricting imports to mature, symptomless apples satisfies the three-pronged Article 5.6 test:

The Panel first analyzed the alternative under the second condition of Article 5.6 i.e. whether restricting imports to mature, symptomless apples achieved Australia's ALOP with regard to fire blight and European canker.

With respect to fire blight, the Panel concluded that in the light of findings under Article 5.1 and 5.2, New Zealand had raised a sufficiently convincing presumption not successfully rebutted by Australia, that the alternative fire blight measure of restricting imports of New Zealand apples to mature, symptomless apples would meet this ALOP. Accordingly, this alternative measure fulfilled the second condition of the Article 5.6 test in the context of fire blight.

With respect to European Canker, in the light of earlier findings of the Panel under Articles 5.1 and 5.2, the Panel concluded that New Zealand had raised a sufficiently convincing presumption not successfully rebutted by Australia, that the alternative European canker measure of restricting imports of New Zealand apples to mature, symptomless apples would meet this ALOP. Accordingly, this alternative measure fulfils the second condition of the Article 5.6 test in the context of European canker, too.

Secondly, the Panel analysed the alternative measure under the first condition i.e. whether restricting imports to mature, symptomless apples was reasonably available taking into account technical and economic feasibility.The experts were of the opinion that, in light of the exhibit submitted by New Zealand there is no evidence that apples exported from New Zealand "will not always be mature, asymptomatic and free of trash". Therefore, the Panel concluded that New Zealand had made a prima facie case that the first condition of the Article 5.6 test was fulfilled in the context of fire blight and European canker, which Australia had failed to rebut. In fact, Australia did not even contest New Zealand's specific arguments with regard to fire blight and European canker under the first condition of the Article 5.6 test.

Lastly, the Panel analysed the alternative measure under the third condition i.e. whether restricting imports to mature, symptomless apples was significantly less trade restrictive than Australia's current fire blight and European canker measures. Australia was not able to explain why New Zealand's alternative measure for fire blight and European canker would be less trade restrictive, nor did Australia contest

any of the specific arguments advanced by New Zealand in the context of fire blight and European canker with regard to the third condition of the Article 5.6 test.

b. Conclusion on New Zealand's Article 5.6 claim with regard to fire blight and European canker:

The Panel found that New Zealand had demonstrated that its alternative measure for fire blight and European canker fulfilled the three cumulative conditions of the Article 5.6 test. Accordingly, the Panel found that the fire blight and European canker measures contested by New Zealand (Measures 1-11 and 13) were inconsistent with Article 5.6 of the SPS Agreement.

Measure regarding ALCM

a. Alternative measure regarding ALCM identified by New Zealand:

New Zealand claimed that Australia's measure regarding ALCM listed in the Panel request (Measure 14) was inconsistent with Australia's obligations under Article 5.6 of the SPS Agreement because requiring inspection of a 600-fruit sample of each import lot was an alternative measure satisfying all three cumulative conditions of the Article 5.6 test. The Panel then went on to analyze this measure under the three pronged test of Article 5.6.

b. Whether inspection of a 600-fruit sample from each import lot satisfies the threepronged Article 5.6 test:

The Panel first assessed the alternative under the second condition of the test. the Panel's finding that New Zealand had raised a presumption (and thereby made a prima facie case) that the 600-unit inspection would reach Australia's ALOP was a legal finding and not a scientific one. If Australia conducted a proper risk assessment for New Zealand apples, subject to an objectively justifiable analysis it might conclude that the ALCM risk exceeds Australia's ALOP. In light of such a conclusion, the Panel felt that Australia might also impose a risk management measure that is different from a 600-unit inspection. Also any such future risk assessment and eventual adoption of risk management measures by Australia must comply with the relevant provisions of the SPS Agreement, more particularly with Articles 2.2, 5.1, 5.2 and 5.6.

Secondly, the Panel assessed the alternative under the first condition of the test. New Zealand argues, the 600-fruit inspection was already the standard sanitary and phyto-sanitary export and import inspection procedure between the Parties, and the procedures to implement it already exist. New Zealand contended that the 600-fruit inspection was also applied by other WTO Members. Accordingly, the 600-fruit inspection was an alternative measure that was technically and economically feasible in the real world, and therefore reasonably available not only in theory but also in actual practice. Hence, the Panel concluded that the alternative measure New Zealand advances in this dispute for ALCM fulfils the first condition of the Article 5.6 test.

c. Third condition:

New Zealand had made a prima facie case that an infestation rate more in the range found in the August 2005 data would be more realistic in light of the various factors that the IRA did not properly take into account. Also, the significant difference in fumigation costs would also result in a significant difference in trade restrictiveness. An SPS measure that was significantly more costly for the complainant than an alternative measure would certainly reduce market access or make it more difficult. Therefore, the Panel concluded that the Panel concluded that New Zealand had demonstrated that the alternative measure of a 600-unit inspection of each import lot would be significantly less trade restrictive than Australia's current ALCM measure.

d. Conclusion on New Zealand's Article 5.6 claim in regard to ALCM:

New Zealand had demonstrated that the alternative for the ALCM measure (Measure 14) fulfils all three cumulative conditions of the Article 5.6 test. Accordingly, the Panel found that Measure 14 was inconsistent with Article 5.6 of the SPS Agreement.

General Measures

a. Alternative measure identified by New Zealand for the general measures:

In the context of Article 5.6 of the SPS Agreement, in its first written submission New Zealand references "auditing by AQIS officers of New Zealand

systems applicable to the import of apples to Australia from New Zealand"[31] as an alternative to the general measures (Measures 1517).

b. Whether an audit by AQIS of a sample of: (i) the relevant systems designed to ensure that apples are mature and symptomless, and (ii) the procedures for inspection of a 600-unit sample satisfies the three pronged Article 5.6 test:

The Panel first addressed the threshold issue — whether the alternative advanced by New Zealand can be usefully compared with the general measures, or at least Measure 15, for the purposes of the third condition of the Article 5.6 test. The Panel held that while it understood that New Zealand might not be responsible for the uncertainty regarding the scope of Measure 15, the burden still falls on New Zealand as the complainant to make a prima facie case regarding these requirements. In the light of the above uncertainties in the IRA regarding Measure 15 and in the absence of the standard operating manual and work plan, the Panel could not usefully compare Measure 15 with New Zealand's alternative.

The Panel continued its analysis of the third prong of the Article 5.6 test by looking at Measures 16 and 17. The Panel was of the opinion that New Zealand should have advanced more arguments and evidence to demonstrate that its alternative is less – let alone significantly less – trade restrictive than Measure 16. In particular, New Zealand should have explained and demonstrated how, by being less costly and time-consuming its alternative measure would involve significantly increased market access for New Zealand apples to Australia than Measure 16.

Moving on to Measure 17, the Panel noted that New Zealand argued only that this measure was unwarranted and scientifically unjustified. Again, the Panel could not consider these arguments as sufficient to demonstrate that New Zealand's alternative measure would be significantly less trade restrictive than Measure 17.

c. Conclusion on New Zealand's Article 5.6 claim with regard to the general measures:

New Zealand had not made a prima facie case that the third condition of the Article 5.6 test was fulfilled in the context of the general measures. Since the three

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[31] New Zealand's first written submission, para. 4.525.

conditions of this test were cumulative, the Panel found that New Zealand had not demonstrated that Measures 15, 16 and 17 were inconsistent with Article 5.6 of the SPS Agreement.

The Panel's conclusions on New Zealand's Article 5.6 Claim

a. The Panel's conclusions under Article 5.6:

In light of the above analysis, the Panel concluded that New Zealand had demonstrated that the contested pest-specific measures (Measures 1-11 and 13-14) were inconsistent with Article 5.6 of the SPS Agreement, while New Zealand had failed to demonstrate the same for the three general measures (Measures 15-17).

b. New Zealand's arguments linking its Article 5.6 claim to Article 2.2 of the SPS Agreement:

The Panel did not consider it necessary to analyze this Article 5.6 related Article 2.2 claim by New Zealand, nor whether New Zealand had properly articulated arguments for this claim. Consequently, the Panel did not need to engage in a detailed analysis of the relationship between the third condition of the Article 5.6 test and the first requirement of Article 2.2 of the SPS Agreement.

New Zealand's Claims under Article 8 and Annex C(1)(a) of the SPS Agreement

Since New Zealand had not effectively identified the measure at issue in the context of its Annex C (1)(a) and Article 8 claims, these measures and the claims to which they relate were outside the scope of this dispute. The Panel referred to the Appellate Body report in Dominican Republic – Import and Sale of Cigarettes, "the Appellate Body has consistently maintained that, where a panel request fails to identify adequately particular measures or fails to specify a particular claim, then such measures or claims will not form part of the matter covered by the panel's terms of reference."

Conclusions and recommendations

For the reasons indicated in this report, the Panel had found that:

a. There was no evidence that the process of selection and consultation of experts was conducted improperly, that the due process in the expert consultation phase of these proceedings was compromised, nor that Australia's procedural rights were in any manner negatively affected in this regard;

b. The 16 measures at issue in the current dispute, both as a whole and individually, constitute SPS measures within the meaning of Annex A(1) and were covered by the SPS Agreement;

c. Australia's measures at issue regarding fire blight, European canker and ALCM, as well as the requirements identified by New Zealand as "general" measures that were linked to all three pests at issue in the present dispute, are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement and, by implication, these requirements were also inconsistent with Article 2.2 of the SPS Agreement;

d. New Zealand had failed to demonstrate that the measures at issue in the current dispute are inconsistent with Article 5.5 of the SPS Agreement and, consequentially, it had also failed to demonstrate that these measures are inconsistent with Article 2.3 of the SPS Agreement;

e. Australia's measures at issue regarding fire blight, European canker and ALCM, were inconsistent with Article 5.6 of the SPS Agreement. However, New Zealand had failed to demonstrate, that the requirements identified by New Zealand as "general" measures that were linked to all three pests at issue in the present dispute, were inconsistent with Article 5.6 of the SPS Agreement; and,

f. New Zealand's claim under Annex C (1) (a) claim and its consequential claim under Article 8 of the SPS Agreement were outside the Panel's terms of reference in this dispute.

Under Article 3.8 of the DSU, in cases where there was an infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment. The Panel concluded that, to the extent that Australia's measures at issue regarding fire blight, European canker and ALCM, as well as the requirements identified by New Zealand as "general" measures that were linked to all three pests at issue in the present dispute,

were inconsistent with the SPS Agreement, they had nullified or impaired benefits accruing to New Zealand under the WTO Agreements.

Findings and Conclusions

Under Article 3.8 of the DSU, in cases where there was an infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment. The Panel concluded that, to the extent that Australia's measures at issue regarding fire blight, European canker and ALCM, as well as the requirements identified by New Zealand as "general" measures that were linked to all three pests at issue in the present dispute, were inconsistent with the SPS Agreement, they had nullified or impaired benefits accruing to New Zealand under the WTO Agreements.

The Panel recommended that the Dispute Settlement Body request Australia to bring the inconsistent measures as listed above into conformity with its obligations under the SPS Agreement of the WTO.

3. EUROPEAN COMMUNITIES AND ITS MEMBER STATES – TARIFF TREATMENT OF CERTAIN INFORMATION TECHNOLOGY PRODUCTS, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010

Parties:
European Union
United States of America

Third Parties
Australia; Brazil; China; Costa Rica; Hong Kong, China; India; Japan (in respect of the United States' and Chinese Taipei's complaints); Korea; the Philippines; Singapore; Chinese Taipei (in respect of the United States' and Japan's complaints); Thailand; Turkey; the United States (in respect of Japan's and Chinese Taipei's complaints); and Vietnam reserved their rights to participate in the Panel proceedings as third parties.

Factual Matrix:

On 28 May 2008, the United States and Japan, and on 12 June 2008, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), independently requested consultations with the European Communities pursuant to Article 4 of the DSU and Article XXII:1 of the GATT 1994 regarding the tariff treatment that the European Communities accords to certain information technology products. The United States, Japan and Chinese Taipei requested, pursuant to paragraph 11 of Article 4 of the DSU, to join in each other's consultations. China, the Philippines, Singapore and Thailand requested to join in the consultations requested by the United States and Japan, and China also requested to join in the consultations requested by Chinese Taipei. The European Communities did not accept these requests, with the exception of the request of China to join in the consultations requested by Chinese Taipei.

Separate consultations were held in Geneva between each complaining party and the European Communities. None of these consultations led to a mutually satisfactory resolution of the dispute. On 18 August 2008, the United States, Japan and Chinese Taipei, jointly and severally, requested the establishment of a panel pursuant to Article 6 of the DSU, with standard terms of reference. At its meeting on 23 September 2008, the DSB established a single Panel pursuant to the joint panel request of the United States, Japan and Chinese Taipei in document WT/DS375/8, WT/DS376/8 and WT/DS377/6 in accordance with Article 6 of the DSU.

Measures at Issue in the dispute:

The complaining parties, being the United States, Japan and the Chinese Taipei, claimed that the European Communities was obliged to grant duty-free treatment to the following information technology products under the European Communities Schedule of concessions to the GATT 1994 (EC Schedule) pursuant to modifications therein to reflect the commitments it had made under the Ministerial Declaration on Trade in Information Technology Products (the "Information Technology Agreement" or the "ITA").

i. "flat panel display devices" ("FPDs")

ii. "set-top boxes which have a communication function" ("STBCs")

iii. "multifunctional digital machines" ("MFMs")

The complaining parties identified the following as the measures at issue in this dispute:

Flat Panel Display Devices or FPDs

i. Council Regulation (EC) No. 493/2005 of 16 March 2005;

ii. Commission Regulation (EC) No. 634/2005 of 26 April 2005;

iii. Commission Regulation (EC) No. 2171/2005 of 23 December 2005;

iv. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;

v. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 133/01 (May 30 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987; and

vi. Any amendments or extensions and any related or implementing measures.

Set-top Boxes which have a communication function or STBCs

i. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended;

ii. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03 (7 May 2008) alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987; and

iii. Any amendments or extensions and any related or implementing measures.

Multifunctional Digital Machines or MFMs

i. Commission Regulation (EC) No. 517/1999 of 9 March 1999;

ii. Report of the Conclusions of the 360th meeting of the Customs Code Committee, Tariff and Statistical Nomenclature Section, TAXUD/555/2005-EN (March 2005);

iii. Commission Regulation (EC) No. 400/2006 of 8 March 2006;

iv. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (including amendments adopted pursuant to Commission Regulation No. 1214/2007 of 20 September 2007); and

v. Any amendments or extensions and any related or implementing measures.

Requests for Findings

The complaining parties requested the Panel to find that the European Communities had acted inconsistently with Articles II: 1(a) and II: 1(b) of the GATT 1994 by according to certain FPDs, STBCs and MFMs treatment less favourable than that provided in the EC Schedule, and by imposing on these products ordinary customs duties, or other duties and charges, in excess of those set forth in the EC Schedule.

The United States and Chinese Taipei further requested the Panel to find that the European Communities, with respect to STBCs, has acted inconsistently with Articles X: 1 and X: 2 of the GATT 1994 by not promptly publishing the Explanatory Notes identified above in respect to these products and by applying duties to these products using the approach specified in these Explanatory Notes prior to the date of their publication.

The European Communities requested the Panel to reject all the claims raised by the United States, Japan and the Chinese Taipei.

The Information Technology Agreement (ITA)

The Information Technology Agreement (ITA) has been adopted by 29 WTO member states or separate customs territories in the process of acceding to the WTO during WTO Ministerial Conference held in Singapore in 1996.

There are 2 attachments to the Annex of the IT Agreement :

Attachment A and Attachment B, that set forth product coverage under the Information Technology Agreement.

Attachment A: lists the HS headings or the parts thereof to be covered and is divided into two sections:

Section 1 included a table listing HS 1996 headings (4 digits) and sub headings (6 digits) with their corresponding HS descriptions.

Section 2, entitled "Semiconductor manufacturing and testing equipment and parts thereof", includes a second table containing HS 1996 sub headings along with corresponding descriptions of the covered products. Certain headings listen in this section are designated "for Attachment B."

Attachment B: lists specific products to be covered by the ITA wherever they are classified in the HS. It provides a positive list of 13 products.

In accordance with paragraph 2 of the ITA, participants to the ITA agreed to "bind and eliminate" customs duties and other duties and charges within the meaning of Article II:1(b) of the GATT 1994, through equal duty rate reductions on —

a. All products classified (or classifiable) with HS 1996 headings listed in Attachment A to the Annex to the ITA; and

b. All products specified in Attachment B to the Annex to the ITA, whether or not they are included in Attachment A.

Paragraph 1 of the ITA Annex mandates participants to incorporate the measures described in paragraph 2 of the ITA in its Schedule of Concessions to the GATT 1994.

ITA participants agreed to modify their respective schedules of concessions, including agreement to bind all tariffs on items listed in the Attachments no later than 1 July 1997 and "phase in" customs duty rate reductions beginning in 1 July 1997 and concluding "no later than 1 January 2000". Each Information Technology Agreement participant submitted a proposed modification to its own Schedule

for review by all WTO Members. Each participant's schedule was certified following a three month review period for that particular schedule.

Most of the original Information Technology Agreement participants incorporated the Information Technology Agreement-related concessions into their WTO Schedules by:

i. consolidating in a single section of their WTO Schedules the HS1996 tariff item numbers listed under both sections of Attachment A;

ii. listing those product descriptions from Attachment A, Section 2 that were described as "[f]or Attachment B", and all product descriptions from Attachment B in a unified, separate section or annex to their schedules; and

iii. attaching a "staging matrix" to their respective WTO Schedules, indicating the duty reductions that would be applicable each year for each of the relevant tariff lines.

General Issues in the Dispute

Burden of Proof

In this dispute, the United States, Japan and Chinese Taipei had jointly claimed that the European Communities acted inconsistently with provisions of Articles II: 1(a) and (b), and Articles X: 1 and X:2 of the GATT 1994. Pursuant to the decision of the Appellate Body in US- Wool Shirts and Blouses and Canada – Dairy and other cases[32] the Panel held that the complainants bear the burden of proof to demonstrate that the European Communities acted inconsistently with these provisions.

Treaty Interpretation

The Appellate Body in EC – Computer Equipment[33] explained that tariff

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[32] Appellate Body Report on *US – Wool Shirts and Blouses*, DSR 1997: I, p. 16, Appellate Body Report on *Canada – Dairy* (Article 21.5 New Zealand and US II), para. 66, Appellate Body Report on *EC – Hormones*, para. 104.

[33] Appellate Body Report on *EC – Computer Equipment*, para. 84.23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

concessions provided for in a Member's Schedule were part of the terms of the treaty and "as such, the only rules which might be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention." Articles 31 and 32 of the Vienna Convention on the Law of Treaties[34] being customary rules of interpretation of public international law shall be applied by the Panel in interpreting the relevant provisions of the covered agreements of the WTO.

Preliminary Horizontal Issues

Status of the EC Member States as respondents :

EC Member States are WTO Members in their own right, with their own obligations, including obligations under Article II of the GATT 1994. Both the European Communities and its Member States play a role in the application of duties to the products in question in this dispute. Although the EC administers the CN and had issued the regulations and CNENs in issue, the national customs authorities in the Member States issue BTIs, interpret and apply the CNENs and other regulations and apply duties to the products in accordance with the same.

As per EC – Computer Equipment, the internal legal relationship between the EC and its member states could diminish the rights of the other WTO members to exercise their rights under the WTO Agreement and bring claims against the EC as well as its member states.

European Communities

EC has had exclusive competence with respect to all tariff matters since 1968, pursuant to Article 133 of the Treaty establishing the European Community. The role of customs authorities of the EC member States was limited to applying measures previously enacted by the European Communities.

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[34] The Vienna Convention on the Law of Treaties (the "Vienna Convention"), done at Vienna, 23 May 1969, 1155 U.N.T.S., 331:8 International Legal Materials 679.

EC Member States were required under EC law to apply the implementing measures taken by the European Communities, and were prevented from taking any remedial action on their own until the European Communities had adopted the required implementing measures to comply with any recommendation by the Panel. Since these were only "as such" claims against measures taken by the EC, there was no basis to direct findings against EC member States for measures that EC member States have no power to repeal or amend.

Panel's considerations and findings

The Panel noted that the complainants' joint panel request was addressed to the European Communities and its member States. In accordance with Article 3.7 of the DSU, primary objective was to secure a positive solution to the dispute and as per the terms of reference to make such findings as would assist the DSB in making the recommendations or in giving the rulings provided for in those agreements. In the context of the claims before the Panel, it would only analyse the complainants' claims with respect to the FPDs and STBCs narrative descriptions and the alleged concession pertaining to MFMs, and will consider the extent to which the European Communities and its member States had failed to comply with obligations in the context of EC commitments set forth in the EC Schedule.

To the extent the EC member States apply WTO inconsistent measures enacted by the European Communities; there was a reasonable basis to conclude that they had acted inconsistently. Accordingly, the Panel refrained on ruling at the outset whether findings against particular EC member States would be necessary to secure a positive solution to the dispute.

Characterization of the Panel's task for the complainants claim under Article II of the GATT 1994

The fundamental issue was whether the identified EC measures result in less favourable tariff treatment to the imports of FPDs, STBCs and MFMs than that provided for in the EC Schedule, and whether the tariff treatment provided was in excess of that provided for in the EC Schedule.

In light of Argentina – Textiles and Apparel[35] and EC – Chicken Cuts[36], in order to assess the complainants' claims the following were analysed:

i. The treatment accorded to the products at issue in the EC Schedule

ii. The treatment accorded to the products at issue under the challenged measures at issue

iii. Whether the challenged measures result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether the challenged measures result in the imposition of duties and charges on the products at issue in excess of those provided for in the EC Schedule.

Various concessions in the EC Schedule cited by the complainants should also have to be interpreted and assessed applying the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties.

What were the requirements to prove an "as such" claim in the circumstances of this dispute?

In order to establish a violation of Article II of the GATT 1994, the task was to demonstrate that the measures necessarily led EC customs authorities to impose duties on one or more products subject to their commitments to provide duty-free treatment.

As per the approach in China – Auto Parts[37], it was not required to demonstrate that the measures in question result in the imposition of duties on every single model of flat panel display that is imported into the European Communities. Instead, any aspect of the criteria in the measures can lead to a violation. Mere fact that a measure might result in the correct duty treatment for a given model of a product in some instances would not "save" the measure from a finding of violation.

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35 Appellate Body Report on *Argentina – Textiles and Apparel*, para. 45.
36 Panel Report on *EC – Chicken Cuts*, para. 7.65.
37 Panel Report on *China - Auto Parts (US)*, para. 7.540.

By demonstrating that a measure excludes from duty-free treatment any display with particular technical characteristics, the measures result in the imposition of duties on products covered by the EC's duty free tariff obligations, thereby violating Article II of the GATT 1994.

European Communities

The complainants failed to identify in sufficient detail the products or aspects in the measures at issue to establish that all or some of the products identified by the complainants were necessarily treated by the European Communities inconsistently with its concessions.

The issue of a violation under Article II could not be determined without consideration of all the relevant characteristics of the particular products at issue that might be involved in an objective classification exercise. The complainants could not show that a certain category of existing products was treated in a way inconsistent with the EC commitments because their arguments address an overly broad product description. Thus, if the Panel should reaches the requested findings "it would not be clear with respect to which products the Panel found a violation".

Panel's considerations and findings

The DSU does not expressly distinguish between "as such" or "as applied" claims of violation, nor does Article 6.2 of the DSU or any other provision of the DSU set forth a particular burden of proof that applies to complainants who raise "as such" claims of violation. As per US – Oil Country Tubular Goods Sunset Reviews[38] and US – Carbon Steel[39], in substantiating an "as such" challenge against laws, regulations, or other instruments of a Member that had general and prospective application, a complainant may adduce evidence in the form of the text of the relevant legislation or legal text, and might also submit evidence of the application of such legislation.

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[38] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[39] Appellate Body Report on *US – Carbon Steel*, para. 157 (emphasis added); see also Panel Report on *Mexico – Rice*, para. 6.26.

In the present dispute, the complainants had identified a series of generally applicable EC measures pertaining to the tariff classification of products (including certain CN codes, classification regulations and CNENs). Further, in certain cases, the complainants had also presented individual classification decisions by customs authorities as evidence of the application of the measures at issue.

The Panel framed 2 questions for consideration:

i. Was it sufficient to focus on aspects of, or particular criteria within, a broader measure in order to establish an "as such" breach?

ii. Was it necessary to identify specific product models or categories of products in order to establish an "as such" breach, or is it sufficient to identify products that share a particular characteristic?

What was required to establish an "as such" breach will vary from case to case depending on the particular circumstances of the case, including the nature of the measures and obligations at issue? The Panel interpreted the complainants' arguments not to be that all products that had the particular characteristic identified must necessarily receive duty-free treatment but rather, that the exclusion from duty-free treatment of all products with a certain characteristic would necessarily result in the application of duties to some products that fall within the EC duty-free commitments.

Specifically, the issue was whether the scope of the EC duty-free concessions included some products with characteristics that, by virtue of the EC measures, are excluded from duty-free treatment. If the obligations did include such products, and if the effect of the EC measures is necessarily to deny such products duty-free treatment, then the Panel would consider that an "as such" breach of the EC commitments will have been established.

Flat Panel Display Devices (FTDs)

I. Preliminary Observations

i. Whether versions of the CN – such as the CN2009 and CN2010 – which were promulgated subsequent to the Panel request, may be considered by the Panel.

In light of the Appellate Body's earlier pronouncements in its reports on Chile – Price Band System[40] and EC – Chicken Cuts[41] a panel's terms of reference might be considered to include "amendments" to measures that were listed in the Panel request subject to two conditions:

- As long as the terms of reference were broad enough.
- The new measures do not "change the essence" of the original measures included in the request or have legal implications overtly different from those of the original measures.

Whether the Panel's terms of reference were broad enough to include subsequent amendments to the CN

The complainants' reference to measure at issue Council Regulation No 2658/87 "as amended" and their use of the phrase "any amendments or extensions and any related or implementing measures" in the Panel request were sufficiently broad to account for the possibility of amendments or extensions of the CN.

Whether subsequent amendments to Council Regulation No. 2658/87 change the essence of the version of that was identified by the complainants

The subsequent amendments to the Council Regulation No. 2658/87 strictly prolong its period of application without modifying any of the terms or headings at issue in this dispute. Accordingly, the Panel concluded that subsequent amendments, including the 2008- 2010 versions, did not change the essence of the version of the CN (2007) set forth in Council Regulation No. 2658/87 that was identified by the complainants.

Whether CNEN 2008/C 133/01 was a measure subject to WTO dispute settlement?

Arguments of EC:

CNEN 2008/C 133/01 was not "legally binding" in the European

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40 Appellate Body Report on *Chile – Price Band System*, para. 144.

41 Appellate Body Report on *Chile – Price Band System*, paras. 139 (also para. 7.175 below) and 144.

Communities' legal order and cannot alter the scope of the CN. CNENs were an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. CNENs were not "like a regulation", but "reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue". CNEN served to confirm the classification made on the basis of the CN, but it was not itself the legal reason and basis for that classification.

Arguments of Complainants:

CNENs set forth rules and norms that were intended to have general and prospective application, which have legal effect and ensure uniformity of administration of the CN. CNENs provided administrative guidance and create expectations among the public and among private actors that they would be applied. A BTI would cease to exist when contrary to a CNEN. EC member States that deviate from the content of a CNEN, and collect less import duties as a result thereof, were considered liable and the Commission had the option of instituting infringement proceedings against such EC member States.

Findings and Consideration of the Panel

The Panel held that CNENs were "authoritative" such that "*per se*" requirements set out in the CNEN could validly form the basis of an "as such" claim of a breach of Article II of the GATT 1994. CNENs did not "preclude the exercise of discretion" by member State customs authorities. It was apparent that there was a clear expectation that such discretion will be exercised in a certain fashion and that infringement proceedings may apply in instances where such discretion was not so exercised. CNENs were issued by the Commission, a body with undisputed authority within the European Communities for ensuring the uniform application of the Customs Code Tariff, and with the power to challenge interpretations not consistent with its own. They set forth rules or norms that were intended to had general and prospective application

BTIs would cease to be valid where they were no longer compatible "at Community level" with "the explanatory notes [...] adopted for the purposes of interpreting the rules". The objective of the CNEN was to ensure the uniform application of the Common Customs Tariff to all products falling under a specific CN code upon importation into the EU. The CNEN creates legitimate expectations among the public and among private actors.

Whether the Panel might consider the continuation of a duty suspension on imports of particular flat panel display devices subsequent to the consultations request and establishment of this Panel?

Arguments of the Parties:

The complainants argued that the extension of the suspension under Council Regulation No. 493/2005 by Council Regulation No. 179/2009 should not be considered by the Panel because it was not in effect at the time the joint Panel Request was made, whereas EC claimed that because Council Regulation No. 179/2009 replaced Council Regulation No. 493/2005 the former was the relevant measure for the Panel's consideration.

Findings and Consideration of the Panel

Council Regulation No. 493/2005 expired on 31 December 2006, but was extended under Council Regulation No. 301/2007 until 31 December 2008. These two regulations suspended the application of duties on "monitors with a diagonal measurement of the screen of 48, 5 cm or less and with an aspect ratio of 4:3 or 5:4". Council Regulation No. 179/2009 replaced Council Regulation No. 301/2007. This regulation suspends the application of duties on certain black and white or other monochrome monitors, and certain colour monitors. The complainants referred to "any amendments or extensions and any related or implementing measures", in addition to identifying Council Regulation No. 493/2005, when discussing the measures at issue.

Applying the same test used in Preliminary Observation, the Panel concluded that its terms of reference were broad enough to include Council Regulations Nos. 301/2007 and 179/2009 and that Council Regulations Nos. 301/2007 and 179/2009 do not change the essence of Council Regulation No. 493/2005.

Had the complainants identified obligations "with the necessary clarity" for the European Communities to defend itself and for the Panel to rule on the complainants' claims under Articles II: 1(a) and II: 1(b) of the GATT 1994?

Arguments of EC

The complainants failed to identify the precise concession that was allegedly

breached both in terms of its substantive content and where precisely it was provided for in the Schedule of the European Communities.

The United States did not define precisely the text that should be analysed when discussing products that are also listed in Attachment B. Japan considered that the text of the ITA was incorporated by reference into the concessions or whether the language in the Annex to the EC Schedule itself is the concession. Chinese Taipei had claimed the concessions are in the EC Schedule and not in the text of the IT Agreement itself, ignoring the fact that the Annex to the EC Schedule contains a list of tariff item numbers.

The complainants "appear to use the terms set forth in the EC Schedule and IT Agreement almost interchangeably without providing a justification for such an approach". The narrative product definitions in the EC Schedule pursuant to Attachment A, Section 2 and Attachment B and the tariff item numbers next to them reflect the common understanding between WTO Members of the scope of the relevant EC commitments pursuant to Attachment A, Section 2 and Attachment B.

The EC recognized two possibilities: first, that the product descriptions and the headings next to them in the Annex to the EC Schedule were the concession, or second that the product descriptions in the ITA itself were incorporated into the EC Schedule as a "safety net". The EC disputed the relevance of document WT/MIN (96)/16/Corr. as there was no evidence that the said document was ever officially circulated among all WTO Members.

Arguments of the Complainants

The United States argued that the Panel "must look at Attachment B and the product descriptions contained therein" to determine the scope of the concession as, it argues, the text of the EC head note expressly directs the reader to Attachment B. Attachment B was modified to reflect certain technical corrections, including the addition of the terms "devices" and "Vacuum Fluorescence", pursuant to document WT/MIN(96)/16/Corr.1[42], dated 13 October 1997 which is an official WTO document that reflects a consensus to correct the legal text of the IT Agreement.

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42 Exhibit US-36.

Japan and Chinese Taipei submitted that the EC concession, while made pursuant to Attachment B, is located in the Annex to the EC Schedule, and not in Attachment B itself.

The language of the product narrative descriptions contained in Attachment B had been incorporated into the EC Schedule, and thus, constituted the language of the EC tariff concession.

Findings and Consideration of the Panel

Two issues arose in light of the European Communities' contention that the complainants did not identify the obligations "with the necessary clarity" for the European Communities to defend itself:

(i) Have the complainants sufficiently referred to the concessions at issue in their joint Panel request?

(ii) What was the location of the concession arising under the FPDs narrative description for the purposes of the Panel's analysis?

Whether the complainants sufficiently identified the obligations in their Panel request to permit the Panel to proceed

To sufficiently present the problem clearly, a complaining Member must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.

It was clear that the complainants' claim relates to the narrative description for flat panel displays, read in association with the head note in the EC's Schedule. While the Panel request could have been clearer in terms of where the obligations were "located" (i.e., incorporated by reference or set out independently in the Annex to the EC Schedule), this has not prejudiced the ability of the European Communities to defend itself in this case.

The complainants identified the obligations "with the necessary clarity" in their Panel request for the European Communities to defend itself and for the Panel to rule on the complainants' claims.

Was the commitment arising under the narrative product description for "flat panel display devices" located in the Annex to the EC Schedule, Attachment B, or both?

The EC head note found in the Annex to the EC Schedule refers to "any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN(96)/16)".

Annex to the EC Schedule reproduces, separately, product descriptions that clearly have their origins in Attachment B of the ITA, though the text of the narrative descriptions for "flat panel display devices (...)" in the Annex to the EC Schedule is not identical with that appearing in Attachment B.

The IT Agreement participants intended to modify the product descriptions contained in the ITA, and that these modified product descriptions should form the basis of the IT Agreement participants' commitments with regard to that product. Evidence for this was found in the fact that the European Communities used this version of the narrative product description in the Annex to its Schedule. There were no discrepancies between the modified narrative product description for flat panel display devices contained in Attachment B of the ITA, as referred to in the EC head note, and that which is reproduced in the list in the Annex to the EC Schedule.

Measures at Issue and their Effects

a. Council Regulation No. 2658/87, as amended by Commission Regulation No. 948/2009

- Council Regulation No. 2658/87 establishes the CN and CCT

CN1997 included the descriptions for CN subheadings 8471 60 90 (Other) under the heading 8471 60 (Input or output units, whether or not containing storage units in the same housing) and CN sub heading 8528 21 90 (Other) under the heading ("Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors" and "Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus").

The CN2007 first introduced the duty-free CN codes 8528 41 00 and 8528 51 00 to replace duty-free CN code 8471 60 80, and dutiable CN code 8528 59 90 to replace CN code 8528 21 90.

The CN2010 maintains the same structure and CCT as the CN2007 version but CN code 8528 59 90 is assigned a 14 per cent duty rate, which is subject to an autonomous duty suspension, until 31 December 2010, "for colour monitors using liquid crystal display technology, with a diagonal measurement of the screen not exceeding 55.9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10 (TARIC code 8528 59 90 40).

It appeared evident that under the CN 'monitors of a kind solely or principally used in an automatic data-processing system of heading 8471' are classifiable under duty free CN codes 8528 41 00 and 8528 51 00. These include CRT-based monitors (under CN code 8528 41 00) and "other" types of monitors (under CN code 8528 51 00).

Non-CRT, "monitors" that were black and white or other monochrome are classifiable under the dutiable CN code 8528 59 10, and subject to a 14 per cent ad valorem duty, and colour "monitors" are classifiable under CN code 8528 59 90, and subject to a 14 per cent ad valorem duty In accordance with an autonomous duty suspension identified in the CN2010, black and white or other monochrome LCD monitors "equipped with either a digital-visual-interface (DVI) or a video-graphics-array (VGA) connector or both, with a diagonal measurement of the screen not exceeding 77,50 cm (i.e. 30,5 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10, with a pixel resolution exceeding 1,92 mega pixels, and with a dot pitch not exceeding 0,3 mm" are exempt from duties. Colour LCD monitors "with a diagonal measurement of the screen not exceeding 55,9 cm (i.e. 22 inches), with an aspect ratio of 1:1, 4:3, 5:4 or 16:10" are similarly exempt from duties.

b. CNEN 2008/C 133/01

The CNEN to CN code 8528 51 00 required that monitors be excluded from that subheading if they are capable of receiving signals from sources other than automatic data-processing machines, as well as monitors that are fitted with DVI, HDMI or other interfaces capable of similar function.

Monitors that match one or both criteria, i.e., that were capable of receiving signals from sources other than an automatic data-processing machine, or are

fitted with DVI, HDMI or similar connectors may not be classified under the duty-free subheading 8528 51. These criteria work as mandatory, "per se", or "automatic" rules. Subject monitors therefore would have to be classified under CN code 8528 59 10 or 8528 59 90, which carries a 14 per cent duty.

c. Commission Regulation Nos. 634/2005 and 2171/2005

- Concerns the classification of certain "colour monitor[s]" using LCD technology

Commission Regulation Nos. 634/2005 and 2171/2005 had the general effect of excluding from duty-free treatment certain LCD colour monitors because they are capable of displaying signals from sources other than an automatic data-processing machine.

Products described in item 4 of Commission Regulation No. 634/2005 and items 3 and 4 of Commission Regulation No. 2171/2005 in connection with CN code 8528 21 90 are excluded from duty-free classification because they are "not of a kind solely or principally used in an automatic data-processing system" and shall hence be classified in a dutiable heading, which sets a 14 per cent duty. Only the product described in item 1 of Commission Regulation No. 2171/2005 is described as "of a kind solely or principally used in an automatic data-processing system". Under the current CN2010, such products would thus be excluded from CN code 8528 51 00.

d. The continuation of the duty suspension under Council Regulation No. 179/2009

Not all monitors presently classifiable under CN code 8528 59 10 or 8528 59 90 and capable of reproducing video images from automatic data-processing systems and sources other than automatic data-processing systems, are eligible for duty suspension under Council Regulation No. 179/2009. This was, for example, the case for either LCD colour monitors, or black and white or other monochrome monitors, exceeding respectively 22 and 30.5 inches in diagonal measurements, respectively, even if they meet all other requirements. In addition, the measures only specified that duties were suspended until 31 December 2010.

e. Conclusions

Tariff item number 8528 41 00 and 8528 51 00 implement the European Communities' obligations with respect to tariff item number 8471 60 90 in the EC Schedule.

Under CNEN 2008/C 133/01, monitors that were capable of receiving signals from sources other than an automatic data-processing machine, or are fitted with DVI, HDMI or similar connectors are automatically excluded from classification under the duty-free CN code 8528 51 00.

Commission Regulation Nos. 634/2005 and 2171/2005, similarly had the effect of excluding from duty-free treatment under CN code 8528 51 00 LCD certain colour monitors that are capable of displaying signals from sources other than an automatic data-processing machine.

Council Regulation No. 179/2009 suspends the application of duties under CN code 8528 59 90 on certain LCD colour and black and white or other monochrome monitors that meet the technical criteria set forth in the regulation. The duty suspension applies until 31 December 2010.

Whether the European Communities' tariff treatment of particular flat panel displays is consistent with its obligations under Article II of the GATT 1994

A. The ordinary meaning of the relevant concession: The EC head note and narrative product description for the FPDs in the Annex to the EC Schedule

a. The meaning of the terms of the head note

An initial textual analysis of the key terms and phrases appearing in the EC head note strongly supported the conclusion that products initially described in or for Attachment B, which in the case of flat panel displays is the same as that reproduced in the Annex to the EC Schedule, must be granted duty-free treatment irrespective of where they are classified in the EC Schedule. The product descriptions in Attachment B determine the scope of the products for which the European Communities is required to extend duty-free treatment, and not the tariff item numbers that are listed next to each of the product descriptions in the Annex to the EC Schedule.

The alternative interpretation, that the tariff item numbers define the scope of the obligation, would appear to read out the phrase "wherever the product was classified" from the head note.

b. Preliminary conclusions on the Panel's interpretation of the role of the EC head note in the Annex to the EC Schedule

On the basis of the plain meaning of the key terms and phrases appearing in the EC head note, the Panel preliminarily concluded that the EC head note requires the European Communities to extend duty-free treatment to products described in the Annex to the EC Schedule, irrespective of where they are classified in the EC Schedule.

The tariff item numbers notified next to the product descriptions, while "illustrative" of the locations where the European Communities considered those products should have been classified at the time of implementation of the IT Agreement, cannot delimit the scope of coverage of the concessions.

The HS, including chapter and explanatory notes and GIRs, were not relevant to the Panel's assessment of the scope of product coverage in any of the narrative descriptions at issue in this case. The substantial uniformity, with which ITA participants included a head note with highly similar language, including identical language in many cases, is fully consistent with the notion that the head note was intended to play an important role in those Members' schedules.

c. Preliminary conclusion on the meaning of the FPDs narrative description

The concession refers to certain apparatus or devices that had a flat display and were generally thinner than conventional CRT displays or monitors, and were designed for visual presentation of data or signals from products falling within the ITA, including notably, automatic data-processing machines.

There was no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI.

While the flat panel display devices at issue must be designed for use with an automatic data-processing machine, there is no requirement for exclusivity, such that the concession would be limited to apparatus that only display or reproduce signals from products falling within the IT Agreement, including automatic data-processing machines.

d. The terms of the FPDs narrative description in their context

The descriptions in the 14 tariff item numbers in connection with the FPDs narrative description as context. FPDs narrative description determined the scope of the concession, no matter where it was classified in the EC Schedule, and that the tariff item numbers appearing alongside the product descriptions do not have the effect of controlling the scope of coverage arising from the ordinary meaning of the product descriptions.

The "monitors" narrative description in the Annex to the EC Schedule was detailed and limited to CRT monitor units of automatic data-processing machines with a precise dot screen pitch that are not capable of receiving and processing television signals or other analogue or digitally processed audio or video signals without assistance of a central processing unit of an automatic data-processing machine as defined in the ITA.

The Panel was required to make a determination on the intended meaning of the term "television". This analysis would take it beyond the complainants' claims as well as their arguments and hence they did not consider it necessary to address this issue.

The network equipment concession shows that negotiators were well aware of concepts such as "solely" and "principally", which are also concepts used in the HS. These terms do not appear in the FPDs narrative description and we consider the absence of the terms "solely" or "principally" to suggest a broader reading. The narrative descriptions for "projection type flat panel display units used with automatic data-processing machines..." and "multimedia upgrade kits for automatic data-processing machines..." as context.

The "projection type flat panel display units..." narrative description contains the terms "used with automatic data-processing machines". (emphasis added) The "multimedia upgrade kits for automatic data-processing machines..." narrative description contains the terms "for automatic data-processing machines". (emphasis added).

The phrase "automatic data-processing machines" in both of these concessions was in principle narrower than the phrase "products falling within this agreement" that appears in the FPDs narrative description. The term "for" in the description meant that such devices must be designed for or capable of providing an acceptable level of operation, to fall within the concession.

Given the considerable detail in which the concession is expressed as compared to the approach used for the FPDs narrative description, thePanel did not consider that this description assists it with the interpretative issue before it. The Panel did not consider the tariff item numbers listed next to the product descriptions as definitive with respect to the concession for FPDs. According to the Panel the information demonstrating the varied approaches for classifying FPDs supported the approach that it was the product description that governs for Attachment B products.

Object and Purpose

Arguments of the Parties

The complainants noted that a recognised object and purpose of the WTO Agreement and GATT 1994 is providing security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and barriers to trade and the ITA may be relevant in analysing the object and purpose of the GATT 1994 because the ITA is an instrument related to the GATT 1994.

The objectives of security and predictability also required that concessions cover products even if they did not exist in that form at the time the concessions had been granted to the extent that they comply with the wording of the concessions concerned.

The European Communities argued that the Panel should not conflate the object and purpose of the ITA with that of the WTO Agreement. The European Communities submitted further that there was no interpretative principle whereby tariff concessions must be broadly construed in order to promote the expansion of trade between Members. The European Communities considered the complainants' interpretative approach was overbroad and compromises the legal certainty and predictability of tariff concessions, creating the risk that Members would become reluctant to pursue the IT Agreement liberalization process.

Findings and Consideration of the Panel

The object and purpose that was relevant to panels analysis, as per Article 31 of the Vienna Convention and the Appellate Body Report in EC – Chicken Cuts, was the object and purpose of the treaty that was the subject of this dispute, namely the WTO Agreement, of which the GATT 1994 and the EC Schedule were an integral part. Tariff concessions made by WTO Members should be interpreted in such a way as to further the objectives of preserving and upholding the "security and predictability" of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade".

The interpretation of the FPDs narrative description described above was fully consistent with this object and purpose.

Subsequent practice (Article 31(3) (b) of the Vienna Convention)

Arguments of the Parties

The European Communities submitted that the "customs officials of the United States have previously classified a number of different multifunctional LCD monitors as video monitors pursuant to GIR 3(c)", including products of various sizes, with or without a TV tuner, and with DVI connectors. The European Communities argued further that the classification practice of ITA participants between 1997 and 1999 demonstrates a tendency towards an increasing agreement on classification.

The United States argued that its supposed classification practice provides no support for the European Communities' view that its measures were not consistent with its obligations, nor does it indicate any particular "practice" on the part of the United States regarding monitors.

The complainants argued that the European Communities' description of where it or other ITA participants classify products that fall within the FPDs narrative description is irrelevant since the concession applies to a product wherever that product was classified.

Findings and Consideration of the Panel

On the basis of guidance provided by the Appellate Body, in EC – Chicken

Cuts, Japan – Alcoholic Beverages II and US – Gambling, on the assessment of subsequent practice for interpreting a treaty provision, the Panel considered whether there is evidence of "consistent, common and concordant" classification practice for flat panel display devices on the part of the ITA participants and with respect to the products at issue during the period since the conclusion of the IT Agreement.

The evidence submitted by the European Communities was not relevant in assessing "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention. The evidence was insufficient to draw conclusions about the "consistency" of the United States classification practice in this regard.

It is incumbent on a party asserting the existence of a "common" and "concordant" practice among WTO Members to provide sufficient evidence – which clearly is something beyond a handful of classification exercises in one Member – to establish such a "consistent, common and concordant" classification practice. The European Communities had not met this burden here.

e. Panel's conclusions on interpretation of the FPDs narrative product description in the Annex to the EC Schedule

The concession refered to certain apparatus or devices that have a flat display and are generally thinner than conventional CRT displays or monitors, and are designed for visual presentation of data or signals from products falling within the ITA, including notably, automatic data-processing machines.

There was no express limitation on technical characteristics, such as screen size, dimension, refresh rate, dot-pixel ratio, or other technical characteristics, including no express limitation on the type of connection or sockets it may possess, such as DVI. There was no requirement for exclusivity, such that the FPDs concession would be limited to apparatus that may only display or reproduce signals from products falling within the IT Agreement, including automatic data-processing machines

Duty-free treatment must be extended to all products that fall within the scope of the FPDs concession in the Annex to the EC Schedule irrespective of where they are classified in the EC Schedule.

B. The ordinary meaning of the relevant concession: Tariff Item Number 8471 60 90 in the EC Schedule

Flat panel display devices were covered not only by the duty-free FPDs narrative description in the Annex to the EC Schedule, but also by the duty-free concession for "input or output units" of an automatic data-processing machine in tariff item number 8471 60 90 in the EC Schedule.

Tariff item number 8471 60 90 covers "Automatic data-processing machines and units thereof"; - Input or output units, whether or not containing storage units in the same housing; — Other; - - - Other".

a. The meaning of the terms of tariff item number 8471 60 90 in the EC Schedule – Input or Output Units

Arguments of the Parties

The complainants refer to definitions of the words "output" and "units" from both standard and technical dictionaries. They also considered the terms in combination. The complainants submitted that "output unit" means "a unit which delivers information from the computer to an external device or from internal storage to external storage".

An LCD computer monitor was an output unit of an ADP machine since it provides the results of processing to the user by providing a visual display of information received from the CPU. The mere fact that a monitor uses a DVI connector, for instance, to transmit the information displayed did not render it something other than an output unit of an ADP.

The European Communities argued that it is not entirely clear whether products identified by the complainants, including what it calls "multifunctional LCD monitors" fall within the scope of the concession. Certain FPDs might also fall within the ordinary meaning of "video monitors" under HS1996 headings 8528 21 and 8528 22, or, in some cases, as "reception apparatus for television" under HS1996 headings 8528 12 and 8528 13 which are subject to ad valorem duties.

Findings and Consideration of the Panel

The plain meaning of the term "output units" in the relevant concession, i.e.,

subheading 8471 60, refers to devices that form part of an ADP or an ADP system and that perform at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system. The concession in 8471 60 90 of the EC Schedule would cover all "input or output units" of automatic data-processing machines that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

b. The terms of tariff item number 8471 60 90 in their context

The other parts of heading 8471 are relevant context for determining the scope of the meaning of the terms used in the concession. The structure and wording of heading 8471 seem to encompass all types of computer units within its parameters. The inclusion of an "other" category in a heading or subheading cannot lead to an interpretation beyond its terms however; the inclusion of an "other" subheading can indicate that the terms of the remaining subheadings do not by themselves delineate the limits of the scope of the main heading.

Thus the context provided by the terms of heading 8471 and subheading 8471 60 shows that the plain meaning of the text of the terms in the concession covers devices that form part of an ADP or ADP system and that perform at least one specified function involving sending/receiving signals, information or data from the ADP or ADP system. The concession in 8471 60 90 of the EC Schedules would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

The HS1996: Note 5 to Chap 84 and the HSEN1996 to heading 8471 and heading 8528

The Section, Chapter, heading and subheadings notes, the HSEN and the GIRs that have been to referred to by the parties qualify as context for interpreting the concessions in subheading 8471 60 of the EC Schedule. The binding elements of the HS may have greater probative value than those which were non- binding.

HS1996 Note 5 to Chapter 84 was relevant in determining whether the flat panel display devices identified by the complainants – those flat panel display devices that were fitted with a DVI interface, or similar connector, and/or were capable of reproducing and receiving video signals from automatic data-processing machines as well as other sources – could fall within the scope of 8471 60.

Notes 5(B) and 5(C) to HS1996 Chapter 84

The requirement in Note 5(B) (a) that units be "of a kind solely or principally used in an automatic data processing system" resonates within an expression of what we have already found to be the plain meaning of a "unit "of" an ADP machine". The Panel also recalled that an ADP system was defined in the subheading note as consisting of at least a CPU, one input unit, and one output unit. Therefore, regardless of whether a unit is presented as part of a complete ADP system or separately it must be "of a kind solely or principally used in an automatic data processing system.

The formulation of "solely" or "principally" as alternatives thus means that it is not necessary for a unit to be used exclusively in an automatic data-processing system for it to be to be classified within heading 8471. Note 5 had to be read holistically and in its entirety such that heading 8471 should not apply differently to units whether presented separately or as part of a complete system. Accordingly, The Panel understood the term "of" in 5(C) embodies the conditions set forth in 5(B).

HSEN1996 to heading 8471 and heading 8528

Note 5 to HS1996 Chapter 84 and the HSEN1996 to heading 8471 leads to the understanding that automatic data-processing machine "units" that were of a kind used solely or principally with an automatic data-processing machine are to be covered under heading 8471, regardless of whether they are presented separately or as part of a complete system. This was also true of units that are printers/keyboards/X-Y units or that are disk storage units. This provides important contextual guidance as to the parameters of the scope of this concession.

The application of GIR 3(c)

GIR 1 directs contracting parties to the HS to consider the terms of the headings and any relevant Section or Chapter Notes in classifying goods at their border, and otherwise, according to the principles in the remaining GIRs 2-6. GIR 3 sets forth applicable rules when goods are prima facie classifiable under two or more headings. The Panel found no need to consider this issue further as it was not relevant in the circumstances of the present case.

c. Panel's conclusions on the ordinary meaning of the terms tariff item number 8471 60 90 in the EC Schedule

The meaning applies to devices that form part of an "automatic data-processing machine" are "of a kind solely or principally used by an automatic data-processing system" and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the ADP machine or ADP System. Tariff item number 8471 60 90 of the EC Schedule would cover all "input or output units" that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50).

There was no relevant subsequent practice indicating that all devices capable of connecting to an ADP or ADP system by accepting or delivering data from or to an ADP necessarily qualify as an input or output unit of heading 8471.

C. Did the flat panel displays at issue which are the subject of this dispute, fall within the scope of the narrative description in the Annex to the EC Schedule or HS 8471 60?

Arguments of the Complainants

The complainants submitted that the flat panel display devices at issue use a DVI connector to transmit the information from the computer to the display, thereby qualifying these products as both flat panel display devices "for" computers or other ITA products, and "output units" within the meaning of tariff item number 8471 60 90 in the EC Schedule.

United States argued that approximately half of all LCD monitors have a DVI connector and that some of these devices must be connected to a computer. The complainants consider that merely because a DVI connector enables a flat panel display device to reproduce and receive signals does not mean the device is no longer "for" a computer. Neither was a display with DVI no longer a "unit" of an automatic data-processing machine or system, just because it transmits information displayed from sources other than an automatic data-processing machine.

The United States and Japan argued that reliance on a "sole or principal use" standard cannot be reconciled with the notion that monitors "capable of connecting to a device other than a computer" are not entitled to duty-free treatment.

The EC had not provided evidence to demonstrate that a device with DVI connector or capable of receiving and reproducing signals from a source other than a computer could be classified in a duty-free subheading. On the contrary, the United States submitted that the evidence shows that customs officials in certain cases have not referred to any characteristic except the presence of DVI connector as the basis for classification in a dutiable subheading. Moreover, it argued that CNEN 2008/C 133/01 demonstrates clearly that the presence of DVI is not merely a strong indicator but is in fact decisive of classification in a dutiable heading

In response to EC's arguments the complainants claimed that the European Communities' reliance on the HSEN is misplaced, as the HSEN are not relevant to extent they contradict the meaning of the HS itself, including its Chapter Notes.

Arguments of the European Communities

The European Communities understood the complainants' claim under tariff item number 8471 60 90 to concern monitors that are "solely or principally" for use with an automatic data-processing machine, whereas it understands the complainant's claim pursuant to the FPDs narrative description to cover devices that are "merely capable of operating with a computer" and it considers these two claims to be different in scope.

The complainants had not established that the identified criteria are dispositive with regard to classification under a dutiable heading as the decision on whether or not a given monitor is used solely or principally in an automatic data-processing system to qualify for duty-free treatment requires a case-by-case analysis based on objective technical characteristics as laid down in HSEN1996 to heading 8471.

In determining the classification of displays, the European Communities argued that it currently takes into consideration a number of technical characteristics, including screen resolution, aspect ratio, bandwidth, size, and the presence of a DVI connector and it does not necessarily limit the scope of the concession to products that can only be used with an automatic data-processing machine.

To the extent any displays were improperly excluded from duty-free coverage as displays solely or principally for use with automatic data-processing machines, the duty suspension in place has reduced the likelihood that duties have been "unduly levied". In cases where duties might had been levied, many products are of the kind that would prima facie be classifiable as "video monitors" under

subheadings 8528 21 and 8528 22, or, in some cases, "reception apparatus for television..." under heading 8528 12 and 8528 13.

As DVI was "display technology independent" it meant that it was foreseen to function with displays using CRT or LCD or other technologies, and thus is not considered as a standard computer connector.

Findings and Consideration of the Panel

The products at issue, including flat panel display devices with DVI, and flat panel display devices able to accept and receive signals from automatic data-processing machines and sources other than automatic data-processing machines, may fall within the scope of the concession, provided that they are designed for use with an automatic data-processing machine.

The FPDs narrative description did not establish particular limitations on the type of connector or socket that a display might incorporate, nor does the concession establish any exclusivity requirement such that a product may only connect with a computer in order to be eligible for duty-free treatment.

There was no reason why a product that otherwise falls within the scope of the concession, would be excluded simply because it is fitted with certain connectors, such as DVI or HDMI. It was conceivable that certain products that have a DVI or similar connector or that are able to display and receive signals from ADP and non-ADP sources would not qualify under the concession.

The mere capability to receive signals from computers is not enough to qualify under the concession. At least some flat panel display devices at issue in this dispute could fall within the scope of the concession for "flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement" that appears in the Annex to the EC Schedule.

The concession pursuant to tariff item number 8471 60 90 in the EC Schedule

An "input or output unit" within the meaning of tariff item number 8471 60 90 is a device that forms part of an "automatic data-processing machine", is "of a kind solely or principally used by an automatic data-processing system", and that performs at least one specified function that involves accepting or delivering data

in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system".

Tariff item number 8471 60 90 of the EC Schedule covers all "input or output units" of an automatic data-processing machine that are not "for use in civil aircraft" (8471 60 10), "printers" (8471 60 40) or "keyboards" (8471 60 50). Not all devices capable of connecting to an ADP machine or ADP system by accepting or delivering data from or to an ADP necessarily qualify as an input or output unit of heading 8471.

The Panel did not preclude the possibility that some of the products at issue, depending on their particular objective characteristics, may fall within the scope of other headings or subheadings, by virtue of the effect of the HS interpretative rules considered as context. The key finding, in terms of the effect of the measures at issue in this case, was that it was not possible to assume that all such products would fall within the scope of these dutiable headings.

Did the measures at issue provide for duties on products identified by the complainants which were in excess of those set forth in the EC Schedule?

CNEN 2008/C 133/01 required that LCD and other flat panel display devices that are fitted with a DVI connector, or that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, are required to be classified under dutiable CN codes 8528 59 10 or 8528 59 90, each of which sets a duty rate of 14 per cent.

Thus, CNEN 2008/C 133/01 required that flat panel display devices that are capable of connecting with sources other than automatic data-processing machine, or those that are fitted with connectors such as DVI-I, DVI-D or HDMI, be excluded from classification under duty-free CN code 8528 51 00.

CNEN 2008/C 133/01, by directing national customs authorities to classify those flat panel display devices in CN codes 8528 59 10 or 8528 59 90, under which the CN imposes duties of 14 per cent, requires the imposition of duties on at least some products which fall within the scope of the FPDs narrative description and/or within the scope of the CN code 8471 60 90 in the EC Schedule. The CNEN and CN operating together therefore result in the levying

of duties in excess of those provided for in the European Communities' Schedule, and are therefore inconsistent with Article II:1(b) of the GATT 1994.

Commission Regulation No. 634/2005 requires that LCD monitors as described in item 4 of its Annex be classified under CN code 8528 21 90. Similarly, Commission Regulation No. 2171/2005 required that LCD monitors as described in items 2, 3 and 4 of its Annex be classified under CN code 8528 21 90, which sets a duty rate of 14 per cent.

Commission Regulation Nos. 634/2005 and 2171/2005 direct national customs authorities to classify all products matching the terms of the description in their annexes under a CN code which imposes a 14 per cent duty, because those products are capable of receiving and reproducing video signals from sources other than an automatic data-processing machine. They therefore result in the imposition of duties on at least some products which fall within the scope of the FPDs narrative description and/or within the scope of the tariff item number 8471 60 90 in the EC Schedule. Commission Regulation Nos. 634/2005 and 2171/2005 therefore result in the levying of duties in excess of those provided for in the European Communities' Schedule, and are therefore inconsistent with Article II:1(b) of the GATT 1994.

Council Regulation No. 179/2009 suspended the application of duties on certain displays that would otherwise be classifiable under dutiable headings 8528 59 10 and 8528 59 90, respectively, each of which sets a duty rate of 14 per cent.

To the extent that Council Regulation No. 179/2009 suspended duties levied on products that the European Communities is obliged to provide duty-free treatment for under either of the concessions, (including LCD monitors with a DVI, or those that are capable of receiving and reproducing video signals from sources other than an automatic data-processing machine), neither CNEN 2008/C 133/01 working in conjunction with the CN, nor Commission Regulation Nos. 634/2005 and 2171/2005 actually imposes duties in excess of those set forth in the EC Schedule. Accordingly, the duty suspension eliminates the inconsistency with the European Communities' obligations under Article II:1(b). In other words, but for the duty suspension, the measures at issue are inconsistent with Article II:1(b) of the GATT 1994.

However, to the extent the duty suspension were not applicable to a particular product that fell within the scope of either concession, i.e., a product covered by

either concession fell outside the scope of the express terms of the duty suspension, or if the suspension measure were to be repealed or annulled, then, as discussed above, CNEN 2008/C 133/01 working in conjunction with the CN, or Commission Regulation Nos. 634/2005 and 2171/2005, would result in the levying of duties in excess of those provided for in the European Communities' Schedule in a manner inconsistent with Article II:1(b) of the GATT 1994.

Did the measures at issue provide less favourable treatment than that set forth in the EC Schedule?

The primary issue under consideration is whether the measures at issue would also provide for less favourable treatment in a manner inconsistent with Article II:1(a) of the GATT 1994, even in cases where the duty suspension under Council Regulation No. 179/2009 is applied.

Arguments of the Parties

The complainants argued that the application of the suspension results in less favourable treatment because it is both temporary, applying for defined and limited time periods, and conditional, because it may be terminated unilaterally if conditions for its continuation are no longer fulfilled.

The United States argued that the failure to provide permanent duty-free treatment adversely affects imports because importers do not have certainty regarding duty treatment.

Chinese Taipei argued that various types of flat panel displays fall outside the scope of the duty suspension and are therefore subject to duties inappropriately.

The European Communities argued that the duty suspension, which has recently been prolonged and extended to cover additional monitors, results in monitors receiving duty-free treatment, for those that might have been erroneously classified in a dutiable heading. Therefore, the European Communities claims that Article II has not been breached.

Findings and Consideration of the Panel

According to the Appellate Body in Korea – Various Measures on Beef whether or not imported products are treated "less favourably" should be assessed by

examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.

If a measure adversely affects the conditions of competition for a product from that which it is entitled to enjoy under a Schedule, this would be less favourable treatment under Article II:1(a). In light of the Appellate Body decision in Argentina – Textiles and Apparel the European Communities' measures are also inconsistent with Article II:1(a).

The question arisen whether the duty suspension eliminates the inconsistency with respect to Article II: 1(a) in the same way as it did with respect to Article II:1(b). The duty suspension regime currently in place has been renewed biannually, is set to expire automatically and is not extended automatically.

The suspension under all three measures (being Council Regulation No. 493/2005, Council Regulation No. 301/2007 and Council Regulation No. 179/2009) was applied retroactively for periods between January and March in 2005, 2007 and 2009, respectively.

Thus, while a suspension on imports of certain LCD displays has formally been in effect for five years or more, the suspension is not permanent in nature, and is subject to a formal extension or amendment. In addition, the Panel noted that the measure at issue (as well as prior measures) implementing the autonomous duty suspension does not set out specific conditions for its withdrawal or non-renewal. Thus the duty suspension in force at a particular time may expire, be repealed, or be amended to increase or decrease coverage.

The European Communities sets forth its tariff bindings in the EC Schedule pursuant to annual amendments to the autonomous duty rate in the CCT. Notwithstanding this fact, tariff bindings set forth in the CCT autonomous duty regime remain in place until formal repeal by the Commission. Thus, tariff treatment under the CCT is not contingent on renewal or extension, unlike under the current duty suspension regime. In our view, this distinction is significant in the sense that continuous tariff treatment provides foreseeability for traders operating in the marketplace.

The tariff treatment established under the CCT is prospective, unlike under the duty suspension regime, where the application of the suspension had been applied retroactively on a number of occasions.

For the foregoing reasons, the Panel was of the view that the duty suspension measure does not eliminate the inconsistency with Article II: 1(a) because there remains the potential of deleterious effects on competition.

Accordingly, the measures at issue, including Council Regulation No. 179/2009 operating in conjunction with the CN and CNEN 2008/C 133/01, and with Commission Regulation Nos. 634/2005 and 2171/2005, are inconsistent with the European Communities' obligations under Article II:1(a) of the GATT 1994. This is true even in cases where Council Regulation No. 179/2009 suspends duties on products that the European Communities is obligated to provide duty-free treatment for, including LCD monitors with a DVI interface, or that are capable of receiving and reproducing video signals from sources other than an automatic data-processing machine.

Set-top boxes which have a communication function (STBCs)

Preliminary Issues

a. STBCs: The measures at issue

The complainants identified the relevant EC measures at issue as follows:

1. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended and

2. Explanatory Notes to the Combined Nomenclature of the European Communities, 2008/C 112/03, (7 May 2008), alone or in combination with Council Regulation (EEC) No. 2658/87 of 23 July 1987, as well as any amendments or extensions and any related or implementing measures.

b. Was CNEN 2008/C 112/03 a measure that could be subject to WTO dispute settlement?

Arguments of the Parties

The European Communities' position was that CNEN in general were not legally binding in the European Communities' legal order, and are in their essence "important tools for the interpretation of the CN". The EC further claimed that

CNEN were not binding on customs officials in their interpretation and application of the CN to customs determinations, to the extent a conflict arises between the terms of the CNEN and CN, including its Section and Chapters notes.

Findings and Consideration of the Panel

The Panel recalled its findings in the case of Flat Panel Display Devices (FTDs) and recorded the same. The CNEN amendments at issue in this dispute are measures of general and prospective application that can be challenged "as such". CNENs are of "general application" because the application of a CNEN is not limited to a single import or a single importer, and they set forth rules or norms that are intended to have general and prospective application that create legitimate expectations among the public and among private actors.

The Panel therefore concluded that CNEN 2008/C 112/03 can be challenged "as such".

c. Had the complainants' identified the EC concession at issue?

Arguments of the Parties

The European Communities argued that the complainants have failed to explain what constitutes the EC concession for "set top boxes which have communication..." and where it is provided for, by referring both to the narrative description appearing in Attachment B, and also the description in the Annex to the EC Schedule.

The complainants had failed to properly identify the precise language of the concession "set top boxes which have a communication function" through their reference to "Set top boxes with a communication function", thus failing to analyse the terms consistent with the approach set forth in Article 31 of the Vienna Convention.

The complainants argued that they have properly referred to the language that constitutes the concession in the Annex to the EC Schedule, namely identifying "Set top boxes which have a communication function".

Findings and Consideration of the Panel

Two issues arose in light of the European Communities' concerns with the

complainants' discussion of the relevant EC concession: first, what was the location of the concession arising under the relevant narrative product description for purposes of the Panel's analysis, and second, what were the implications of the reference to "set top boxes with a communication function" to this dispute.

i. Was the relevant commitment located in the Annex to the EC Schedule, Attachment B, or in both?

The issue that arised over the European Communities' complainant is whether the narrative description for "Set top boxes which have a communication function ..." is the narrative description reproduced separately in the Annex to the EC Schedule, or that contained in Attachment B, or whether both texts were relevant.

The Panel recalled its view in the case of Flat Panel Display Devices (FTDs) that the ITA participants did not intend for there to be discrepancies between the descriptions that appear in Attachment B of the ITA and those appearing in the EC Schedule. Accordingly it refused to address further the question of whether the focus should be on the narrative descriptions in Attachment B of the ITA, or those reproduced separately in the Annex to the EC Schedule.

The identical language used in these narrative product descriptions in the ITA on the one hand, and as reproduced in the EC Schedule on the other, would give rise to obligations of identical scope.

ii. What were the implications of the reference to "set top boxes with a communication function" to this dispute?

Arguments of the Parties

The European Communities considered the complainants' reliance on the descriptive language "set top boxes with a communication function", rather than the language of the concession which uses the terms "which have", leads to a different conclusion on the scope of coverage.

The United States and Japan argued additionally that it did not consider there was any substantive distinction between the terms "with" and "which have". The United States further specified that it considers the European Communities has made separate commitments both for "set top boxes which have a communication function" and "set top boxes with a communication function". The United States

explains that the first arises from the inclusion of the headnote and narrative description in the Annex to the EC Schedule, while the latter arises from a fourth tariff line (tariff item number 8528 71 13).

The European Communities argued that the decision to notify an additional code in 2000 did not introduce a separate narrative description into its Schedule nor modify the existing one.

Findings and Consideration of the Panel

In light of complainant's reference in their joint Panel request to the precise language of the concession as it appears in the EC Schedule, and their subsequent discussion of this language, the Panel considered that the complainants had explained what constitutes the concession. Accordingly, the Panel decided to consider the effect of the EC measures identified by the complainants, and subsequently, the scope of the relevant concessions in its assessment of the complainants' claims concerning Article II of the GATT 1994.

The Measures at Issue and their Effects

a. Council Regulation No. 2658/87, as amended

- Council Regulation No. 2658/87 establishes the CN and CCT.

- Council Regulation No. 2658/1987 (as amended) sets forth in CN 8528 71 13, the duty-free CN code that applies to the following products: "Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving televisions signals ('set-top boxes with communication function')".

- In addition, the CN establishes dutiable CN codes 8521 90 00, applicable to "[v]ideo recording or reproducing apparatus, whether or not incorporate a video tuner", which sets a 13.9 per cent duty.

- The CN also sets forth CN codes 8528 71 19 and 8528 71 90, as "other" headings, each of which sets a duty rate of 14 per cent.

b. CNEN 2008/C 112/03

Arguments of the Parties

The complainants argued that the European Communities by virtue of CNEN 2008/C 112/03 improperly applied either 13.9 or 14 per cent duties on certain set top boxes that should have been extended duty-free treatment

- In particular, under this CNEN, the complainants argued that the following products are excluded from duty-free treatment under CN code 8528 71 13:

  i. Set top boxes with a hard disk or DVD drive are excluded from CN code 8528 71 13 and must be classified in CN code 8521 90 00 and subject to a 13.9 per cent duty;

  ii. Set top boxes with ISDN, WLAN or Ethernet technology are excluded from CN code 8528 71 13 and are classified under 8528 71 19 and subject to a 14 per cent duty;

  iii. Set top boxes that use an external (not "built in") modem are excluded.

The European Communities submitted that consideration of whether a particular product is a set top box which has a communication function that qualifies for duty-free treatment requires objective consideration of "the totality of technological elements present in the set top box" subject to the GIRs. If a set top box fulfils the objective characteristics of a reception apparatus for television, it is to be classified in heading 8528. Otherwise, if a product has the characteristics of a video recording or reproducing apparatus, it is classified in heading 8521. The European Communities asserted that the presence of a hard disk was not assessed in isolation of other characteristics of the product.

Findings and Consideration of the Panel

Under the CNEN to CN code 8528 71 13, set top boxes which incorporate a device performing a recording or reproducing function, including specifically a hard disk or DVD drive are excluded from this subheading, and are directed to be classified in subheading 8521 90 00 which covers "set-top boxes" and which carries a 13.9 per cent duty.

Set-top boxes which do not have a built-in modem, but use an external modem are similarly excluded from CN code 8528 71 13 and the European Communities has confirmed that these products are classifiable under CN code 8528 71 19 that is described in CNEN 2008/C 112/03 as "other" and which is assigned a 14 per cent duty. The CNEN to CN code 8528 71 19 indicates that products that incorporate a device performing a recording or reproducing function are not to be classified in CN code 8528 71 19.

Products classifiable in 8528 71 90 must also be excluded from coverage there if they perform a recording or reproducing function. These products would be classifiable in 8521 90 00 and similarly subject to a 14 per cent duty.

Thus in conclusion products that were in part described by CN code 8528 71 13 but that did not meet the requirements enumerated in this paragraph were required to be classified under other codes under heading 8528, subject to 14 per cent duties, or otherwise under CN code 8521 90 00 and subject to 13.9 per cent duties.

c. Conclusions

CN code 8528 71 13 was duty-free, while CN codes 8521 90 00, 8528 71 19 and 8528 71 90 are all dutiable. CNEN 2008/C 112/03 identifies certain product characteristics as dispositive for classification in CN codes other than duty-free treatment under CN code 8528 71 13.

Set top boxes that do not have a built-in modem, as described in the provisions, or otherwise incorporate ISDN, WLAN or Ethernet technology, were excluded. A set top box that qualifies as a product without a screen which is a reception apparatus for television but which does not incorporate a video tuner was also excluded. Any set top box that contained a device performing a recording or reproducing function, such as a hard drive or DVD drive, would also be excluded.

Whether the European Communities' tariff treatment of particular set top boxes is consistent with its obligations under Article II of the GATT 1994

a. The Ordinary Meaning of the Relevant Concession: The EC head note and narrative product description for STBCs in the Annex to the EC Schedule.

The meaning of the terms of the EC head note

In accordance with Article 31 of the Vienna Convention the EC head note operates so that the EC concession is defined by the narrative product descriptions in the Annex to the EC Schedule and not by the terms of the tariff item numbers beside them, which are "illustrative" of the headings that the European Communities considered relevant at the time of implementation of the ITA. The tariff item numbers do not delimit the particular products that should be extended duty-free treatment.

The Panel would thus consider the ordinary meaning of the specific terms of the STBCs narrative description to determine the treatment under the EC concession.

The terms of the STBCs narrative description in the Annex to the EC Schedule

The term "set top box" generally describes an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set. Through the inclusion of additional features or incorporation into another product, an apparatus may no longer be described as, in essence, a "set top box which ha[s] a communication function" and would not be covered by the concession.

The terms of the STBCs concession in the Annex to the EC Schedule extends to any "set top box" that fulfils all of the following requirements: is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange.

Accordingly, devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession.

b. The ordinary meaning of the relevant concession: the United States' claim in connection with tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 in the EC Schedule

The United States had additionally claimed that the European Communities is required to provide duty-free treatment to STBCS under individual tariff lines

that appear in the EC Schedule. The United States argued that the language "whether or not incorporating radio broadcast receivers or sound or video recording or reproducing apparatus" in HS1996 heading 8528 does not mean that set top boxes incorporating a device performing a recording or reproducing function are excluded from duty-free coverage.

According to the Panel the United States had not offered any analysis of the ordinary meaning to be attributed to the terms of the tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99, and has summarily limited its assessment of the terms of 8528 12 91. Moreover, the United States has not considered in limited fashion the location of the concession in its context, including its surrounding provisions.

The United States had asserted with only limited argumentation that the devices in question fall within the scope of the four identified tariff lines. The Panel considered that the United States has failed to meet its burden to establish a prima facie case of violation, with respect to its claims concerning tariff item numbers 8517 50 90, 8517 80 90, 8525 20 99 and 8528 12 91 in the EC Schedule.

c. Did the set top boxes which are the subject of this dispute fall within the scope of the narrative description in the Annex to the EC Schedule?

The question was whether the products at issue are "set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange."

Did products which incorporate ISDN, WLAN, and Ethernet technology incorporate modems for gaining access to the Internet?

The complainants argued that devices which incorporate communication devices with ISDN, WLAN, and Ethernet technology are devices which "incorporate a modem for gaining access to the internet and having a function of interactive information exchange."

Given the functionality of ISDN, WLAN and Ethernet devices, and the European Communities' acceptance that set top boxes incorporating "cable modems" fit within the scope of the STBCs narrative description, the United States argued that there was no rationale for considering cable modems as

"modems", but excluding ISDN, WLAN or Ethernet devices, which also modulate and demodulate signals.

The European Communities argued that only digital-to-analogue telephone-based modems and cable modems fulfil the conditions of performing digital-to-analogue modulation and demodulation and modulating for the purposes of "direct" transmission and communication with the Internet, and are thus "modems" within the meaning of the STBCs narrative description. The European Communities argued further that ISDN-based devices do not constitute "modems" because these device do not perform digital-to-analogue modulation and demodulation to connect to the Internet, but instead perform digital-to-digital transmission only.

Ethernet and WLAN also did not constitute "modems" under the concession, because they do not perform digital-to-analogue modulation and demodulation, and do not connect directly to the Internet, but connect only after connecting first to an external modem. It argues that WLAN and Ethernet are thus not modems but "devices for connection to an internal network" via an "external modem".

Were the products at issue which incorporate additional features still set top boxes of a type covered by the STBCs Concession?

The complainants argued that the addition of features such as video recording does not change the fact that the product is a set top box with a communication function. The United States contended that the European Communities' position that the recording function can somehow be divorced from the communication function, such that a device could be described as 80 per cent recording and 20 per cent communication is utterly flawed.

Chinese Taipei and Japan submitted that set top boxes which have a communication function "sometimes include a hard disk to record television programmes, download software from a digital television provider and to perform other ancillary applications enabled by the digital television provider". The European Communities argued that the products at issue fall outside the scope of the STBCs narrative description because, the main features of certain set top boxes make them "digital video recorders" or "personal video recorders", which are "completely different" than what is covered by the concession.

Even a cursory review of the products discussed in the BTIs presented by the complainants would reveal that they are no longer considered to be "set top boxes", as their main features and functionality make them completely new products that do not fall within the scope of the STBCs concession.

A determination of whether a "set top box" is excluded from duty-free treatment because of its additional functionality is not done merely based on the presence of a hard disk, but rather based on a consideration of all the characteristics of those products.

Findings and Consideration of the Panel

A "set top box" is an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set.

The use of the terms "which have a communication function" places an important emphasis on the communication functionality in defining the particular type of set top box that is covered under the concession. Although all such set top boxes must have a communication function, the terms of the concession did not convey the meaning such that coverage is limited to set top boxes with only a communication function.

The terms of the STBCs concession in the Annex to the EC Schedule extends to a "set top box" that fulfil all the following requirements: it is microprocessor-based; incorporates a "modem", and is capable of gaining access to the Internet and handling two-way interactivity or information exchange.

In the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but should be informed by the clear emphasis on functionality. Thus, the term should not be interpreted to refer only to components that connect to the Internet directly, or perform digital-to-analogue signal conversion over a telephone line.

Interpreting the concession in context and in light of the clear focus on functionality, the Panel found that devices that incorporate, or have built in, technologies to access the Internet and provide interactive information exchange may fall within the scope of the concession. It was clear that devices based on ISDN, WLAN and Ethernet technology incorporate, or have built in, technologies

to access the Internet and provide interactive information exchange. The Panel therefore conclude that set top boxes that otherwise meet the terms of the concession, and that incorporate ISDN, WLAN, and Ethernet technology fall within the scope of the concession.

With respect to set top boxes which have a communication function which also incorporate a recording device or hard disk, the STBCs narrative description is not limited to products that only have a communication function. A determination about whether a product is or not such a set top box must be made based on a case-by-case analysis of the objective characteristics of a particular product as it is presented at the border.

d. Did the CN, in conjunction with CNEN 2008/C 112/03, provide for duties on products identified by the complainants which are in excess of those set forth in the EC Schedule?

Article II:1(b) requires that Members shall not apply ordinary customs duties in excess of those provided for in the Schedule.

The complainants argued that, through the measures at issue — Council Regulation No. 2658/87, as amended and CNEN 2008/C 112/03 — the European Communities does not provide duty-free treatment to set top boxes which have a communication function.

Under CNEN 2008/C 112/03, products may only qualify under duty-free CN code 8528 71 13 to the extent they meet the terms of the CNEN generally. However, set top boxes that do not have a built-in modem, as described in the provisions, or otherwise incorporate ISDN, WLAN or Ethernet technology, are excluded. A set top box that qualifies as a product without a screen which are reception apparatus for television, but which does not incorporate a video tuner is also excluded. Finally, any set top box that contains a device performing a recording or reproducing function, such as a hard drive or DVD drive, will also be excluded. Products that are in part described by CN code 8528 71 13, but do not meet the requirements enumerated in this paragraph are instructed to be classified under other codes under heading 8528, subject to 14 per cent duties, or otherwise under CN code 8521 90 00 and subject to 13.9 per cent duties.

CNEN required that set top boxes which incorporate a device performing a recording or reproducing function, as well as those which utilise ISDN, WLAN or

Ethernet technology be classified outside the scope of the duty-free CN code 8528 71 13. The CNEN by directing national customs authorities to classify those set top boxes in dutiable CN code 8521 90 00 or in dutiable CN codes 8528 71 19 and 8528 71 90 under which the CN imposes duties of 13.9 per cent and 14 per cent respectively, requires the imposition of duties on at least some products which fall within the scope of the STBCs narrative description.

Therefore, the CNEN and CN operating together result in the imposition of duties in excess of those provided for in the European Communities' Schedule and are inconsistent with Article II: 1(b) of the GATT 1994.

e. Did the CN, in conjunction with the CNEN 2008/C 112/03 provide less favourable treatment than that set forth in the EC Schedule?

If the applied rate exceeds the bound duty rate, then the application of customs duties would be "in excess" of those provided for in the EC Schedule, and would consequently also violate Article II: 1(a) of the GATT 1994 by according to imports of the products at issue treatment less favourable than that provided for those products in accordance to the applicable concession in the EC Schedule.

Accordingly, for those products that were classified under a dutiable heading, that should otherwise be accorded duty-free treatment in respect of the concession for "Set top boxes which have a communication function: a microprocessor based device incorporating a modem for gaining access to the Internet and having a function of interactive information exchange" as provided for in the EC Schedule, the application of duties on these products would consequently result in treatment less favourable in violation of Article II:1(a) of the GATT 1994.

Whether the European Communities' actions concerning the delivery of opinions with respect to the proposed amendments to the Explanatory Notes contained in 2008/C 112/03 were inconsistent with Articles X:1 and X:2 of the GATT 1994

On 7 May 2008, the Commission published in the EU Official Journal an amendment to a CNEN regarding the classification of "set-top boxes with communication function" of duty-free CN2007 code 8528 71 13 ("STBCs").

This amendment explained inter alia the scope of coverage of that code and provides that among the conditions required for classification under this code are:

(1) the presence of a "video tuner"; (2) the presence of a modem, but not including devices that it states perform a similar function but which do not modulate or demodulate signals, such as ISDN-, WLAN- or Ethernet connectivity; and (3) the absence of a device performing a recording or reproducing function such as a hard disk or a DVD drive.

The United States argued that the European Communities violated Article X:1 of the GATT 1994 in that it "made effective" certain CNEN amendments in October 2006 and May 2007, that is, well before their publication in the EU Official Journal on 7 May 2008.

The United States argued that the European Communities violated Article X:2 of the GATT 1994 since it used CNEN amendments to apply duties on certain products before officially publishing those CNEN amendments.

Chinese Taipei had advanced similar arguments under its GATT 1994 Article X claims.

The European Communities, however, submitted that the CNEN amendments cannot be considered "laws, regulations, judicial decisions or administrative rulings of general application" under Article X:1 nor "measures of general application" under Article X:2 "in particular, because of the factual features of the CNEN such as their non-binding nature combined with their essentially and inherently informative character".

The European Communities strongly emphasizes the "draft" character of the CNEN amendments, being merely "preparatory" acts, i.e. draft measures. The European Communities submitted that draft CNEN amendments cannot be "made effective" or "enforced" within the meaning of Articles X:1 and X:2 of the GATT 1994. Since the CNEN amendments were only adopted by the Commission on 29 April 2008 and published in the Official Journal a few days later on 7 May 2008, there is no Article X:1 violation.

The European Communities also argued that the CNEN amendments were not enforced before official publication in the EU Official Journal and that the evidence submitted by the complainants in support of this allegation is not satisfactory. Accordingly, the European Communities argued, there is no Article X:2 violation either.

a. The Measures at Issue

The first measure identified by the two complainants was the "Draft CNEN on Satellite receivers with built-in modem". This proposal contained explanatory notes for different interrelated CN codes, i.e. for CN codes 8528 12 90 to 8528 12 95 ("video tuners"); 8528 12 91 ("set-top boxes with a communication function"); and 8528 12 98 ("other").

The second measure identified by the two complainants is the "Draft CN Explanatory Notes: Set-top box incorporating a hard disk". This proposal for amendment of the CNEN called for exclusion from duty-free CN code 8528 12 91 set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive); this had been proposed at the October 2006 meeting, but had been postponed.

b. The United States' and Chinese Taipei's claim under Article X:1 of the GATT 1994

Arguments of the Parties

The United States and Chinese Taipei assert that the measures at issue fall within the scope of Article X:1 of the GATT 1994 as they constitute regulations or administrative rulings of general application pertaining to the classification of products for customs purposes. They claim further that the measures at issue were made effective upon the votes in the Customs Code Committee in October 2006 and April 2007, but that they were published only in May 2008 (i.e., more than one year later). As a consequence, they argue, the European Communities violated its obligation under Article X:1 to publish promptly the measures at issue once they were made effective.

The European Communities responded that the measures at issue do not constitute a "law, regulation, judicial decision or administrative ruling of general application" in the sense of Article X: 1 of the GATT 1994. According to the European Communities, "this is, in particular, because of the factual features of the CNEN such as their non-binding nature combined with their essentially and inherently informative character".

Furthermore, the identified measures at issue are merely "preparatory acts" that were not "made effective". In the alternative, the European Communities argued that the measures at issue were published promptly and in such a manner as to allow governments and traders to become acquainted with them.

Findings and Consideration of the Panel

Pursuant to the interpretation in EC – Poultry and EC – Selected Customs Matters that Article X:1 of the GATT 1994 is primarily concerned with the publication of "laws, regulations, judicial decisions and administrative rulings of general application" as opposed to the content of such measures. In particular, Article X:1 addresses the due process notion of notice by requiring publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them.

Were the measures at issue laws, regulations, judicial decisions or administrative rulings of general application pertaining to the classification of products for customs purposes?

Arguments of the Parties

The United States and Chinese Taipei argued that the measures at issue are either "regulations" or "administrative rulings" of "general application" within the meaning of Article X:1 of the GATT 1994 that "plainly pertain" to the classification of products for customs purposes. It is the content and substance of the measure that ultimately determine whether it is indeed a "regulation" or "administrative ruling", not the label given to it under domestic law.

According to the United States, the measures at issue, in conjunction with the CN, were administrative rulings since "they are used by administrative authorities in the member States as a basis for determining tariff classification of an entire category of merchandise".

The United States and Chinese Taipei further submitted that the measures at issue are of "general application" because it applies to a range of situations or cases, rather than being limited in its scope of application.

The European Communities responded that the measures at issue do not

constitute a "law, regulation, judicial decision or administrative ruling of general application" in the sense of Article X:1 of the GATT 1994. This was because of the factual features of the CNEN such as their non-binding nature combined with their essentially and inherently informative character. The European Communities further explains that the CNEN only comes into play at the eight-digit level of the CN, and that "the CNEN serves to confirm the classification made on the basis of the CN, but it is not itself the legal reason and basis for that classification".

Findings and Consideration of the Panel

Whether a given instrument constitutes a "law", "regulation", "judicial decision" or an "administrative ruling" of general application within the meaning of Article X:1 must be based primarily on the content and substance of the instrument, and not merely on its form or nomenclature as per the Appellate Body Reports in China – Auto Parts and US – Softwood Lumber IV.

Accordingly, "laws, regulations, judicial decisions and administrative rulings" can encompass more than those instruments formally characterized as such by a WTO Member. Substantively, and when read as a whole within the context of Article X:1, the phrase "laws, regulations, judicial decisions and administrative rulings" reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders.

A narrow interpretation of the terms "laws, regulations, judicial decisions and administrative rulings" would not be consistent with this intention, and would also undermine the due process objectives of Article X . Thus, the ordinary meanings of the terms "laws, regulations, judicial decisions and administrative rulings" indicates that the instruments covered by Article X:1 range from imperative rules of conduct to the exercise of influence or an authoritative pronouncement by certain authoritative bodies.

Accordingly, the coverage of Article X:1 extends to instruments with a degree of authoritativeness issued by certain legislative, administrative or judicial bodies. This does not mean, however, that they have to be "binding" under domestic law. However, whether a particular measure has a degree of authoritativeness such that it would be properly characterised as "laws, regulations, administration rulings or judicial decisions" requires a case-by-case assessment of the particular factual features of the measure at issue.

The "CNEN reflect a Commission's view on how the CN should be interpreted and applied with respect to a certain product or a category of product at issue". The CNENs "constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States".

CNEN can have legal consequences for BTIs and that "if a Member State deviates in its classification practice from the approach taken in a CNEN, the Commission can institute infringement proceedings before the European Court of Justice against such a Member State".

CNENs had a degree of authoritativeness such that they may be properly characterized as a "law, regulation, administration ruling or judicial decision" as those terms are used in Article X: 1. The fact that CNENs are not "legally binding" under EC law does not diminish this conclusion. The transparency and due process purpose of Article X: 1 would be defeated if CNENs, which evidently play a key role in EC at the classification practice, were not be covered by the obligations in Article X:1. The Panel consider this supportted it interpretation that CNENs qualify as "law, regulation, judicial decision [or] administrative ruling.

i. Whether CNENs were of "general application"?

As per the Appellate Body Reports in -EC – Selected Customs Matters and US – Underwear laws, regulations, judicial decisions and administrative rulings of general application' described in Article X:1 of the GATT 1994 are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application. The CNEN amendments at issue in this dispute are of "general application" within the meaning of Article X:1 of the GATT 1994.

This was so because the application of a CNEN is not limited to a single import or a single importer. Rather, the objective of the CNEN is to ensure the uniform application of the Common Customs Tariff to all products falling under a specific CN code upon importation into the European Communities.

ii. Whether the CNEN pertain to one of the specific subjects enumerated in Article X:1?

At the very least, the measures at issue "pertain to the classification of products for customs purposes". This was evident from a superficial reading of the measures.

iii. Whether the draft CNENs were "made effective" in October 2006 and/or April 2007?

Arguments of the Parties

The United States and Chinese Taipei argued that the CNEN amendments were "made effective" upon voting in the Customs Code Committee. The votes were cast in October 2006 for the first measure at issue (the CNEN amendment concerning the exclusion for certain types of modems) and in April 2007 for the second measure at issue (the CNEN amendment concerning the exclusion of set top boxes with a recording or reproduction device such as a hard disk or a DVD drive).

The term "made effective" required a factual assessment of whether the CNEN amendment has been made "applicable". Such assessment should be made irrespective of the measure's formal status or legal qualification in the Member's domestic legal order. Accordingly, the characterization as "draft" does not change the fact that the CNEN amendments have been "made effective".

Various statements of the Chairman of the Customs Code Committee and BTIs issued by EC member State customs authorities prove that the CNEN amendments were "made effective" once voted in the Customs Code Committee. The European Communities responded that "made effective" means "entered into force" and that – under EC law CNEN amendments only enter into force after adoption by the Commission and publication in the EU Official Journal.

It emphasized that the Customs Code Committee does not "adopt" measures. The vote in the Customs Code Committee is merely a "step" in the adoption procedure. The CNEN amendments were therefore merely "preparatory acts" to which, in the European Communities' view, Article X:1 does not apply.

Allowing "preparatory" acts to fall within the disciplines of Article X: 1 would mean that draft bills and laws could be challenged as they are "discussed in their parliaments." Regarding the statements by the Chairman of the Customs Code Committee, the European Communities affirms that the statement by a "Commission official presiding" over the Customs Code Committee meeting "does not create any rights or obligations for the Member States".

Findings and Consideration of the Panel

"Made effective" also covered measures brought into effect in practice. In other words, it may include measures that have not yet been formally adopted in accordance with municipal law as per the Appellate Body in US – Gasoline. This understanding was supported by the ordinary meaning of "effective" as "actual, *de facto*, in effect; (of an order etc.) operative, in force" and "operative" as "being in operation or force, exerting force or influence". Neither of these definitions suggests that "made effective" covers only measures that have officially entered into force.

Limiting the meaning of "made effective" to include only measures that have officially entered into force in accordance with municipal law could open the possibility for WTO Members to avoid the disciplines of Article X:1, merely by asserting that a certain "law, regulation, ..." has not yet formally entered into force under municipal law.

This would run counter to the due process and transparency objectives reflected in the requirement in Article X: 1 that governments and traders must be able to become acquainted with "laws, regulations, administrative rulings and judicial decisions" through prompt publication. This being so, in circumstances where the relevant measure has been "made effective", the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a "draft" measure under the Member's municipal legal order.

iv. Were the CNEN amendments made effective before adoption by the Commission?

After examining evidence such as various Statements of the Chairman of the Customs Code Committee ("the Chairman's Statements") during its 413th, 432nd and 433rd meetings, as well as the BTIs issued by certain EC member State customs authorities the Panel concluded that the Second Chairman's Statement, which expressly relates to CNEN for set top boxes, instructed the customs authorities of EC member States "to follow" the measures at issue once voted upon but before they were formally adopted by the Commission and officially published in the EU Official Journal.

The various elements discussed by the Panel – the votes of the Customs Code Committee; the statement of the Chair in the 432nd meeting and certain BTIs

issued by EC member States with explicit reference to the measures at issue – form a particular constellation of facts, particular to this case, which supports the position of the two complainants that the draft CNEN were "made effective" as that term is understood in Article X:1 of the GATT 1994.

The cumulative effect of the votes in the Customs Code Committee, the relevant BTIs and the Second Statement by the Chair, are such that the measures at issue were "made effective" within the meaning of Article X:1 of the GATT 1994.

v. When were the CNEN amendments "made effective"?

The CNEN amendments were made effective before their adoption by the Commission, and before their publication. The votes in the Customs Code Committee took place in October 2006 and April 2007; that the second statement of the Chair is dated October 2007; and that some of the relevant BTIs were issued in July 2007.

Bearing these factors in mind, the Panel concluded that the CNEN amendments were made effective, at the latest, at the time of the October 2007 statement of the Chair.

vi. Were the measures at issue were published promptly?

Arguments of the Parties

The United States argued that the CNEN amendments were not published "promptly" as required by Article X: 1 of the GATT 1994. By referring to the Panel Report in EEC – Apples (US) the United States contends that prompt" means done without delay. The United States pointed out that the measures at issue were approved by the Customs Code Committee in October 2006 and April 2007, but that they "did not appear in the EC's official gazette for over a year after approval, making it virtually impossible for affected companies and other Members to access them in a reasonable manner".

Chinese Taipei advanced a similar understanding of the term "prompt" as used in Article X:1 and argues that "since the draft CNEN relating to STBCs with a hard disk drive was 'made effective' in April 2007, the publication thereof made in May 2008 cannot be considered to have been done 'promptly' or 'without delay'".

The European Communities, however, argued that the amended CNEN was adopted by the Commission only at the end of April 2008 and that it was "promptly" published on 7 May 2008. In the alternative, the European Communities noted that even if the measures at issue had been made effective upon the vote in the Customs Code Committee – which it strongly contests – the CNEN amendments at issue were "published promptly via the Comitology website"

Findings and Consideration by the Panel

Article X:1 of the GATT 1994 required that "laws, regulations, judicial decisions and administrative rulings, made effective by a contracting party, pertaining to the classification ... of products for customs purposes shall be published promptly in such a manner as to enable governments and traders to become acquainted with them". The meaning of prompt was not an absolute concept, i.e. a pre-set period of time applicable in all cases. Rather, an assessment of whether a measure has been published "promptly", that was "quickly" and "without undue delay", necessarily requires a case by case assessment.

The CNEN amendments were published in the EU Official Journal at least eight months after they were made effective. In the circumstances of this case and in light of the nature of the measures at issue, the Panel considered that publication after eight months did not meet the requirement to publish "promptly".

With regard to the publication of the CNEN amendments on the Comitology website as annexes to the minutes of the respective Customs Code Committee meetings the Panel found that publication prior to the date the measure was made effective, satisfies the requirement to publish "without delay" and hence that the measure was published promptly.

vii. Were the measures at issue published "in such a manner as to enable governments and traders to become acquainted with them"?

Arguments of the Parties

The United States and Chinese Taipei considered the publication in the EU Official Journal as not being prompt and argue that the publication of the measures at issue on the Comitology website does not meet the standard of publication required by Article X:1 of the GATT 1994.

According to Chinese Taipei, to assess whether a publication has been made in such a manner as to enable governments and traders to become acquainted with them, "it is necessary to put oneself at the level of the newcomer wishing to enter a new market rather than at the level of the experienced insider who through his contacts or specialised knowledge is able to obtain information which is otherwise difficult to obtain". Chinese Taipei submitted that, when applying this standard, it is "obvious" that the inclusion of a document on the EC Comitology website is insufficient to comply with the requirements of Article X:1 because "the Comitology website contains thousands of documents issued by hundreds of different Committees. Unless one knows the precise name of the Committee dealing with the issue of the specific document number" it argues, "it is impossible to retrieve information of how a product is treated".

The European Communities submitted that the measures at issue were promptly published in the EU Official Journal because the measures were made effective on 29 April 2008 and that such publication meets the requirements of Article X:1. The European Communities pointed out further that the laws, regulations, judicial decisions and administrative rulings of general application covered by Article X:1 "do not need to be communicated via an official gazette and, depending on the circumstances, even a communication via a website may be sufficient".

Findings and Consideration of the Panel

Pursuant to the approach taken by the Appellate Body in Chile – Price Band System if measures are to be published "in such a manner as to enable governments and traders to become acquainted with them", it follows that they must be generally available through an appropriate medium rather than simply making them publicly available.

The rationale behind the publication requirement in Article X of the GATT 1994 is to ensure due process and transparency about measures that affect governments and traders. Publication thus offers the possibility for governments and traders to learn of "laws, regulations, judicial decisions and administrative rulings of general application" applicable to trading with that Member or its nationals.

It was clear from the a textual analysis of Article X:1 that it is not any manner of publication that would satisfy the requirement, but only those that would give

power to or supply governments and traders with knowledge of the particular measures that is "adequate" so that traders and Governments may become "familiar" with them, or "known" to them in a "more or less complete" way.

In the Panel's view, making the minutes of the Customs Code Committee, with draft CNENs attached, available on the Comitology website does not meet this standard. In particular, it noted that there is nothing in the minutes, or the draft CNENs attached, that would supply traders and governments with adequate knowledge of measures that are or would be applied in trading with the EC member States. Thus the Panel found that, in the circumstances, posting the draft CNEN on the Comitology website does not constitute publication "in such a manner as to enable governments and traders to become acquainted with them".

c. The United States' and Chinese Taipei's claim under Article X:2 of the GATT 1994

Main Claim of the Parties

The United States and Chinese Taipei argued that, because some EC member States applied the measures at issue before the official publication of the CNEN amendments in the EU Official Journal on 7 May 2008, the European Communities has violated Article X:2 of the GATT 1994.

The European Communities responded that Article X:2 of the GATT 1994 does not apply in the present case because the conditions for Article X:2 are not met. The European Communities argued that the CNEN amendments at issue cannot be a "measure of general application" because of their specific characteristics. Further, the European Communities submitted that the CNEN amendments at issue did not affect an advance in rate of duty under an established and uniform practice. The European Communities also submitted that their specific characteristics, together with their character as "preparatory" acts, excludes them from being "enforced". The CNEN amendments cannot be enforced. In the alternative, the European Communities argued that the United States and Chinese Taipei have not submitted sufficient proof that the measures at issue have violated Article X:2 of GATT 1994.

The Panel, pursuant to the interpretation given in US – Underwear, interpreted Article X:2 of the GATT 1994 to contain five conditions: (i) the existence of a "measure"; (ii) the measure is of "general application"; (iii) the measure is taken

by a contracting party (WTO member); (iv) the measure is of the type described in Article X:2 (i.e. a measure "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore"); and (v) the measure was enforced before its official publication.

i. Were the measures at issue a "measure" and, if so, were they of "general application" and "taken by a contracting party"

According to the United States and Chinese Taipei, the CNEN amendments at issue are "measures" of "general application" for the same reasons that they are a "law, regulation, ..." of "general application" under Article X:1.

Similarly, the arguments invoked by the European Communities to reject the Article X:2 claim are similar to those raised in its defence against the applicability of Article X:1.

In the Panel's analysis of Article X:1, it found that the CNEN amendments at issue are contemplated by that range, namely, a "law, regulation, judicial decision [or] administrative ruling". Article X:2 refers simply to "measure" and hence encompasses an even broader category – namely, any act or omission by a WTO Member. Therefore the drafters intended to include a broad range of measures that have the potential to affect trade and traders

The CNEN amendments at issue qualify as "measures" in the sense of Article X:2and also that the CNEN amendments are of "general application". The CNEN amendments are a "measure of general application" in the sense of Article X:2. In addition, measure at issue must be "taken by a contracting party" (WTO member), as was the case here.

ii. Were the measures at issue of a kind effecting an advance in rate of duty under an established and uniform practice

Article X:2 requires that the measure "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice or imposes a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefore". The specific question before the Panel was whether the CNEN amendments at issue are of a kind "effecting an advance

in the rate of duty" and whether they do so "under an established and uniform practice".

"effecting an advance in rate of duty"

The Panel concluded that "effecting an advance in a rate of duty" means that the CNEN amendments at issue are of a type that "bring about" an "increase" in a rate of duty. The function of the language "effecting an advance in a rate of duty" is to further describe the type of measures that are subject to the obligation in Article X: 2 of GATT. That was, it operated to define the class of measures to which the injunction against enforcement before official publication applies.

As such, the focus under this aspect of Article X: 2 of GATT was on the type of measure under consideration. The question is whether the measures at issue are of the type that they are intended to have a certain effect, namely, an increase in a rate of duty. The issue was not, at this point in the analysis, whether they had actually had that effect in practice.

In this particular case, therefore, the question at this stage of the analysis was not whether the complainants have proved that the CNEN amendments have actually resulted in increased rates of duty in particular instances. Rather, the question was whether, in general terms, the CNEN amendments were measures of a type that can be said to be intended to effect an advance in the rate of duty.

On their face, the CNEN amendments at issue indicated that certain STBCs were not classifiable as set top boxes with a communication function in duty-free CN code 8528 12 91. Instead, as a result of the CNEN amendments, those STBCs were classifiable in other tariff lines which were dutiable. The applicable rates of duty, however, were not specified in the measures at issue, but rather are set out in the Common Customs Tariff of the European Communities, which imposed varying duty rates of between 13.9 per cent and 14 per cent with respect to the relevant tariff lines. The measures result in the exclusion of certain STBCs from duty-free treatment. The CNEN amendments at issue necessarily lead to certain STBCs being classified in tariff lines that impose a duty rate in excess of zero while other STBCs were classifiable in duty-free tariff lines.

Through the CNEN amendments at issue, the Commission sent a clear signal to all customs authorities of EC member States that STBCs with certain features were not eligible for classification in duty-free CN code 8528 12 91, leaving other

dutiable codes as the only available classification options. In consequence, the CNEN amendments at issue entailed a change in classification practices for some EC member States with the practical consequence that certain STBCs became dutiable.

Hence, the Panel concluded that the CNEN amendments at issue effect an advance in rate of duty and as such fall within the measures contemplated by Article X: 2 GATT 1994.

"under an established and uniform practice"

The phrase "under an established and uniform practice" qualifies the term "advance", which relates to both "rate of duty", and "or other charge on imports". The term "or", as used in the phrase "advance in a rate of duty or other charge on imports" indicates that "rate of duty" and "other charge" are subcategories of the broader category of "charge on imports", which encompasses both "duties" and "other charge[s]". The phrase "under an established and uniform practice" must relate to both "rate of duty" and "other charge" and that it should not be read to refer only to "other charge" only. Accordingly, the Panel concluded that the "advance in a rate of duty" must be "under an established and uniform practice".

"Uniform practice", in its context, refers to the similar application of a measure in the customs territory of a Member. Accordingly, "uniform practice" means that the customs authorities of the EC member States apply the measures at issue similarly and consistently throughout the customs territory of the European Communities.

"Established" entails an element of duration. Hence, under Article X:2 of GATT, measures must be of a type that effect an advance in a rate of duty under an established and uniform practice, which means that the advance in a rate of duty must be applied ("practice") in the whole customs territory ("uniform") and its application should be on a secure basis ("established").

iii. Whether the draft CNEN were enforced before official publication

Arguments of the Parties

The United States claimed that the BTIs before the Panel "support the conclusion" that EC member States relied on the CNEN in their classification decisions before the official.

United States pointed out that "five BTIs submitted as evidence to the Panel were issued between the vote and official publication classifying STBCs in the dutiable heading, and that four of the five BTI refer to the CNEN as a "justification" for the classification" publication of the CNEN amendment.

Chinese Taipei pointed out that the measures at issue were indeed "enforced" since the EC customs authorities took "actual decisions in specific cases compelling the observance with the measure, e.g., levying higher duties, withdrawing contrary BTIs or issuing BTIs consistent with the criteria laid down in the measure".

Findings and Consideration of the Panel

One of the meanings of "enforced" is "carried out effectively". In the Panel's view, proof that a measure had been applied would establish that it was enforced.

There was no basis in Article X:2 to require any particular threshold in terms of the number of instances of enforcement that must be demonstrated in order to establish that a relevant measure has been enforced prior to its official publication within the meaning of Article X:2. Even a single instance of enforcement of a measure before its official publication could amount to a violation of Article X:2, depending on the facts of the case. To find otherwise would undermine the due process objective embodied in Article X:2.

The Panel examined the submitted BTIs and in considering whether they establish that this CNEN amendment was enforced before its official publication on 7 May 2008, it noted that they all concern STBCs with a hard disk or a DVD drive. None relates to a classification decision on STBCs with WLAN-, ISDN- or Ethernet- connectivity. As such, there was no evidence establishing that the October 2006 CNEN amendment was enforced by the Customs authorities of the EC member States before 7 May 2008.

Accordingly, the Panel concluded that the United States and Chinese Taipei have failed to prove that the October 2006 CNEN amendment was enforced before its official publication in the EU Official Journal as CNEN 2008/C 112/03 on 7 May 2008. The explicit reference to the CNEN amendment in certain BTIs clearly demonstrates that the customs authorities were well aware of the measure at issue. In addition, the fact that the measure at issue was explicitly mentioned as a "classification justification" demonstrates that at least those EC

member States issuing those BTIs applied this measure at issue before the official publication of the amendment to the CNEN on 7 May 2008.

As a consequence, the Panel found that the 2007 CNEN amendment at issue was enforced by EC member States to determine the tariff classification prior to the official publication of the CNEN amendment in the EU Official Journal.

Consequently, the Panel concluded that the United States and Chinese Taipei had established that the April 2007 CNEN amendment was enforced by at least some EC member States before its official publication in the EU Official Journal as CNEN 2008/C 112/03 on 7 May 2008. The United States and Chinese Taipei had therefore established that the European Communities has acted inconsistently with Article X:2 in respect of the April 2007 CNEN amendment.

Multifunctional Digital Machines (MFMs)

Preliminary Issues

a. The measures at issue identified in the joint Panel request

The complainants identified the following as the EC measures at issue in this dispute with respect to their claims of tariff treatment of MFMs by the European Communities that is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994:

- Commission Regulation (EC) No. 517/1999
- Report of the Conclusions of the 360th meeting of the Customs Code Committee (the "2005 Statement")
- Commission Regulation (EC) No. 400/2006
- Council Regulation (EEC) No. 2658/87, as amended (the "CN2007")
- Any amendments or extensions and any related or implementing measures

b. Are Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement outside the Panel's jurisdiction because they were no longer effectively applicable?

Arguments of the Parties

The European Communities argued that Commission Regulation Nos. 517/1999 and 400/2006 are both based on CN code 9009 12 00, which was permanently removed as a consequence of the implementation by the European Communities of the HS2007, as reflected in the CN2007 (and subsequent versions therein).

It was in the process of formally repealing Commission Regulation Nos. 517/1999 and 400/2006, as well as all other Regulations providing for the classification of certain products under HS heading 9009. The United States and Japan (with respect to Commission Regulation Nos. 517/1999 and 400/2006 as well as the 2005 Statement) and Chinese Taipei (only with respect to Commission Regulation Nos. 517/1999 and 400/2006) respond that these measures are still valid and in effect, and still form part of the EC legal system, at least so long as they have not been expressly and formally withdrawn, annulled, revoked or amended.

Findings and Consideration of the Panel

The Panel was faced with two questions. First, what were the factual status of Commission Regulation Nos. 517/1999 and 400/2006 and the 2005 Statement? Second, if the implementation of the CN2007 did indeed supersede and render inapplicable Commission Regulation Nos. 517/1999 and 400/2006 as well as the 2005 Statement, does this mean they can no longer be considered measures at issue with respect to the MFM claims?

Even if the formal repeal of the measures did occur after the Panel was established and its terms of reference had been set, it would still be within its discretion to decide how to take into account subsequent modifications or a repeal of the measures at issue.

Therefore, the Panel considered that it may proceed to make recommendations with respect to these measures.

c. Was the 2005 Statement a measure that could be subject to WTO dispute settlement?

The United States and Japan argued that, through the 2005 Statement, the European Communities made explicit for the first time that output speed – pages per minute – would be the "key criterion" for determining whether or not an MFM would be subject to duties, even though copying speed had no basis in the language of the various headings at issue.

Chinese Taipei also mentioned that, in addition to this new criterion applying on the Community-wide basis, some EC member States, such as Germany and the United Kingdom, had also incorporated the criterion of 12 pages per minute into their "national classification guidance".

The European Communities argued that the 2005 Statement was "never meant to have any legal effects". The European Communities submitted that the 2005 Statement "records an opinion expressed by [the Customs Code Committee]" and that "while it may have some interpretive value, it is not a legal act under EC law".

The Panel held that when a Member brings a challenge to a rule or norm "as such", as is the case here, the Member must establish that it is a rule or norm which is attributable to the responding Member, its precise content, and that it has general and prospective application. A determination of whether something is a "measure" "must be based on the content and substance of the instrument, and not merely on its form or nomenclature" or its legal status as an instrument within the domestic legal system of a Member.

The Panel concluded that the 2005 Statement is a measure within the meaning of Article 3.3 of the DSU as it is attributable to the European Communities and sets forth rules or norms of general and prospective application. Consequently, because the 2005 Statement is a measure and it is undisputed that it was specifically identified in the joint Panel request, the Panel proceeded to make findings with respect to the WTO consistency of this measure.

d. Article 6.2 of the DSU

In Korea – Dairy, the Appellate Body explained that Article 6.2 contains four distinct obligations with respect to the Panel Request: "The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific

measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

Identification of the specific measures at issue

Although it may be sufficient to identify a measure by its form, (i.e., by the name, number, date and place of promulgation of a law, regulation, etc. ...) this is not the only manner of identification which could serve to satisfy the obligation in Article 6.2 of the DSU. A measure may also be identified by its substance e.g. by providing a narrative description of the nature of the measure, so that what is referred to adjudication by a panel may be discerned from the Panel request.

Provision of a brief summary of the legal basis of the complaint

Although a complainant must provide a "summary" of the legal basis of its complaint, this does not mean, however, that the complainant is required, in its request for establishment, to set out the arguments in support of a particular claim. The arguments in support of a claim may be set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.

By contrast a party may not use its submissions to "cure" a deficient panel request.

Sufficient to present the problem clearly

To sufficiently present the problem clearly, a complaining Member must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits."

The Measures at Issue and their Effects

a. Commission Regulation No. 517/1999

The complainants explained that via Commission Regulation No. 517/1999 the European Communities began to reclassify certain MFMs as "photocopiers" in dutiable CN code 9009 12 00. Chinese Taipei and the United States noted that the main criterion for such "reclassification" was that the MFMs at issue have

several functions, i.e., printing, scanning, copying and faxing, while none of the functions are considered to give to the apparatus its essential character.

The Panel concluded that the undisputed meaning of Commission Regulation No. 517/1999 was that: (1) a multifunction facsimile machine as described in item 1 of the Annex must be classified under CN code 8517 21 00, which sets a duty rate of 0 per cent; meanwhile (2) a MFM meeting the description set forth in item 2 of the Annex must be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent.

b. The 2005 Statement

The United States and Japan argued that, through the 2005 Statement, the European Communities made explicit for the first time that output speed – pages per minute – would be the "key criterion" for determining whether or not an MFM would be subject to duties –i.e., whether it would be a facsimile machine under duty-free 8517 or a photocopier under dutiable 9009 even though copying speed had no basis in the language of the various headings at issue.

The complainants submitted that this page per minute criterion reclassifies MFMs with a fax function from duty-free heading 8517 (covering "facsimile machines") into dutiable CN code 9009 12 00 (covering photocopying machines) and, as of HS2007, dutiable CN code 8443 31 91, both subject to a 6 per cent customs duty. The guidance the 2005 Statement provides to national customs authorities with respect to the uniform application of the common customs tariff is to classify MFMs which can "photocopy" in black and white 12 or more pages per minute (A4 format) as a photocopier under CN code 9009 12 00 which sets a 6 per cent duty rate.

c. Commission Regulation No. 400/2006

The undisputed meaning of Commission Regulation No. 400/2006 was that: (1) a multifunctional machine as described in item 4 of the Annex shall be classified under subheading 9009 12 00, which sets a duty rate of 6 per cent.

d. The CN2007 codes 8443 31 10; 8443 31 91 and 8443 31 99

Based on the evidence and submissions before the Panel concluded that the

following products were classified under code 8443 31 91 and were therefore subject to a 6 per cent ad valorem tariff:

ADP MFMs that had an electrostatic print engine and can print, copy and fax with a copying speed exceeding 12 monochrome pages per minute ("ppm"); ADP MFMs that have an electrostatic print engine and can print and copy, but do not have a fax transmission function; and nonADP MFMs that have an electrostatic print engine and can copy and fax with a copying speed exceeding 12 monochrome ppm.

The Panel also concluded that under the CN2007 the dutiable CN2007 code 8443 31 91 did not apply to:

ADP MFMs that have an electrostatic print engine but do not have a copying function, which may instead be covered by the duty-free CN2007 code 8443 31 99; ADP MFMs that can print, copy and/or fax, but do not have an electrostatic print engine (e.g. those with an "ink jet engine" or "thermal printer"), which may instead be covered by the duty-free CN2007 code 8443 31 99; and ADP MFMs that have an electrostatic print engine and can print, copy and fax, with a copying speed of 12 ppm or less, which may instead be covered by the duty-free CN 2007 code 8443 31 10.

NonADP MFMs that have an electrostatic print engine and can copy and fax are subject to 0 per cent customs duty if they have a copy speed of 12 ppm or less, which may instead be covered by the duty-free CN 2007 code 8443 31 10.

NonADP MFMs that can copy and fax, but do not have an electrostatic print engine (e.g. those with an "ink jet engine" or "thermal printer"), may instead be covered by the duty-free CN2007 code 8443 31 99.

Whether the European Communities' tariff treatment of ADP MFMs was consistent with its obligations under Article II of the GATT 1994

a. The ordinary meaning CN 8471 60 of the EC Schedule

The complainants submitted that ADP MFMs are covered by the dutyfree concession in subheading 8471 60 in the EC Schedule ("Automatic data-processing machines and units thereof"; Input or output units, whether or not containing storage units in the same housing"). Japan and Chinese Taipei further submitted

that ADP MFMs also fall more precisely under the eight-digit concession in the EC Schedule in tariff item number 8471 60 40 (" Other;" Printers"). Furthermore, Chinese Taipei claimed that these products, if not covered by tariff item number 8471 60 40 as "printers," are at least covered by the residual eight-digit concession in tariff item number 8471 60 90 ("Other").

In order to determine the ordinary meaning of subheading 8471 60 in the EC Schedule, pursuant to Article 31 of the Vienna Convention, the Panel decided to examine the text of the concession in its context and in light of its object and purpose.

Conclusion on the meaning of the text of sub heading 8471 60

On analysis of the text of the tariff concession in its context and in light of its object and purpose the Panel concluded that the ordinary meaning of the concession is such that it applies to devices that form part of an "automatic data-processing machine" or an "automatic data-processing machine system", and that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". Not all devices capable of connecting to an ADP by accepting or delivering data from or to an ADP necessarily qualify as an input or output unit of heading 8471.

The Panel also did not find any relevant subsequent practice on the matter and the documents proposed as supplementary means of interpretation by the parties cannot serve as such.

b. Whether ADP MFMs were "input or output units" within the meaning of 8471 60

Arguments of the Parties

The complainants described MFMs, in general, as "digital devices" that perform, in addition to printing, one or more of the functions of scanning, copying, or facsimile transmission. They further describe these machines as "generally" incorporating: (i) an "input unit" (i.e., a "scanner unit" to convert information into digital input for the device) and (ii) an "output unit" (i.e., a "printer unit" that allows the digital output from the device to be printed in paper form).

The complainants argued that once a document has been converted into "digital information" by the MFM, such information can be "stored, manipulated on the computer, transmitted over phone lines, or sent over the internet." The complainants described ADP MFMs, in particular, as MFMs that were "capable of directly connecting to an automatic data-processing machine or to a computer network in a digital form." Chinese Taipei further added that these machines "normally incorporate," in addition to the printing function, a scanning and copying function, and they "sometimes" also had a fax function.

The European Communities, however, argued that contrary to the complainant's assertions MFMs are not 'technologically advanced versions of printers' but rather are best described as "the result of a process of technological convergence whereby different devices, each with a specific function (photocopiers, printers and/or facsimile machines), have been merged into a single machine capable of performing simultaneously various functions." The European Communities asserted that these machines were developed from a "photocopier basis." The central point of disagreement between the complainants and the European Communities was whether, via the proper application of the rules of the HS, in particular Note 5(B)(a) to Chapter 84, the MFMs at issue can be classified under HS1996 subheading 8471 60

The United States argued that, as required by Chapter Note 5(B), ADP MFMs are "of a kind solely or principally used" in an automatic data-processing machine, "connectable" to an automatic data-processing machine, and "able to accept or deliver data in a form (codes or signals) which can be used by the system".

All three complainants focused on the fact that the machines were made of "printer modules" and "scanning modules" which were designed to work with an automatic data-processing machine, to support their contention that these devices are "principally used" with an automatic data-processing machine or computer system. The complainants also pointed out that the printing function is the most significant and that the print module is by far the largest component of the MFM. According to the complainants "printing" and "scanning" were the objective characteristics of these devices and "digital copying" is simply an "incidental function" that occurs because of the combination of these two core objective characteristics.

The European Communities submitted that the complainants failed to properly take into account Note 5(B) to HS1996 Chapter 84. According to the European

Communities, pursuant to that note, the MFMs at issue cannot be classified under HS1996 subheading 8471 60, unless it can be shown, on a case-by-case basis, that the copying function of each particular kind of MFM is secondary in relation to its ADP functions.

The European Communities did not consider that the actual use given to the products was relevant because, as confirmed by the Appellate Body in EC – Chicken Cuts, in characterizing a product for the purposes of tariff classification, it was necessary to look exclusively at the "objective characteristics" of the product in question when presented for classification at the border.

Findings and Consideration of the Panel

An "input or output unit" within the meaning subheading 8471 60 was a device that was of an "automatic data-processing machine" or part of an "automatic data-processing machine system", that was connectable to the central processing unit either directly or through one or more other units and that performs at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or "automatic data-processing machine system". Not all devices capable of connecting to an ADP by accepting or delivering data from or to an ADP necessarily qualify as an input or output unit of heading 8471.

The analysis should not be on actual use, but the design and intended use of the products based on an examination of the objective characteristics. This can clearly only be done on a case-by-case, product specific basis.

The Panel was not persuaded that an MFM which can copy more than 12 monochrome pages per minute is necessarily not "of a kind solely or principally used with an automatic data-processing system". Similarly, it was not persuaded by the contention that this analysis will necessarily lead to the conclusion that all MFMs are input or output units. This is a determination that needs to be made on a case–by-case basis, taking into account the objective characteristics of each MFM.

In certain circumstances, some ADP MFMs will fall within the scope of subheading 8471 60 if the principal function of that machine was printing, scanning or another "input" or "output" function. While such a determination needs to be made on a case-by- case basis, according to the Panel reading the concession in light of the context of the HS Chapter and Section Notes and the object and

purpose certain of the ADP MFMs at issue in this dispute will fall within the terms of the concession in subheading 8471 60.

c. Ordinary meaning of the terms of the concession under HS1996 subheading 9009 12

To ascertain the meaning of electrostatic photocopying apparatus "operating by reproducing the original image via an intermediate onto the copy (indirect process)" the Panel was required to consider the following key terms of this concession: "electrostatic photocopying apparatus" and the "indirect process" where the copy is produced "via an intermediate."

In order to complete this interpretative exercise the Panel looked beyond the plain meaning at the structure of Chapter 90 and other materials of the HS offered by the complaining parties as providing context for the interpretation of the ordinary meaning.

The Panel also reviewed the language of the 1996 HSEN to heading 9009, which, the complainants claim, confirms that the scope of the concession in HS1996 subheading 9009 12 is limited to analogue photocopying .The Panel concluded that the context examined, in particular the 1996 HSEN to heading 9009, informs the view that the "indirect process" utilized by an electrostatic photocopying apparatus, that is covered under subheading 9009 12, is identical to the process utilized by "analogue photocopiers" to make photocopies.

The ordinary meaning of the concession for electrostatic photocopying apparatus operating by "indirect process" in subheading 9009 12 of the EC Schedule, seen in context and in light of the object and purpose of the Agreement, was limited to the photocopying process used by "analogue photocopiers"

d. Were ADP MFMs covered by the concession in Subheading 9009 12?

Arguments of the Parties

The European Communities contended that ADP MFMs which have an electrostatic print engine and have a copying function that was not secondary or is at least equivalent to the other functions of the apparatus are electrostatic

photocopying apparatus within the scope of the dutiable concession in HS1996 subheading 9009 12.

The European Communities considered that because light is used in digital copying, albeit in different ways than in analogue photocopying, it follows that the latter process is also "photocopying" under the terms of the concession.

The complainants argued that because ADP MFMs copy using a digital technology far different from "indirect process electrostatic photocopying", and because they have other functions unrelated to copying, these products can never fall under the dutiable concession under HS1996 subheading 9009 12. They contrasted their understanding of what electrostatic photocopying using an "indirect process" means with the way copies are made using a "digital copying" process. They consider that the differences between these two processes confirm that "digital copying" can never be covered by the concession at issue.

Findings and Consideration of the Panel

It was undisputed that all ADP MFMs at issue only make copies digitally and that they do this using a scanner unit. As a consequence, these machines never use the analogue copying process, which characterizes indirect process electrostatic photocopying under the concession at issue.

The ordinary meaning of the terms of the concession for "indirect process electrostatic apparatus", seen in its proper context and in light of the object and purpose of the Agreement, in fact, does not include digital copying. ADP MFMs were not covered by the concession in the EC Schedule for electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process), as described in HS1996 subheading 9009 12.

Other objective characteristics ADP MFMs possess also support the conclusion that they were not captured by this dutiable concession, chiefly among them is the undisputed fact that these machines are connectable to computers and/or computer networks. It was this intrinsic characteristic of ADP MFMs that allows them to perform various tasks that further distance them from the "unifunctional", analogue character that characterizes machines under the concession in HS1996 subheading 9009 12.

Because the ADP MFMs at issue are not photocopiers incorporating an optical system that operate by reproducing the original image onto the copy via an intermediate (indirect process), they cannot fall within the scope of the concession in subheading 9009 12 of the EC Schedule, regardless of the primary, secondary, or equivalent nature of the copying function vis-à-vis these machines' other functions.

e. Were ADP MFMs covered by the concession in HS1996 subheading 8472 90?

Arguments of the Parties

Japan argued that the reasoning that because stand-alone digital copiers fall within subheading 8472 90 so do MFMs ignores the important difference between the two types of products: the MFMs ability to connect to an automatic data-processing machine and process data from an automatic data-processing machine.

Chinese Taipei concurred with Japan that an ADP MFM can only be classifiable under heading 8471 60 in view of its computer connectivity and that 8472 90 will not be prima facie applicable to an ADP MFM.

The United States, however, seemed to agree that an ADP MFM could be prima facie classifiable under both subheadings 8471 60 and 8472 90. In the case of ADP MFMs, the United States submitted that the principal function of MFMs that connect to an ADP is imparted by the print module – whether printing a document scanned into the MFM's memory or printing a file from the ADP machine, therefore these devices must be classified under subheading 8471 60.

Findings and Consideration of the Panel

Given the lack of argumentation on the possibility that ADP MFMs could fall within the scope of HS1996 subheading 8472 90 and the lack of argumentation on the ordinary meaning of the concession in HS1996 subheading 8472 90 the Panel could not conclude that the European Communities had demonstrated that the products at issue fall within the scope of this concession.

Therefore, the Panel did not make any findings with respect to the scope of the concession in HS1996 subheading 8472 90 as it appears in the EC Schedule, whether ADP MFMs fall within the scope of that concession, or whether the

European Communities was charging duties in excess of those provided for in subheading 8472 90 of its Schedule.

f. Conclusion

The Panel concluded that at least some of the MFMs at issue, fall within the scope of the subheading 8471 60, and that none of the MFMs at issue fall within the scope of the concession in HS1996 subheading 9009 12. The Panel did not make any finding as to whether some of the products at issue may also fall within the scope of subheading 8472 90 and tariff item number 8472 90 80 of the EC Schedule.

g. Did the Measures at Issue Provide for Duties on ADP MFMs which were in excess of those set forth in the EC Schedule?

i. Commission Regulation No. 517/1999

Commission Regulation No. 517/1999 require that a MFM meeting the description set forth in item 2 of the Annex must be classified under tariff item number 9009 12 00, which sets a duty rate of 6 per cent. The products at issue do not fall within the scope of products defined in tariff item number 9009 12 00, and that at least some of them will fall within the scope of tariff item number 8471 60, which is a duty-free concession.

Therefore, because Commission Regulation No. 517/1999 requires the imposition of a 6 per cent duty on products that the European Communities is obligated to provide duty-free treatment for, the measure is inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

ii. The 2005 Statement

If a national customs authority were to follow the non-binding guidance in the 2005 Statement then it would proceed to classify MFMs which can photocopy in black and white 12 or more pages per minute as a photocopier under tariff item number 9009 12 00 which sets a 6 per cent duty rate. Therefore, because the 2005 Statement guides the European Communities, through its national customs authorities, to uniformly apply a duty of 6 per cent on products that the European Communities was obliged to provide duty-free treatment for, the measure is

inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

iii. Commission Regulation No. 400/2006

Commission Regulation No. 400/2006 requires that a multifunction machine as described in item 4 of the Annex to the Regulation shall be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent. Therefore, because Commission Regulation No. 400/2006 requires the imposition of a 6 per cent duty on products that the European Communities was obligated to provide duty-free treatment for, the measure was inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

iv. CN2007 codes 8443 31 10, 8443 31 91, and 8443 31 99

The CN2007, as well as the subsequent versions of the CN to date, is based on HS2007, which made a variety of changes in headings covering the very products at issue in this dispute. The HS2007 completely removed HS1996 subheading 9009 12. Moreover, several products that used to be classifiable under different HS1996 subheadings, including inter alia some input or output units that used to be classifiable under HS1996 subheading 8471 60, were merged under a new HS2007 heading 8443.

One of these CN2007 codes 8443 31 91 provides for a 6 per cent ad valorem duty for products classifiable therein. Specifically, pursuant to CN2007 code 8443 31 91 the European Communities would apply a 6 per cent duty to "[m]achines performing a copying function by scanning the original and printing the copies by means of an electrostatic print engine."

The existence of these two eight-digit tariff item numbers under the same subheading, means that ADP MFMs with a fax function which copy at a speed exceeding 12 monochrome pages per minute are subject to the 6 per cent duty under 8443 31 91 while those that copy at rates of 12 monochrome pages per minute or slower are exempt from duties.

The CN2007 requires that all ADP MFMs which do not have a facsimile function or make copies at a speed in excess of 12 monochrome pages per minute be classified in eight-digit tariff item number 8443 31 91 which provides for a 6 per cent ad valorem duty. As a result, certain ADP MFMs that are

entitled to duty free treatment are subject to 6 per cent duty under the EC's measure.

Therefore, because the CN2007 requires that a duty in excess of that set forth in the EC Schedule be levied against certain ADP MFMs which fall within the scope of the duty-free concession in subheading 8471 60 in the EC Schedule, the measure was inconsistent with Article II:1(b) of the GATT 1994.

h. Did the measures at issue provide less favourable treatment than that set forth in the EC Schedule?

According to the Appellate Body Report in Argentina – Textiles and Apparel, a violation of Article II:1(b) necessarily results in less favourable treatment which was inconsistent with the obligations in Article II:1(a). Given that the Panel found that Commission Regulation No. 517/1999, Commission Regulation No. 400/2006, the 2005 Statement, and the 2007CN are inconsistent with Article II:1(b) of the GATT 1994, those measures also provide for less favourable treatment in a manner inconsistent with Article II:1(a) of the GATT 1994.

Were the European Communities' tariff treatment of Non-ADP MFMs consistent with its obligations under Article II of the GATT 1994?

a. Were non-ADP MFMs covered by the concession in Subheading 8517 21 of the EC Schedule?

The complainants referred to these products as non-ADP MFMs. The complainants argued that these products fall within the European Communities' dutyfree concession in the EC Schedule for "facsimile machines" in subheading 8517 21.

The European Communities argued that "since the non-ADP MFMs at issue in this section have both a copying function and a facsimile transmission function, they were prima facie classifiable under the concessions for both HS96 8517 21 and 9009 12. According to the European Communities "non-ADP MFMs would fall prima facie within both HS96 8517 21 and HS96 8472 90 and their classification would have to be determined, on a case-by-case basis, pursuant to Note 3 to Section XVI of the HS96.

The Panel held that the relevant issue with respect to the complainants' claim that non-ADP MFMs are entitled to duty-free treatment is whether non-ADP MFMs (or at least some of them) may be covered by subheadings other than HS1996 8517 21, that were dutiable.

b. Were non-ADP MFMs covered by the concession in Subheading 9009 12 of the EC Schedule?

The European Communities contended that because the products at issue have a copying function they are prima facie classifiable within subheading 9009 12 of the EC Schedule and that a proper application of the GIRs of the HS, in particular GIR 3(c), will result in all of the non-ADP MFMs at issue falling within the scope of that dutiable concession.

The complainants argued that digital copying is not the type of photocopying covered by the concession in subheading 9009 12 of the EC Schedule and as such, non-ADP MFMs which make copies using digital technology combining the work of a scanner and a print engine, cannot fall within the concession in subheading 9009 12 of the EC Schedule.

The Panel concluded that the ordinary meaning of electrostatic photocopying apparatus operating by reproducing the original image via an intermediate onto the copy (indirect process) in subheading 9009 12 in the EC Schedule, was limited to the photocopying process used by "analogue photocopiers" and does not include within its scope digital copying technology.

The non-ADP MFMs utilize the same digital copying process as ADP MFMs. Given that the copying process utilized by non-ADP MFMs was not the type of photocopying process covered by the concession in subheading 9009 12 of the EC Schedule, then that non-ADP MFMs cannot fall within the scope of the concession in subheading 9009 12 of the EC Schedule.

c. Were Non-ADP MFMs covered by the concession under subheading 8472 90 of the EC Schedule?

The European Communities argued that if digital copiers are not photocopiers under subheading 9009 12, then digital copiers would have to be classified under subheading 8472 90.

The United States claimed that non-ADP MFMs whose "essential character" is that of a facsimile machine are included in the concession for "facsimile machines" under subheading 8517 21, while other non-ADP MFMs may not be "facsimile machines" and therefore would fall within the concession for goods of subheading 8472 90.

Japan and Chinese Taipei maintained that all non-ADP MFMs are included in the concession on HS1996 subheading 8517 21. Japan and the United States reiterated that even if some non-ADP MFMs were properly classifiable in subheading 8472 90 the duty treatment under the current EC measures would still exceed that provided for in that concession.

The Panel reiterated its earlier finding that given the lack of evidence and argumentation on the scope of HS1996 subheading 8472 90 and that any claim of inconsistency with Article II:1(b) because of tariff treatment in excess of that provided for in 8472 90 was outside its mandate that it would not make any findings with respect to whether ADP MFMs fall within the scope of that concession.

d. Did the measures at issue result in the imposition of duties on the products at issue in excess of those provided for in the EC Schedule?

i. Commission Regulation No. 517/1999

Commission Regulation No. 517/1999 required that a MFM meeting the description set forth in item 2 of the Annex, which could include a non-ADP MFM with a facsimile function, must be classified under CN code 9009 12 00, which sets a duty rate of 6 per cent.

The products at issue do not fall within the scope of products defined in tariff item number 9009 12 00 of the EC Schedule, but that at least some of them fall within the scope of subheading 8517 21 of the EC schedule, which was a duty-free concession.

Therefore, as Commission Regulation No. 517/1999 required the imposition of a 6 per cent duty on products that the European Communities was obliged to provide duty-free treatment for, the measure was inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

ii. The 2005 Statement

If a national customs authority were to follow the non-binding guidance in the 2005 Statement, then it would proceed to classify MFMs (including non-ADP MFMs with a facsimile function) which can photocopy in black and white 12 or more pages per minute as a photocopier under CN code 9009 12 00 which sets a 6 per cent duty rate.

Therefore, because the 2005 Statement guides the European Communities, through its national customs authorities, to uniformly apply a duty of 6 per cent on products that the European Communities was obliged to provide duty-free treatment for, the measure was inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994.

iii. Commission Regulation No. 400/2006

The complainants had provided no specific argumentation as to how application of Commission Regulation No. 400/2006 results in duties being applied to non-ADP MFMs with a facsimile function.

Therefore, with respect to the claim regarding the tariff treatment of non-ADP MFMs with a facsimile function, the Panel found that the complainants had not established that, by virtue of this regulation, the European Communities was levying duties on non-ADP MFMs with a facsimile function in excess of those provided for in its Schedule.

iv. CN2007 codes 8443 31 10, 8443 31 91, and 8443 31 99

The existence of these two eight-digit CN codes under the same subheading, means that non-ADP MFMs which copy at a speed exceeding 12 monochrome pages per minute were subject to the 6 per cent duty under 8443 31 91, while those that copy at rates of 12 monochrome pages per minute or slower are exempt from duties. Certain of the non-ADP MFMs at issue, fall within the scope of subheading 8517 21 of the EC Schedule.

The CN2007 requires a duty of 6 per cent ad valorem be charged on at least some products that properly fall within the scope of the duty-free concession for facsimile machines in subheading 8517 21 of the EC Schedule. Therefore, because the CN2007 requires that a duty in excess of that set forth in the EC Schedule be

levied against certain non-ADP MFMs which fall within the scope of the duty-free concession in subheading 8517 20 of the EC Schedule, the measure was inconsistent with Article II:1(b) of the GATT 1994.

e. Did the measures at issue provide less favourable treatment than that set forth in the EC Schedule?

Pursuant to the Appellate Body's Report in Argentina – Textiles and Apparels "the application of customs duties in excess of those provided for in a Member's Schedule inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a). Thus, a violation of Article II:1(b) necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a) of GATT 1994.

Hence, Commission Regulation No. 517/1999 , the 2005 Statement, and the CN2007 result in tariff treatment of non-ADP MFMs that was inconsistent with Article II:1(b) of the GATT 1994, those measures also provided for less favourable treatment in a manner inconsistent with Article II:1(a) of the GATT 1994.

Rulings and Recommendations

The Panel recalled the complainants' request that the Panel issue its findings in the form of a single document containing three separate reports with common sections on the Panel's conclusions and recommendations for each complaining party. In accordance with the requests by the complaining parties, the Panel therefore provided three separate sets of conclusions and recommendations.

A. Complaint by the United States (DS375): Conclusions of the Panel

Nullification and impairment

Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent that the European Communities had acted inconsistently with Articles II: 1(a), II:1(b), X:1 and X:2 of the GATT 1994. The Panel held further that EC had nullified or impaired benefits accruing to the United States under that agreement.

Recommendations

Pursuant to Article 19.1 of the DSU, having found that the European Communities had acted inconsistently with Articles II:1(a), II:1(b), X:1, and X:2 of the GATT 1994, the Panel recommended that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

The Panel recalled that the European Communities had indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed. In addition, the European Communities had indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009. However, there was no evidence properly before the Panel confirming such repeal. Therefore, the Panel had proceeded on the basis that the said measures were in force.

B. Complaint by the Japan (DS 376): Conclusions of the Panel

Nullification and impairment

Under Article 3.8 of the DSU, in cases where there was infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent that the European Communities had acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994, it had nullified or impaired benefits accruing to Japan under that agreement.

Recommendations

Pursuant to Article 19.1 of the DSU, having found that the European Communities had acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994, the Panel recommended that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

The Panel recalled that the European Communities had indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed. In addition, the European Communities had indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009. However,

there was no evidence properly before the Panel confirming such repeal. Therefore, the Panel had proceeded on the basis that the said measures were in force.

C. Complaint by the Chinese Taipei (DS377): conclusions of the Panel

Nullification and impairment

Under Article 3.8 of the DSU, in cases where there was infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent that the European Communities had acted inconsistently with Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, it had nullified or impaired benefits accruing to Chinese Taipei under that agreement.

Recommendations

Pursuant to Article 19.1 of the DSU, having found that the European Communities had acted inconsistently with Articles II:1(a), II:1(b), X:1, and X:2 of the GATT 1994, the Panel recommended that the Dispute Settlement Body request the European Communities to bring the relevant measures into conformity with its obligations under the GATT 1994.

The Panel recalled that the European Communities had indicated that the Commission Regulation Nos. 634/2005 and 2171/2005 would be repealed. In addition, the European Communities had indicated that Commission Regulation Nos. 517/1999 and 400/2006 would be repealed as of October 2009. However, there was no evidence properly before the Panel confirming such repeal. Therefore, the Panel had proceeded on the basis that the said measures were in force.

4. UNITED STATES – CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA (WT/DS392/R) 29 September 2010

Parties:
United States
People's Republic of China

Third Parties
Brazil, the European Union, Guatemala, Korea, Chinese Taipei and Turkey

Factual Matrix:

On 17 April 2009, the People's Republic of China requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII of the General Agreement on Tariffs and Trade 1994 and Article 19 of the Agreement on Agriculture concerning measures taken by the United States affecting the importation of poultry products from China. In addition, China also requested consultations with the United States pursuant to Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures. China and the United States held consultations. However, no mutually agreed solution was found.

On 23 June 2009, China requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII: 2 of the GATT 1994, Article 19 of the Agreement on Agriculture, and Article 11 of the SPS Agreement. At its meeting on 31 July 2009, the DSB established a panel pursuant to the request of China in document WT/DS392/2, in accordance with Article 6 of the DSU.

This dispute concerned with China's pursuit of access to the US market for poultry. According to China, the possibility to access the US market was cut off by legislation passed by the United States Congress which, restricted the ability of the United States Department of Agriculture ("USDA") and its agency, the Food Safety and Inspection Service ("FSIS") to use funds allocated by the US Congress for the purpose of establishing or implementing a rule permitting the importation of poultry products from China into the United States.

The measure at issue in the dispute

The measure at issue in this dispute was Section 727 of the AAA of 2009 which reads:

"None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."

Section 727 was accompanied by a Joint Explanatory Statement ("JES") which provided the following:

"There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S. It is noted that China has enacted revisions to its food safety laws. USDA is urged to submit a report to the Committees on the implications of those changes on the safety of imported poultry products from China within one year. The Department is also directed to submit a plan for action to the Committees to guarantee the safety of poultry products from China. Such plan should include the systematic audit of inspection systems, and audits of all poultry and slaughter facilities that China would certify to export to the U.S. The plan also should include the systemic audit of laboratories and other control operations, expanded port-of-entry inspection, and creation of an information sharing program with other major countries importing poultry products from China that have conducted audits and plant inspections among other actions. This plan should be made public on the Food Safety and Inspection Service web site upon its completion."

As a matter of United States law, a JES served to explain the purpose of a given provision in an appropriations bill. Section 727 expired on 30 September 2009.

The United States' Regime for the importation of poultry

On 28 August 1957, the US Congress adopted the Poultry Products Inspection Act ("PPIA"), which was set forth in Title 21 of the United States Code ("USC"). This statute had been subsequently amended on numerous occasions. In the PPIA, the US Congress sets out the general legal framework governing all aspects of trade in poultry products, both imported and domestically produced. Because

poultry, among other food products, falls within the competency of the USDA, the US Congress delegated to the Secretary of Agriculture ("the Secretary") the duty to set out detailed rules and regulations relating to the inspection of poultry and poultry products. The Secretary promulgated regulations establishing the conditions under which poultry products were allowed to be imported in the United States which are contained in the US Code of Federal Regulations ("CFR").

The Secretary had established an "equivalence" based regime for gaining permission to import poultry into the United States. The FSIS, which was an agency of the USDA, implemented and enforced the regulations on poultry importation. The FSIS authorized the importation of poultry products into the United States on a country-by-country basis. Countries wishing to export poultry products to the United States had to first request a determination of eligibility by the FSIS. The FSIS would then establish whether an applicant's poultry inspection system was equivalent to that of the United States in order to allow the importation of its poultry products.

If the FSIS determined that an applicant country's poultry inspection system was equivalent to that of the United States, it published rules allowing the importation of poultry products from that country in the Federal Register. Subsequent to that initial determination, the FSIS also did annual reviews to determine if approved countries' poultry safety standards continue to be equivalent to those of the United States. The FSIS also re-inspected imported products to ensure that they meet the United States' poultry safety standards.

The equivalence process started by an applicant country making a request for eligibility to export poultry products to the United States. After the equivalence request had been submitted, the FSIS would evaluate the equivalence of the applicant country's poultry inspection system. If the FSIS determined that the applicant country's system was equivalent, the applicant country must certify establishments as fit to export. After the applicant country commenced exporting, the FSIS conducted ongoing equivalence verifications. The process includes:

1. **Initial equivalence determination**: In this first stage the FSIS determined whether the poultry inspection system of the applicant country was equivalent to the inspection system of the United States own poultry safety measures. If FSIS made a preliminary determination that the systems were equivalent, it publishes a proposed rule in the Federal Register. If, after reviewing the comments it receives, FSIS made a final determination that the country's system was equivalent; the

FSIS published a final rule in the Federal Register and adds the applicant to the list in the CFR of countries eligible to export poultry products to the United States.

2. Certification of establishments: During this second stage, the eligible applicant country must certify individual establishments as fit to export to the United States; and,

3. Ongoing equivalence verification: In this third stage, the eligible applicant country submitted to an ongoing (typically annual) equivalence process to maintain eligibility to export to the United States.

First Stage: Initial equivalence determination

In this initial stage, the FSIS investigated whether the poultry inspection system of the applicant country was equivalent to that of the United States. This first stage was triggered by the request of an exporting country to obtain authorization to export poultry products to the United States. The application had to include copies of all the laws and regulations on which its own poultry inspection system is based. Once eligibility for importation of poultry was requested, an initial equivalency evaluation was conducted including three sequential steps:

a. a document review,

b. an on-site audit, and

c. The publication of the proposed and final rules in the Federal Register and the country's addition to the list in the CFR.

a. Document review

The first step in the initial equivalence stage was the evaluation of the applicant country's laws, regulations and other written information related to the applicant's poultry inspection system. In order to further the application for authorization to import, the applicant country was asked to provide the FSIS with copies of the laws and regulations on which its poultry inspection system is based.

b. On-site audit

During the on-site audit, a team of FSIS expert verified that the applicant's

regulatory system had satisfactorily implemented all the laws, regulations, and other inspection or certification requirements that the FSIS had found to be equivalent during the document review step.

c. Publication in the Federal Register

The third step was the publication of the final rule allowing the importation of poultry products from certified establishments in the applicant country. After both the document review and the on-site audit steps had been satisfactorily completed, the FSIS publish a draft rule in the Federal Register that announces the results of the first two steps and proposes to add the applicant country to the list of eligible exporters in the CFR. Upon receipt and consideration of public comments, the FSIS made a final decision about equivalence based upon all available information and, if favourable, published a final rule in the Federal Register announcing the applicant country's eligibility.

Second Stage: Certification of establishments for export by the eligible exporting country

Once the initial equivalence determination stage had been completed, the applicant country must conduct inspections of establishments wishing to export to the United States. Only those establishments that were determined by the applicant country's authorities to fully meet the entire equivalent sanitary requirements may be certified to export to the United States. The applicant country authorities must ensure ongoing compliance with the equivalent sanitary requirements, especially with respect to establishments that were exporting to the United States. The applicant country notifies the FSIS of the certification by transmitting a certification list according to the form specified in the CFR. This certification must be renewed annually.

Third Stage: Ongoing equivalence verification

The regulations require that ongoing reviews be conducted by the FSIS. The purpose of the ongoing equivalence verification was to maintain eligibility for exportation. Like an initial equivalence determination, the ongoing equivalence verification was conducted in three stages:

i. a recurring document analysis,

ii. further on-site audits, and

iii. Continuous port-of-entry re-inspections of poultry products shipped to the United States from the eligible exporting country.

China's request for equivalence

China requested an initial equivalence determination to export poultry products to the United States on 20 April 2004. Further to this request; the FSIS conducted an initial equivalence audit, the objective of which was to "evaluate the performance of China's Central Competent Authority ('CCA') with respect to controls over the slaughter and processing establishments proposed for certification by the CCA as eligible to export poultry products to the United States."The final report concerning this audit was issued on 17 May 2005. The report found a number of deficiencies in some processing and slaughter plants, and as a consequence, the FSIS sent a letter to China proposing a follow-up equivalence audit to check whether the deficiencies identified in the slaughter system during the December 2004 audit had been corrected. The FSIS conducted the second initial equivalence audit on China's poultry slaughter inspection system in July and August 2005, and on 4 November 2005 issued its Final Report.

On the basis of the Report of the first on-site audit, on 23 November 2005, the FSIS proposed to amend the Federal Poultry Products Inspection regulations to add China to the list of countries eligible to export processed poultry products to the United States, provided that the poultry products processed in certified establishments in China came from poultry slaughtered in the United States or certified establishments in other countries eligible to export poultry to the United States. On 24 April 2006, the FSIS published notification in the Federal Register that it would be adding China to the list in the CFR of countries eligible to export processed poultry products not slaughtered in China as described above. As noted above, China also applied for equivalence with respect to its inspection system for slaughtered poultry. The April Federal Register Notice only covered processed poultry and did not propose allowing the importation of poultry slaughtered in China.

Two weeks after publication of the Federal Register Notice, on 9 May 2006, the FSIS sent China a letter outlining the remaining two steps that had to be completed before China could export processed poultry products to the United States. According to this letter, China needed to:

i. submit to the FSIS a list of establishments certified by the Chinese inspection services as satisfying the requirements for exporting processed poultry products to the United States, and

ii. submit product labels by certified establishments in China for review by the Labelling Consumer Protection Staff of the FSIS.

In June 2006, based in part on previous on-site audit of the slaughtered poultry operations in China, the FSIS made a preliminary determination that China's poultry inspection system for domestically slaughtered poultry was equivalent to United States standards. Notwithstanding, the FSIS did not publish a draft rule in the Federal Register requesting public comments on China's slaughtered poultry operations or announcing the results of the document review and the on-site audit. At this point, the FSIS had thus determined that China's poultry production system was equivalent to that of the United States for processed poultry products from the United States or another country that the FSIS had determined was equivalent to the United States. At the same time, FSIS had determined that China's inspection system for slaughtered poultry was preliminarily equivalent pending further evaluation through the rulemaking process.

On 20 December 2007, the FSIS sent a letter to China requesting the annual certification of establishments eligible to export processed meat or poultry products to the United States. Six days later, on 26 December 2007, the Consolidated Appropriations Act of 2008 entered into force. This Act contained the AAA of 2008 which provided the funds for the USDA and its agencies, such as the FSIS, to execute their activities. In particular, Section 733 of the AAA of 2008 restricted the use of funds to establish or implement any rule allowing poultry products from China to be imported into the United States. Section 733 which expired on 30 September 2008, was not a measure at issue in this dispute. The funding restriction established by Section 733 was maintained by Division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009.

Nearly two years after the United States' first request, on 12 March 200855, China sent the list of certified establishments to the FSIS.56 On 23 July 2008, the FSIS published the list of countries eligible to export poultry products to the United States. China was included as eligible to export processed poultry products. For certain countries, indicated with shading in the table, eligibility was suspended for animal health reasons or pending equivalence re-verification. The country

specific note for China states that "FY 2008 appropriation legislation bars FSIS from spending funds on import of poultry from China." On 28 February 2009, China's National People's Congress Standing Committee enacted a new food safety law.

On 11 March 2009, the US Congress enacted the Omnibus Appropriations Act. This Act contained the AAA of 2009. Section 727 of the AAA of 2009, which was the measure being challenged by China in this dispute, shared the same wording of Section 733 and thus restricted the use of funds to establish or implement any rule allowing poultry products from China to be imported into the United States.

Upon its expiry at the end of the 2008-2009 Fiscal Year on 30 September 2009, the funding restriction instituted by Section 727 was continued by Division B of the Legislative Branch Appropriations Act (Continuing Appropriations Resolution) of 2010. Division B also expired once the AAA of 2010 entered into force on 21 October 2009.This new AAA of 2010 included Section 743 a measure that also relates to funding of FSIS activities relating to China's application for equivalency of its poultry inspection system. In particular, Section 743 allowed that funding to establish or implement a rule permitting the importation of poultry products from China can be restored if the Secretary complies with certain conditions set forth in that provision.

China had decided not to pursue a claim with respect to Section 743 in this dispute. Section 727 was accompanied by a JES which listed two actions that the US Congress expected the FSIS to take. In particular, the JES urged the USDA to submit a report to the Committees on the implications of the recent changes to China's food safety law within one year. The JES also "directed" the USDA to submit a plan for action to the Committees to guarantee the safety of poultry products from China and stated that the plan should be made public on the FSIS web site upon its completion.

With respect to how it complied with the requests in the JES, the United States noted that two months after the passage of Section 727, the FSIS had sent a letter to the Chinese authorities requesting "information to understand the nature and implication of revisions in food safety laws, regulations, and inspection and control procedures enacted since 2006." At the first substantive meeting of the Panel with the parties, China indicated that it did not respond to this letter because it had already initiated dispute settlement proceedings at the WTO.

Additionally, the United States informed the Panel that the USDA had sent a document to the US Congress which it argues was the action plan called for in the JES. The one-page document, which was undated and not on official USDA letterhead, is entitled "FSIS Action Plan for Creation of Congressionally-Mandated China Poultry Inspection System Reports". According to this document, the FSIS had to review the changes to the Chinese food safety law, and develop a plan of action to guarantee the safety of poultry products from China.

Parties' requests for findings and recommendations

China requested the Panel to find that Section 727 was inconsistent with:

i. Article I:1 of the GATT 1994, because it failed to extend the advantage of the opportunity to export to the United States immediately and unconditionally to like poultry products from China;

ii. Article XI:1 of the GATT 1994, because it imposed import restrictions that limit competitive opportunities for poultry products from China;

iii. Article 4.2 of the Agreement on Agriculture, because it imposed a quantitative restriction on poultry products from China;

iv. Article 2.3 of the SPS Agreement, because it arbitrarily and unjustifiably discriminated against China;

v. Article 5.5 of the SPS Agreement, because the higher level of sanitary protection applied to China is arbitrary and unjustifiable, resulting in discrimination;

vi. Article 5.1 and 5.2 of the SPS Agreement, because it was not based on a risk assessment within the meaning of Article 5.1 that takes into account the factors in Article 5.2;

vii. Article 2.2 of the SPS Agreement, because it was not maintained based on scientific evidence;

viii. Article 5.6 of the SPS Agreement, because it was inconsistent with the obligation that SPS measures not be unduly trade-restrictive; and

ix. Article 8 of the SPS Agreement, because the delay resulting from its application was unjustifiable, or undue.

x. Given that Section 727 had expired, China further requests the Panel to issue a recommendation that the United States did not revert to language similar to that in Section 727 in its future legislation.

The United States requested that the Panel rejects China's claims in its entirety.

Interim Review

On 14 June 2010, the Panel issued its Interim Report to the parties. On 28 June 2010, both parties submitted written requests for the review of precise aspects of the Interim Report. The parties submitted written comments on the other party's comments on 8 July 2010.

Terms of reference of the Panel

At the outset of the proceedings, the United States requested a preliminary ruling concerning China's SPS claims. Additionally, the issue had arisen whether an alleged moratorium existed and whether the alleged moratorium and a measure enacted after the establishment of the Panel were within our terms of reference. As explained below, the Panel need not resolve the latter two issues because China has decided not to pursue them within the confines of this dispute. Others, such as the United States' contention that China had not requested consultations on its claims under the SPS Agreement and that, therefore, these are not within this Panel's terms of reference. Another issue that pertains to this Panel's terms of reference was whether the Panel can rule on an expired measure given that Section 727 was no longer in force.

Request for a preliminary ruling by the United States

The United States contended that China's claims under the SPS Agreement were outside the Panel's terms of reference. In its view, China had failed to request consultations under Article 11 of the SPS Agreement. The United States submitted that Article 4.7 of the DSU provides that a request for

establishment of a panel might be submitted only after consultations had first been requested and therefore should a "matter" have been left out of the request for consultations, it would be outside the terms of reference of the Panel. The United States argued that in order for a Member to bring a dispute under the DSU with respect to the SPS Agreement, that Member must, according to Article 1.1 of the DSU bring the dispute "pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding", including the SPS Agreement. The United States argued that China's consultations request was only made pursuant to Article 4 of the DSU, Article XXII of the GATT 1994 and Article 19 of the Agreement on Agriculture.

China argued that its consultations request was fully in accordance with Article 11 of the SPS Agreement and Article 4 of the DSU. In China's view, not only was Article 11 of the SPS Agreement invoked in the consultations request, but a number of potential violations of specific provisions of that Agreement were included in both paragraph 6 and paragraph 7 of its consultations request. China also stated that it even anticipated and rejected a number of the potential defences of the United States under the SPS Agreement in paragraph 7 of its Request. China submitted that it had made an alternative claim, and that an argument in the alternative was not a proper basis for disrupting the ability of China to achieve a "prompt settlement" of this dispute. China stressed that over 30 per cent of its consultations request was dedicated to claims under the SPS Agreement.

Analysis by the Panel

The Panel was therefore called upon to determine whether China's use of the conditional tense in its consultations request meant that China had not requested consultations under the SPS Agreement and whether that would deprive the Panel of jurisdiction to hear China's claims under the SPS Agreement.

The relevance of the consultations request and the holding of consultations to a panel's terms of reference

A panel's terms of reference, as provided for in Article 7.1 of the DSU, were generally set in the Panel Request which must follow the rules set forth in Article 6.2 of the DSU[43]. Additionally, the Appellate Body had explained that "as a general matter, consultations are a prerequisite to panel proceedings"[44] and had

underscored the importance and benefits of consultations. In particular the Appellate Body had pointed out that consultations serve to help the parties assess the strengths and weaknesses of the case, narrow the scope of differences between them and reach a mutually agreed solution. In addition, consultations provide the parties with an opportunity to define and delimit the scope of the dispute. Consultations are regulated in Article 4 of the DSU. Article 4.2 of the DSU provides that [e]ach Member undertakes to ... afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former."

The Appellate Body has observed in Brazil – Aircraft[45], that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel". In that same proceeding, the Panel had considered that because the DSU essentially required the DSB to establish a panel automatically upon request of a party, a panel cannot rely upon the DSB to ascertain that requisite consultations have been held and to establish a panel only in those cases. Accordingly, the Panel determined "that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute."

The requirements that apply to consultations requests were set out in Article 4.4 of the DSU, which provides, in relevant part, that "[a]ny request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."

In this respect, China argued that "indication" of the legal basis of the complaint under Article 4.4 requires significantly less than what was required under Article 6.2, i.e. "identify the specific measures at issue and provide a brief summary

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43 Appellate Body Report, Guatemala-Cement I Paras 69-76, Appellate Body Report, US-Carbon Steel Paras 125-127

44 Appellate Body Report, Maxico-Corn Syrup (Article 21.5-US), Para 58.

45 Panel Report, Brazil-Aircraft, Para 7.10 (citing) Appellate Body Report, *EC-Bananas III*, Para 142.

of the legal basis for the complaint sufficient to present the problem clearly". In China's view, an "indication" under Article 4.4 was a "hint suggestion, or piece of information from which more may be inferred" while Article 6.2 required a description that is "sufficient" meaning adequate for a certain purpose, enough, to present the problem clearly. China considered that this difference reflects the heightened burden of panel requests under Article 6.2 of the DSU and the understanding that the legal basis of a claim often evolve during the course of consultations. China thus submitted that it had met the burden of providing as "indication" in terms of Article 4.4 of the DSU.

The United States agrees that an "indication" of the legal basis did not require that all the claims be spelt out in the consultations request. However, the United States argued that this distinction was not pertinent to the issue of whether claims under the SPS Agreement were within the Panel's terms of reference, because, in its view, China's consultations request plainly states China's view that the United States' measure was not subject to the SPS Agreement.

Therefore, the Panel has decided to inquire whether China indicated the SPS Agreement as a legal basis for its complaint in its consultations request and in doing so decided to look at that consultations request as a whole and in light of the attendant circumstances. However, the Panel had not used as a basis for its determination what either party alleges took place during consultations. Therefore, the Panel had considered the exchange of letters in April 2009 – which were precisely about the scope of China's consultations request. The Panel had not considered any questions posed or answers given during the consultations.

Whether China has requested consultations pursuant to the SPS Agreement?

The United States focused its arguments on China's statement that it did not believe that the United States' measures were SPS measures and that it was requesting consultations with the United States pursuant to Article 11 of the SPS Agreement "if it were demonstrated that any such measure is an SPS measure".

According to the United States, a "conditional" request for consultations under Article 11 of the SPS Agreement did not amount to an "actual" request for consultations pursuant to Article 11 of the SPS Agreement. Most importantly, the United States contended that it would have no way of knowing whether the condition had been satisfied and that China's request had become operative.

Although the language in China's consultations request and, in particular, the reference to a "demonstration" that the measures in question were SPS measures, was not the most artful, the Panel, further to the above-mentioned jurisprudence, should not look at one phrase in the consultations request in isolation, but rather examine the consultations request as a whole and in light of the "attendant circumstances." This meant that the Panel needs to consider the consultations request in its entirety and place the SPS references in the context of the rest of the consultations request.

With respect to the rest of the consultations request, the Panel noted that China's consultations request dealt with US measures affecting the importation of poultry products from China into the United States. Additionally, in paragraph 1 of the consultations request, China stated that it "is concerned that Section 727, in conjunction with the overall US regime for regulating imports of poultry products places restrictions on the import from China of poultry products that are inconsistent with the United States' WTO obligations." The Panel was of the view that it was reasonable to interpret this reference to the overall regime for the importation of poultry products to be a reference to the PPIA as well as its implementing regulations, especially given China's reference, in the immediately succeeding paragraph to 9 CFR §381.196211 as one of several US regulations that could not be implemented because of Section 727. There was no dispute among the parties that the PPIA and the regulatory regime set up pursuant to its mandate were SPS measures.

China's consultation request, after outlining the legal basis for its complaint with respect to Articles I and XI of the GATT 1994, included, in paragraphs 6 and 7, controversial language where it specifically references the SPS Agreement. It appeared to the Panel that China was attempting to challenge Section 727 under the GATT 1994 and the Agreement on Agriculture, and, in the alternative, under the SPS Agreement in the event the United States argued that Section 727 was an SPS measure within the scope of the SPS Agreement. It thus seemed to the Panel that China wanted to ensure that the SPS Agreement was within the Panel's terms of reference in such a case. Rather than being confusing, this seems consistent with the Panel's reasoning in Korea – Commercial Vessels that "if a complaining party wishes to pursue claims in respect of a given measure under multiple provisions, whether complementarily or alternatively, not only is it permitted by Article 6.2 of the DSU to refer to all of those provisions in its request for establishment, but it is required to do so." The

Panel was of the view that the same logic should also apply to consultations requests.[46]

Given the surrounding context, the Panel was of the view that China's consultations request did "indicate" an SPS basis for its complaint, even if that basis, seen in isolation, was qualified in somewhat unclear conditional language. In that respect, it is important to note that although there were many similarities between Articles 4.4 and 6.2 of the DSU and they should be interpreted in an harmonious way, the obligation on a Member in its consultations request is to "indicate" the legal basis for the complaint whereas the obligation in the Panel request was to provide a "brief legal summary of the legal basis of the complaint sufficient to present the problem clearly." Therefore, an indication was something less than a summary sufficient to present the problem clearly. While the Panel did not wish to be perceived as encouraging WTO Members to present their problems confusingly in their consultations request, it did seem that there was a bit more leeway in how WTO Members phrase complaints in a consultations request vis-à-vis the clarity required in a panel request which was the final word on the scope of the dispute.

It seems that what had happened in this case was that China merely forecasted its expectation of obtaining a better understanding of the operation of the challenged measures and that the SPS Agreement might be relevant in the consultations request rather than simply waiting to reveal the possibility of an SPS claim in the Panel Request. The Panel found it difficult to sustain a reading of Articles 4 and 6 of the DSU whereby a complainant could make no reference to the possibility of an evolution of its claims in its consultations request and nevertheless had those claims included in the terms of reference of the Panel, yet a complainant who did mention them would have them excluded.

In light of the above, the Panel concluded, examining the consultations request as a whole that China, in its Consultation Request, indicated that the SPS Agreement would serve as the basis of its claims, albeit in a conditional manner. Additionally, an examination of the attendant circumstances, most notably the exchange of letters prior to consultations taking place, supported the conclusion that the SPS Agreement was indicated as a basis for China's claims. Accordingly, the Panel found that China did request consultations inter alia pursuant to Article 11 of the SPS

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46 Panel Report, *Korea Commercial Vessels*, Sub Paragraph 29 of Para 7.2.

Agreement and that, therefore, China's SPS claims were within its terms of reference.

The Panel therefore disagreed with the United States' contention that China did not request consultations under the SPS Agreement and finds that China did request consultations pursuant to Article 11 of the SPS Agreement, indicated the various provisions of that Agreement that were the basis for its claims, and that, therefore, China's SPS claims were within its terms of reference.

Whether the Panel may rule on an expired measure?

The United States had contended, and China agreed, that Section 727 expired on 30 September 2009, i.e. two days after the deadline for China's first written submission. This raises the question of whether the Panel should make findings on a measure that is no longer in force.

The Panel noted that the United States had not requested the Panel not to make findings on an expired measure. Nevertheless, the Panel believed that before going ahead and examining the WTO consistency of Section 727 pursuant to China's various claims, they need to decide whether to make rulings and recommendations on a measure that was no longer in force.

The United States alleged that Section 727 had expired and thus had been supplanted by Section 743. The United States further argued that any funding restriction imposed by Section 743 had been lifted as a consequence of the Secretary of Agriculture's issuance of a letter to the US Congress on 12 November 2009. As indicated above, the United States had not requested the Panel not to rule on Section 727.

China did not contest that Section 727 was no longer in force. For China, though, the expiration of Section 727 had no bearing on the Panel's terms of reference, as Section 727 expired after the Panel was established and its terms of reference were set. China contended that measures expiring after the establishment of a panel or during the Panel process had repeatedly been found by panels and the Appellate Body to be within a panel's jurisdiction. As an example, China argued, in Indonesia – Autos, the Panel rejected Indonesia's argument that the National Car program was a moot issue because it had expired. In doing so, China explained, the Panel referenced several GATT and WTO disputes where measures included in the terms of reference were terminated after the commencement of the Panel

proceedings, and where panels nevertheless went on to makes findings in respect of those measures.[47] China submits that this approach had been followed in subsequent disputes, such as EC – Selected Customs Matters and US – Upland Cotton. China stresses that, in US – Upland Cotton, the Appellate Body noted that "GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the Panel [and] [i]n none of these cases has a panel or the Appellate Body premised its decision on the view that, a priori, an expired measure could not be within a panel's terms of reference".[48]

The Panel therefore determined whether it should rule on an expired measure. The Appellate Body explained in EC – Bananas III (Article 21.5 – Ecuador II), "once a panel has been established and the terms of reference for the Panel have been set, the Panel has the competence to make findings with respect to the measures covered by its terms of reference".[49] The Appellate Body thus concluded that it is "within the discretion of the Panel to decide how it takes into account ... a repeal of the measure at issue".[50] It was therefore within the discretion of the Panel to decide whether to make findings on Section 727.

The Panel noted that, in the past, panels had decided to make rulings on expired measures where the respondent Member had not conceded the WTO inconsistency of the measure and the repealed measure could be easily re-imposed. This was precisely the case of Section 727 since the United States did not concede the alleged WTO inconsistency of Section 727 and the appropriations legislation in the United States was of an annual nature. Section 727 reiterated the language of a previous annual appropriations provision with identical wording, Section 733, and it had now expired and a new provision, Section 743, had been adopted to address FSIS access to appropriated funds for activities regarding China's equivalence application. Although the Panel acknowledged that Section 743 did not share the same language as Section 727 and its predecessor, Section 733, the Panel considered that if they refused to make findings on the expired measure – Section 727 – the Panel might be depriving China of any meaningful review of the consistency of the United States' actions with its WTO obligations, while

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47 The Panel Report, *Indonesia-Autos* para 14.9 citing panel report, *US-Wool Shirts and Blouses* and GATT disputes *EEC-Dessert Apples, EEC-Apples (US), EEC-apples I (Chile), US Canadian Tuna, EEC-Animal Feed Proteins* and US – Sec. 337.

48 Appellate Body Report, *US-Upland Cotton.*

49 Appellate Body Report. *EC-Bananas III (*Article 21.5-Ecuador II*) para 270*

50 Ibid.

allowing the repetition of the potentially WTO-inconsistent conduct. This would certainly call to mind the "moving target" scenario which the Appellate Body in Chile – Price Band System stated that a complainant should not have to face.

The Panel thus proceeded to make findings on the WTO consistency of Section 727 which was within its terms of reference. Nevertheless, the Panel recognized that it would not be appropriate to make recommendations pursuant to Article 19 of the DSU with respect to a WTO-inconsistent repealed measure that had ceased to have legal effect. Indeed, if the Panel found that Section 727 was inconsistent with any of the provisions of the covered agreements within its terms of reference, it would be pointless to ask the United States to bring Section 727 into conformity with those covered agreements since the measure is no longer in force.

The Panel therefore concluded that to find the WTO-consistency of Section 727 which was within its terms of reference.

Whether Section 727 was an SPS measure within the scope of the SPS Agreement?

China's characterization of Section 727 as an SPS measure had, during the proceedings, evolved from one extreme to the other. Following the language in both its consultations and Panel requests, China had argued in its first written submission that based on its text and legislative context, Section 727 was but a budgetary measure which resulted in the banning of imports of poultry products from China, and thus would not appear to be an SPS measure. Therefore, China's SPS claims were conditionally made to the extent that Section 727 may be considered to be an SPS measure within the meaning of the SPS Agreement.

During the first substantive meeting, China radically changed its position and argued for the first time that Section 727 is an SPS measure. China justified its new approach on the assertion by the United States that the policy objective for enacting Section 727 was the protection of human and animal life and health from the risk posed by the importation of poultry products from China.

The United States first noted that the burden was on China, in establishing its claim, to prove that Section 727 was an SPS measure. Further, the United States argued that the mere fact that a measure implicates food safety did not dictate whether a measure was covered by the SPS Agreement. Additionally, for the United States, even if a measure was covered by the definition of SPS measures in

Annex A, it did not necessarily follow that all of the obligations in the SPS Agreement apply to that particular measure.

After having initially argued that Section 727 was only a budgetary measure as opposed to an SPS measure, China changed its position and argued at the first substantive meeting that the United States had demonstrated that Section 727 was an SPS measure.

Concerning the definition of an SPS measure, China argued that SPS measures were defined in Annex A (1) of the SPS Agreement based on their purpose and legal form. In its view, this conclusion was reached when interpreting Annex A (1) on the basis of the Vienna Convention on the Law of the Treaties ("VCLT"). According to China, "SPS measures are defined in Annex A (1) as measures enacted for one of the purposes enumerated in paragraphs (a) through (d) – including the protection of 'human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease causing organisms in food, beverages or feedstuffs", "and the 'form' of which are 'laws, decrees, regulations, requirements or procedures."'

China referred to the statements made by the United States in its first written submission that "Section 727 was enacted with the policy objective of protecting against the risk to human and animal life and health posed by the importation of poultry products from China", and to the Joint Explanatory Statement accompanying Section 727 which in its view "defines the alleged risk to human health addressed by the measure in the broadest of terms, namely "concerns about contaminated foods" originating in China. China pointed out that, in the United States' first written submission, the United States referred to the risk posed by Salmonella, Listeria, and Campylobacter to illustrate the inherent danger of consuming poultry that was not produced under sanitary conditions or thoroughly inspected for contaminants and the FSIS audit procedures that were suspended due to Sections 727 include rigorous assessment of the testing methods for Salmonella, Listeria, and E. coli in production facilities. China argued that "[b]ased on the description of the purpose of Section 727 in the Explanatory Statement and the representations made in the United States' first written submission, Section 727 clearly falls within the confines of the definition of an SPS measure, as stated in Annex A(1)(b)." Further, it notes that the form of Section 727 – a legal provision – clearly falls within the illustrative list in Annex A (1). China concluded by stating that because Section 727 affects international trade, it is subject to the SPS Agreement under Article 1.1.

China noted that the United States had never denied, rebutted or otherwise responded to the Panel's question on whether the United States considered that Section 727 satisfied the definition of an SPS measure in Annex A of the SPS Agreement.

The United States noted that China, as the complaining party, bears the burden of proving that Section 727 met the definition in the SPS Agreement of an SPS measure and of explaining how and why each SPS provision cited applies to Section 727 including a consideration of the nature of the measure. Moreover, China also had the burden of explaining precisely what has changed from its first written submission where it claimed that Section 727 was simply a "budgetary" measure to the first substantive meeting when China argued that Section 727 is an SPS measure. According to the United States, China had not met its burden to prove how the measure meets each element of the definition in the SPS Agreement.

The Panel examined whether the measure at issue, i.e. Section 727, was an SPS measure within the scope of the SPS Agreement. The Panel first reviewed the provisions of the SPS Agreement setting forth what an SPS measure was and how they had been interpreted by panels and the Appellate Body. The Panel then looked into whether Section 727 falls within the definition of an SPS measure under the SPS Agreement. The Panel acknowledged that it is China's burden to prove that Section 727 is indeed an SPS measure.

The concept of SPS measure under the SPS Agreement

Article 1 of the SPS Agreement provides for the scope of application of the Agreement as follows:

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

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

Therefore, there were two conditions for the application of the SPS Agreement to a given measure; namely, (i) the measure must be an SPS measure as defined in Annex A of the SPS Agreement, and (ii) the measure has to directly or indirectly affect international trade. We turn to examine these two conditions.

Definition of SPS measures

Annex A of the SPS Agreement defines SPS measures in the following manner:

1. Sanitary or phytosanitary measure – Any measure applied:
...

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; ...

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

The Panel noted that there had been six completed disputes, to date, which have dealt with SPS issues. In all of these cases, with the exception of EC – Approval and Marketing of Biotech Products, determining whether the measure at issue was an SPS measure had been straight forward.[51]

The first dispute where the Panel examined the definition of an SPS measure in depth was EC – Approval and Marketing of Biotech Products.[52] In that case, the Panel examined whether various EC actions constituted SPS measures that would fall under the SPS Agreement. In particular, the Panel looked at the definition of an SPS measure set out in Annex A(1) and explained that in determining whether

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51 Panel Report, *EC-Hormones Para 8.22*, Panel Report *Australia-Salmon*, Para 8.30, Panel Report, *Japan-Agricultural Products II*, Para 8.12 and Japan-Apples Para 8.19

52 Panel Report, *EC-Approval* and *Marketing of Biotech Products*, Para 7.149

a measure was an SPS measure, regard must be had to elements such as the purpose of the measure, its legal form and its nature. The Panel considered that the purpose element was addressed in Annex A (1)(a) through (d) ("any measure applied to"); the form element is referred to in the second paragraph of Annex A(1) ("laws, decrees, regulations") and the nature of the measure was addressed by the second paragraph of Annex A(1) "requirements and procedures". The Panel thus took the phrase "laws, decrees, regulations, requirements and procedures including ...," and divided it into two components: "Laws, decrees and regulations," it said, referred to the "form" of the measure; and "requirements and procedures" referred to its "nature". The Panel found that one of the measures at issue, a moratorium, did not have the "nature" of an SPS measure – because it did not provide for requirements or procedures – and therefore could not be considered an SPS measure for purposes of Annex A(1) of the SPS Agreement.

The Panels in US/Canada – Continued Suspension followed the approach of the Panel in EC –Approval and Marketing of Biotech Products to the extent that they indicated that they were examining the purpose, form and nature of the measure but did not examine the meaning of the term "nature". The Panels first determined whether the purpose of the measure fell within

Annex A (1)(b), then they considered whether the measure fell within "laws, decrees and regulations as well as requirements and procedures".[53] Thus, the Panels found that the measure at issue was adopted for the purpose of protecting human life from contaminants in food and took the form and nature contemplated in the second paragraph of Annex A, hence an SPS measure pursuant Annex A(1)(b) of the SPS Agreement.

Directly or indirectly affect[s] international trade

Even if a measure falls within the definition of an SPS measure in Annex A(1) of the SPS Agreement, further to Article 1.1 of the SPS Agreement, such measure still needs to be a measure that directly or indirectly affect[s] international trade to be covered by the disciplines of the SPS Agreement.

The Panel took note of the other previous SPS disputes, in Australia – Salmon, neither of the parties to the dispute contested that the measure at issue affected

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[53] Panel Report, *US-Continued Suspension* para 7.433

international trade.[54] The Panel indicated that it agreed it affected international trade. In EC – Hormones, the Panel agreed with the parties that the measure at issue affected international trade, and added that it could not be contested that an import ban affects international trade.

The Panel in EC – Approval and Marketing of Biotech Products stated that, consistent with Panels interpreting other provisions of the WTO agreement, it determined that "it is not necessary to demonstrate that an SPS measure has an actual effect on trade" (emphasis added). It further noted that Article 1.1 of the SPS Agreement merely required that an SPS measure "may, directly or indirectly, affect international trade." The Panel thus concluded that measures which caused delays or imposed information and documentation requirements on applicant's affected international trade.

Whether Section 727 is an SPS measure under the SPS Agreement

The Panel therefore needs to determine whether Section 727:

i. falls within the definition of Annex A(1) of the SPS Agreement and

ii. affects directly or indirectly international trade.

The measure at issue

The Panel recalled that Section 727 was enacted on 11 March 2009 and that it expired on 30 September 2009. The panel further recalled that the AAA of 2009, in which Section 727 appears, was a regular appropriations bill that provides the necessary funding for the FSIS to carry out, inter alia, the functions foreseen by the PPIA.

7.92 Section 727 reads as follows:

"None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."

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[54] Panel Report, *Australia-Salmon*, Para 8.30 and Panel Report *EC-Hormones,* Para 8.23

The AAA of 2009 was accompanied by a Joint Explanatory Statement (JES) which explains why the Congress restricted the funds for establishing or implementing rules allowing the import of poultry products from China. The JES provides the following:

"There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to more forward with rules that would allow for the importation of poultry products from China into the U.S. It is noted that China has enacted revisions to its food safety laws. USDA is urged to submit a report to the Committees on the implications of those changes on the safety of imported poultry products from China within one year. The Department is also directed to submit a plan for action to the Committees to guarantee the safety of poultry products from China. Such plan should include the systematic audit of inspection systems, and audits of all poultry and slaughter facilities that China would certify to export to the U.S. The plan also should include the systemic audit of laboratories and other control operations, expanded port-of-entry inspection, and creation of an information sharing program with other major countries importing poultry products from China that have conducted audits and plant inspections among other actions. This plan should be made public on the Food Safety and Inspection Service web site upon its completion."

Whether Section 727 falls within the definition of Annex A (1)

The Panel thus considered whether Section 727 fell within the definition of Annex A(1) of the SPS Agreement. The panel in EC – Approval and Marketing of Biotech Products, later followed by the Panels in US/Canada – Continued Suspension, explained that, in determining whether a measure was an SPS measure within the definition in Annex A (1) of the SPS Agreement, regard must be had to elements such as the purpose of the measure, its legal form and its nature. The Panel in EC – Approval and Marketing of Biotech Products considered that the purpose element was addressed in Annex A (1)(a) through (d) ('any measure applied to'); the form element is referred to in the second paragraph of Annex A(1) ('laws, decrees, regulations') and the nature of the measure is addressed by the second paragraph of Annex A(1) "requirements and procedures".

The Panel asked the parties for their views on whether the Panel should follow the above three pronged test elaborated by the Panel in EC – Approval and Marketing of Biotech Products. The parties had opposing views; while China wanted the Panel not to follow the test instituted by the Panel in EC – Approval

and Marketing of Biotech Products, the United States requested to follow these cases. For China, interpreting the definition of Annex A(1)(b) in light of the rules in the VCLT, SPS measures were defined on the basis of their purpose and legal form but claims that the third element, "nature", was not mentioned in the definition.

The United States, however, argued that it was essential for the Panel to review carefully all aspects of a measure, including its nature, purpose and form, in order to determine how, if at all, a food safety measure fits under any particular provision of the SPS Agreement. The United States, however, did not elaborate on how the nature of the measure should be determined, or how the reasoning of the Panel in EC – Approval and Marketing of Biotech Products applies to the facts of this case.

The Panel therefore had to decide which approach to follow; i.e. look into the purpose, form and nature of Section 727, or just into the purpose and form.

The Panel noted that the text of Annex A (1) did not mention the term "nature" but neither does it mention the terms "purpose" and "form" . This did not mean that an analysis of the ordinary meaning of the wording of Annex A(1) in its context and in light of its object and purpose, would not lead us to examining both the purpose and form of Section 727 in order to determine whether it was an SPS measure.

The Panel noted that the first part of Annex A (1) (a) to (d) refers to an SPS measure as "any measure applied ... to protect ... to prevent". Both parties and the Panel agreed that this language refers to the "purpose" of a measure. The second part of Annex A(1), after having enunciated the possible purposes for which an SPS measure could be applied, goes on to provide a list of the types of SPS measures. It reads "[SPS] measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia ..." This wording is followed by a list of possible types of SPS measures such as:

"[E]nd product criteria; process and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging labelling requirements directly related to food safety."

The Panel carefully examined the Panel's findings in EC – Approval and Marketing of Biotech Products as regards the legal basis for distinction of "form" and "nature" and had difficulty with following the reasoning. The rationale for dividing the phrase "laws, decrees, regulations, requirements and procedures including ...," into "form" and "nature" was not clear as the Panel did not elaborate on this point. The Panel did not explain how "requirements and procedures" were somehow fundamentally different from "laws, decrees, and regulations" or why it believed that all SPS measures somehow have the nature of a "requirement" or "procedure". The Panel noted that there was no such separation and a plain reading might lead one to believe that "requirements and procedures" were also descriptions of the possible types or "forms" of an SPS measure while the substantive descriptions following "including inter alia" were just illustrative examples of the types of SPS measures Members have imposed.

In the view of the Panel, the nature of a measure was an intrinsic element of its form. Therefore, reading the second part of Annex A(1) as a whole, means that an examination of whether a measure was of the type set forth in Annex A(1) will encompass an holistic examination of the measure, including, both its form and nature. The Panel had therefore examined whether Section 727 was an SPS measure by looking at whether it serves one of the purposes set forth in Annex A(1)(a) through (d) and whether it was of the type listed in the second part of Annex A.

Annex A (1)(a) through (d)

According to the Panel in EC – Approval and Marketing of Biotech Products, the purpose element is addressed in Annex A (1) (a) through (d) ("any measure applied to").[55] The Panel in Colombia – Ports of Entry[56] held that municipal law is to be approached as a "factual issue". In making an objective assessment of municipal legislation, a panel should consider the very terms of the law, in their proper context, and complemented, whenever necessary, with additional sources, which may include proof of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof would vary from case to case.

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55 Panel Report *EC-Approval and Marketing of Biotech Products*, para 7.149, Panel Report US-ontinued Suspension, para – 7.429.

56 Panel Report *Columbia-Ports of Entry*, para 7.93, Appellate Body Report India-Patents (US) Para 66, Panel Report, US-Section 301 Trade Act, Para 1.78

China had the burden of adducing evidence as to the scope and meaning of the relevant US legislation to substantiate its assertion that it is WTO-inconsistent. Such evidence would typically be produced in the form of the text of the relevant legislation or legal instrument, which China has done. In this case, China had produced not only the text of Section 727, but also the JES which explains the purpose of Section 727. In addition, China has argued that the exhibits produced by the United States including a number of statements from the US Congress, support the premise that the purpose of Section 727 was the protection against the risk to human and animal life and health from contaminated food.

The Panel began its analysis by considering the very terms of Section 727 to ascertain its purpose. Hence, on its face, Section 727 was a measure which purely relates to the appropriated funds for the activities of an Executive Branch agency of the United States Government. There was nothing in its specific text which addresses the purposes embodied in Annex A (1) (a) through (d). As China has pointed out, the United States itself has argued that the policy objective underlying Section 727 was to protect against the risk to human and animal life and health arising from the importation of poultry products from China It had further argued that this policy objective was reflected in the legislative history of the measure. The Panel noted that the JES plainly states that the purpose of Section 727 was to prohibit the FSIS from taking actions which the Congress felt would be contrary to its concerns about contaminated food from China.

The United States had drawn the Panel's attention to a number of statements from the US Congress showing that the objective of Section 727 was to address concerns about the risk to human and animal life and health posed by the prospect of importation of poultry products from China. The legislative history of the measure appeared to reflect the policy objective referred to by the United States. The United States provided the Panel with the FY 2008 Omnibus Appropriations Act Committee Report which refers to the barring of the funds due to food contamination episodes in China:

"Given the recent situation involving pet foods contaminated with melamine from China and the repeated, serious food contamination incidents within China, it is clear that we cannot rely on the Chinese government to ensure its plants adhere to U.S. standards in processing. Weak government controls in China, coupled with the high incidence of H5N1 in that country, provide no assurance that the returned product is actually from U.S. poultry or that poultry carrying the H5N1 virus is not used instead of U.S.-produced poultry. While FSIS has said that the

products would be safe because processing would kill any H5N1 viruses, U.S. inspectors will not be standing over the shoulders of Chinese workers; in fact, U.S. inspectors would visit the Chinese plants at most once a year."

The United States also cited the statements of Representative Rosa DeLauro, the author of Section 727, where she said that the objective of Section 727 was to address concerns about the health risks posed by the importation of poultry products from China. These statements could be seen to reflect the legislative intent of Section 727.

China asserted that, according to the JES, the purpose of Section 727 was to protect human life and health and not animal health. It stated that the JES refers to "serious concerns about contaminated food' without mentioning any animal diseases at all." The United States argued that the policy objective of Section 727 was to protect human and animal life and health from the risk posed by the importation of poultry products from China. The Panel noted that the House Committee Report also referred to the protection of animal life and health.

In the Panel's view, Section 727 was enacted for the purpose of protecting human and animal life and health from the risk posed by the prospect of the importation of contaminated poultry products from China. Accordingly, the Panel concluded that Section 727 was a measure applied for the purpose set forth in Annex A (1) (b).

Second part of Annex A (1)

The second part of Annex A (1) provides that SPS measures "include all relevant laws, decrees, regulations, requirements and procedures ... ."

China argued that Section 727 was a budgetary measure under the legal system of the United States. The Panel understood this to be a fact not contested by the United States. According to China, the obvious conclusion was that, given that Section 727 was a provision of a law, it falls within the illustrative list of measures in Annex A(1).

The Panel noted that Section 727 was a provision of a law, the AAA of 2009314, dealing with appropriations relating to the activities of an Executive Branch agency of the United States Government. The fact that Section 727 dealt with monetary appropriations concerning the activities of an Executive Branch agency of the

United States Government, instead of directly regulating sanitary and phytosanitary issues could be viewed as signifying that Section 727 was not an SPS measure. Indeed, a legal provision dealing with monetary appropriations which would affect the activities of a given government agency did not appear to fit the common perception of an SPS measure. The Panel had thus carefully pondered this approach, being the first time that a measure such as Section 727 had been challenged under the SPS Agreement. Although, Section 727 was an appropriations bill, it was Congress' way of exerting control over the activities of an Executive Branch agency responsible for implementing substantive laws and regulations on SPS matters. Thus, the fact that it was an appropriations bill did not exclude it from the scope of the types of SPS measures set forth in the second part of Annex A (1).

Given that Section 727 was a measure applied to achieve the purpose set forth in subparagraph (b) of Annex A(1) and it is a measure of the type described in the second part of Annex A(1), the Panel concluded that Section 727 falls within the definition of an SPS measure in Annex A(1) of the SPS Agreement.

Whether Section 727 affected directly or indirectly international trade?

Once the Panel had concluded that Section 727 falls within the definition of an SPS measure in Annex A (1) of the SPS Agreement, the Panel needed to look at the second element of the test to decide whether Section 727 was an SPS measure within the scope of the SPS Agreement, i.e. whether it affects directly or indirectly international trade.

In this respect, China argued that by preventing China from exporting poultry products to the United States, Section 727 directly or indirectly affects international trade within the meaning of Article 1.1 of the SPS Agreement" and therefore Section 727 was a measure subject to the SPS Agreement. The United States had not contested this statement by China.

In the Panel's view, Section 727 did affect international trade because it prohibited the FSIS from using appropriated funds for the establishment and implementation of a rule allowing the importation of poultry products from China. Whether a measure affects international trade directly or indirectly depends on how one views it. The Panel noted that regardless of whether one considers the effect of Section 727 as direct or indirect, the effect of the measure was such that while it was in force poultry exports from China to the United States could not commence. Therefore, Section 727 directly or indirectly affected international trade

in poultry products. Thus, the Panel concluded that Section 727 also satisfied the second condition in Article 1 of the SPS Agreement.

Having concluded that Section 727 falls within the definition of an SPS measure in Annex A(1) of the SPS Agreement and that it directly or indirectly affected international trade, the Panel found that Section 727 was an SPS measure within the scope of the SPS Agreement.

Whether Article 4 was the only provision of the SPS Agreement applicable to section 727?

The United States argued that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding. In this context, the United States contended that Section 727 would be subject to the provisions of Article 4 of the SPS Agreement instead of the various claims presented by China because Article 4 was specifically addressed to regulate equivalence-based measures. The Panel noted that Article 4 of the SPS Agreement was not part of our terms of reference. Pursuant to the obligation under Article 11 of the DSU to determine the applicability of the cited provisions, before entering into an examination of China's claims, the Panel examined the United States' contention that the provisions of the SPS Agreement China cited do not apply to Section 727 and that only Article 4 of the SPS Agreement was the applicable provision.

The United States argued that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding. It continued to explain that action by Congress was not separate and apart from the system in the United States to ensure the safety of imported food, but rather, part of the system. It stated that Section 727 was part of the equivalence regime itself. In this respect, it characterized Section 727 as a "procedural requirement adopted in the course of an ongoing equivalency review". The United States further explained that the requirement imposed by Section 727 was that FSIS could not use appropriated funds to establish or implement equivalence rules related to Chinese poultry during fiscal year 2009.

China challenged the United States' characterization of Section 727. It argued that the measure was not an "intermediate step" or a "procedural requirement" in the standard FSIS equivalency process and that rather, it prevented FSIS from performing any science-based analysis of the equivalence of China's poultry safety and inspection regime. To that end, China noted that neither the CFR nor the

FSIS handbook refer to Congressional action blocking the application of procedures for one applicant country. China further argued that Section 727 was a "law" enacted as part of the AAA 2009 which was separate and legally distinct from the PPIA and the FSIS regulations. Accordingly, China submitted that Section 727 was a distinct SPS measure reflecting a separate ALOP that was applied only to China, and that it must comply with all of the provisions of the SPS Agreement.

The parties argued vigorously about the legal characterization that the Panel should assign to Section 727, and the implications it had for the application of several provisions of the SPS Agreement. The parties disputed two main issues:

First, whether Section 727 was part of an equivalence regime, and Second, whether it was the type of SPS measure subject to the obligations embodied in Articles 2 and 5 of the SPS Agreement or rather only subject to Article 4 of the SPS Agreement.

In the Panel's view, the paramount question was to determine whether Section 727 was an SPS measure subject to the provisions of the SPS Agreement claimed by China. The Panel commenced its analysis by addressing the United States' argument that Article 4 was the only provision in the SPS Agreement that was applicable to equivalence-based measures, such as, in its view Section 727. The Panel recognized that China had made no claim with respect to the consistency of Section 727 with Article 4 and thus Article 4 was outside the terms of reference. Therefore, the Panel had not analyzed of what was required to comply with the obligations in Article 4. Rather, the Panel's examination of the provision simply concerned a determination of whether it was the only provision in the SPS Agreement that could apply to Section 727.

The Panel then turned to the text of Article 4 which provides as follows:

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

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

The Panel noted that equivalence regimes adopted pursuant to Article 4 had never been the subject of a dispute before the DSB. There was however, a decision from the SPS Committee entitled "Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures" (the Decision).[57] This Decision was adopted under the authority of the SPS Committee to carry out the functions necessary to implement and further the objectives of the SPS Agreement under Article 12. Its preamble provides that the Decision was adopted "[d]esiring to make operational the provisions of Article 4" of the SPS Agreement.

The Decision sets out guidelines for any Member who requests the recognition of equivalence of their SPS measures and for the importing Member who was the addressee of such request. As contemplated in the Decision, upon a request for equivalence, the importing Member should explain the objective and rationale of the SPS measure and identify clearly the risks that the relevant measure was intended to address. The Decision further explained that the importing Member should indicate the ALOP which its SPS measure was designed to achieve. Such an explanation should be accompanied by a copy of the risk assessment on which the SPS measure was based on a technical justification based on a relevant international standard, guideline or recommendation. The exporting Member should then provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the ALOP identified by the importing Member. The importing Member should analyze such information with a view to determining whether the exporting Member's SPS measure achieves the ALOP provided by its own relevant SPS measure.

The Panel noted that while this decision was not binding and did not determine the scope of Article 4, this Decision expands on the Members' own understanding of how Article 4 relates to the rest of the SPS Agreement and how it was to be implemented. The Panel saw nothing in Article 4 or the Decision which suggested that Article 4 was the only provision in the SPS Agreement which regulated the

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[57] Committee on Sanitary and Phytosanitary Measures, *Decision on the implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary measures*, document G/SPS/19/rev.2, dated 23rd July, 2004

operation of equivalence regimes, including their "procedural requirements" or that it should be applied in isolation from other relevant provisions of the SPS Agreement. In fact, the Decision stated that the importing Member should explain its SPS measures by identifying the risk and provide a copy of the risk assessment or technical standard on which the measure was based. Further, it required the importing Member to analyze the science-based and technical information provided by the exporting Member with respect to that Member's own SPS measure(s) to examine if the measure achieved the importing Member's ALOP. The Decision referred inter alia to risk assessments, international standards and ALOPs, which were governed by Article 2 which embodies the "Basic Rights and Obligations", Article 3 governing harmonization with international standards and Article 5 which regulated the assessment of risk and determination of the ALOP. The Decision, therefore, implied that measures taken as part of an equivalence regime, subject to Article 4, should also comply with the other relevant provisions of the SPS Agreement.

In addition, there was nothing in the text of Article 4 that suggested that it should be applied in a vacuum, isolated from other relevant provisions of the SPS Agreement. This was further reinforced by the fact that, as stated by the Panel in Japan – Apples, Article 4 was not a defense against violations of other provisions of the SPS Agreement.[58]

The Panel did not intend to exhaustively explain the relationship between Article 4 and other provisions of the SPS Agreement. Suffice it to say that Article 4 was to be applied to the exclusion of other relevant provisions of the SPS Agreement. A determination, of which particular provisions were applicable to a given measure, must be done on a case-by-case basis. It was the Panel's view that nothing in Article 4 a priori precludes a given measure from being subject to the disciplines of Article 2, 4 and 5 at the same time.

As the United States noted, Section 727 was a measure related to the equivalence regime set up by the United States. In particular, Section 727 was an expression of the US Congress role in overseeing Executive Branch agencies. Article 4 was ipso facto the only provision applicable to measures adopted in the context of an equivalence regime. In the view of the Panel, a determination of what provisions of the SPS Agreement may apply to a given measure should be done on a case-by-case basis. Consequently, the Panel examined the particular features of

[58] Panel Report, *Japan-Apples*, para 8.107.

Section 727 and determine whether the provisions cited by China, namely Articles 2 and 5 of the SPS Agreement were applicable to it.

The Panel noted that prior panels had discussed the scope of both Articles 2 and 5 by making a distinction between "substantive" SPS measures taken to achieve a Member's ALOP and "procedural requirements". In particular, the Panel in Australia – Salmon (Article 21.5 – Canada), made a distinction between risk reduction measures allegedly needed to achieve a WTO Member's ALOP, which it called "substantive SPS measures in their own right" and procedures or information requirements to check and ensure the fulfillment of sanitary measures that are subject to Annex C (1)(c) of the SPS Agreement.

The Panel noted further that Article 2 was entitled "Basic Rights and Obligations". The overarching and encompassing title of this Article, led the Panel to conclude that the obligations in Article 2 informed all of the SPS Agreement. The Panel found support for understanding in the prior decisions of panels and the Appellate Body with respect to the relationship between Articles 2 and 5. In particular, the Appellate Body had explained that the obligations in Article 2 and Article 5 should be constantly read together. The Appellate Body stated that Article 2.2 informs and imparts meaning to Article 5.1, and that similarly, Article 2.3 informs Article 5.5. Further, the Panel in Japan – Agricultural Products II stated that the more specific language of Article 5.6 should be read in light of the more general language in the first requirement of Article 2.2.[59]

Article 2.2 provides that:

"Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. " The Panel in EC – Approval and Marketing of Biotech Products explained that Article 2.2 contains three separate requirements:

i. the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health;

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[59] Panel Report, Japan-Agricultural Products II, para 8.71. Also approved by the Panel Report, EC-Approval and marketing of Biotech Products, para 7.1433

ii. the requirement that SPS measures be based on scientific principles; and

iii. the requirement that SPS measures not be maintained without sufficient scientific evidence.[60]

The Panel noted that China's claim related only to the third requirement of Article 2.2 of the SPS Agreement. Therefore, the Panel focused on whether this third requirement, was applicable to Section 727. The text of Article 2.2 plainly stated that it applies to "any" SPS measure. The Panel saw nothing in the language of Article 2.2 that would somehow exempt an SPS measure from its scope. The Panel found that Section 727 was an SPS measure, regardless of whether it relates to equivalence. Accordingly, the Panel concluded that the disciplines of Article 2.2 apply to Section 727 and China may pursue a claim on this basis.

The Panel now turned to Article 2.3 of the SPS Agreement. This provision provides that:

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

The United States argued that "it is unclear whether Article 2.3 is intended to apply to a procedural requirement, rather than a substantive SPS measure, and China has presented no explanation of how Article 2.3 would apply." China contested this assertion by arguing that the text of Article 2.3 referred to SPS measures without distinguishing between different types or forms, and that all SPS measures were disciplined by Article 2.3.

The text of Article 2.3 obliged Members to ensure non-discrimination in "their SPS measures" without making any distinction between possible types of SPS measures. Given that it embodies a non-discrimination obligation, the Panel saw no reason to conclude that Article 2.3 of the SPS Agreement would be inapplicable to procedural requirements as the United States argued. Indeed, both "substantive" SPS measures as well as procedural and information requirements could be applied in a manner which arbitrarily or unjustifiably discriminated between Members or

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[60] Panel Report, *EC-Approval and Marketing of Biotech Products*, para 7.1424

constitutes a disguised restriction on international trade. The Panel saw no reason why such arbitrary or unjustifiable discrimination or disguised restrictions on trade would be prohibited for one type of SPS measure and yet allowed for another. The broad wording of Article 2.3 of the SPS Agreement and the nature of the obligations it contained was bound to be applicable to all SPS measures. The Panel found that Section 727 was an SPS measure, regardless of whether it relates to equivalence. The Panel concluded that the disciplines of Article 2.3 apply to Section 727 and China may pursue a claim on this basis.

With respect to China's claims under Article 5, the Panel noted that the Panel in EC – Approval and Marketing of Biotech Products assessed the scope of Articles 5.1, 5.5, and 5.6 of the SPS Agreement and determined that that these provisions apply to measures aimed at achieving the relevant Member's ALOP. The type of measure referred to by the Panel in EC – Approval and Marketing of Biotech Products as being subject to Article 5 appeared to be the same as the "substantive SPS measure in its own right" referred to by the Panel in Australia – Salmon (Article 21.5 – Canada). The Panel found the reasoning of these prior panels to be persuasive and make it our own.

Because the provisions in Article 5 cited by China apply to "substantive" SPS measures, the Panel turned now to assess whether Section 727 was a "substantive" SPS measure which must comply with the obligations in Articles 5.1, 5.2, 5.5 and 5.6.

The United States' argued that there was a risk to human and animal life and health from the importation of poultry products from China. In its view, "this risk results from both the inherent danger of consuming poultry that is not produced under sanitary conditions or thoroughly inspected for contaminants, the risk to animal life and health from the import of poultry infected with avian influenza, and the particular risk that exists when importing food from China due to China's history of food safety scandals and longstanding systemic issues with smuggling, corruption, and the inadequate enforcement of its food safety laws."

The United States thus contended that Section 727 ensured that no Chinese poultry would be imported during 2009 by ensuring that equivalence rules for Chinese poultry would not be established and thus protect life and health. The United States further argued that this was one of the ways in which Section 727 contributed to poultry products from China being considered "safe", and it had already mentioned that "safe" was the ALOP enshrined in the PPIA. In addition,

the United States argued that Section 727 and its JES also contributed to the protection of life and health by ensuring that FSIS would take additional steps to evaluate China's food safety inspection system in light of its recent food safety crises, enforcement issues, and new food safety law.

The establishment and implementation of a rule by FSIS in the Federal Register allowing the importation of poultry products from a given country was a prerequisite for the importation of such products. Without the establishment or implementation of this rule, countries were prohibited from importing poultry products to the United States.

Section 727 thus forbids the FSIS to use appropriated funds to "establish" or "implement" a rule allowing the importation of poultry products from China. This funding restriction, although not directly prohibiting the importation of Chinese poultry products, had the effect of prohibiting the importation of poultry products from China because without a rule being established / implemented, Chinese poultry products were banned from entering the US market.

It was through this ban, as well as the related activity that the USDA was urged to undertake, that Section 727 would be contributing to combating the risks highlighted by the United States. The United States had referred to certain risks that Chinese poultry might entail – contaminants and avian influenza – and the need to prevent them entering its territory through a prohibition on importation. The United States had sought to achieve its ALOP – poultry products in the market being safe – through a ban on the importation of Chinese poultry products. The Panel therefore concluded that Section 727 was a "substantive SPS measure in its own right" because it was enacted to achieve the United States' ALOP for poultry products from China. Section 727 was therefore subject to the obligations under Articles 5.1, 5.2, .5.5, 5.6, 2.2 and 2.3 of the SPS Agreement.

Having concluded that China has raised claims regarding the consistency of Section 727 with provisions that are applicable to it, the Panel thus proceeded to examine the claims presented by China under the SPS Agreement.

Whether the section 727 was inconsistent with Articles 2.2, 5.1 and 5.2 of the SPS Agreement?

China argued that Section 727 was not supported by a risk assessment and, therefore, it was inconsistent with Articles 2.2, 5.1 and 5.2 of the SPS Agreement.

China noted that there was no indication in any publicly available documentation that Section 727 was enacted on the basis of scientific evidence demonstrating that Chinese poultry products posed any specific health threat as required by Article 2.2, or on the basis of a risk assessment as required by Article 5.1 of the SPS Agreement. China submitted that the legislative history of Section 727 did not indicate that there was any scientific evidence underpinning the provision sufficient to meet the standards of Article 2.2 of the SPS Agreement. It pointed to the fact that the JES did not mention any specific health threat posed by Chinese products that Section 727 was meant to address. Further, China argued that the funding restriction would eventually impede the elaboration of a risk assessment because the FSIS' expert scientists were prohibited from investigating the risk by the very terms of Section 727. Finally, China noted that had United States conducted a proper risk assessment, it would not have resulted in a total ban of Chinese poultry.

United States argued that Articles 2.2, 5.1 and 5.2 of the SPS Agreement did not apply to Section 727 because it was a procedural requirement adopted in the course of an equivalence determination. In response to a question by the Panel, the United States argued that Section 727 was based on science and that it was intended to address food safety problems identified with respect to China and that there was a need to ensure that exports from China would be safe.

a. Relationship between Articles 2.2, 5.1 and 5.2 of the SPS Agreement – Order of analysis

Articles 2.2, 5.1 and 5.2 of the SPS Agreement were provisions that deal with the scientific foundation of SPS measures. The Appellate Body has ruled that Articles 2.2 and 5.1 of the SPS Agreement should "constantly be read together", because Article 5.1 of the SPS Agreement might be viewed as a specific application of the basic obligations contained in Article 2.2 of the SPS Agreement. Therefore, according to the Appellate Body, Article 2.2 informed Article 5.1 and thus the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1.

An SPS measure which was not based on a risk assessment conducted according to the requirements in Article 5.1 and 5.2, this measure could be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. Nonetheless, given the more general character of Article 2.2 of the SPS Agreement not all violations of Article 2.2 are covered by Article 5.1 and 5.2 of the SPS Agreement.

b. Article 5.1 and 5.2 of the SPS Agreement

Article 5.1 of the SPS Agreement enunciates the basic principle that SPS measures must be based on a risk assessment. This provision reads as follows:

"Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal orplant life or health, taking into account risk assessment techniques developed by the relevant international organizations."

Article 5.2 of the SPS Agreement further instructs WTO Members on how to conduct a risk assessment. Specifically, Article 5.2 states that:

"In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine and other treatment."

The Panel in Japan – Apples noted that Article 5.1 and 5.2 of the SPS Agreement "directly inform each other, in that paragraph 2 sheds light on the elements that are of relevance in the assessment of risks foreseen in paragraph 1". Therefore, because Article 5.2 imparts meaning to the general obligation contained in paragraph 1 to base measures on an "assessment of risks".

An analysis under Article 5.1 of the SPS Agreement would consist of answering two fundamental questions: first, was a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the elements listed in Article 5.2, conducted? Second, is the SPS measure based on that risk assessment?

In determining whether a measure was based on a risk assessment within the meaning of Article 5.1 of the SPS Agreement, one needs to first determine whether a risk assessment was conducted at all. In order to do so it is helpful to start by looking into what a risk assessment is, in light of the definition in Annex A (4).

c. The concept of risk assessment pursuant to Annex A(4) of the SPS Agreement

The concept of risk assessment was defined in Annex A (4) of the SPS Agreement as follows:

"The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs." (Emphasis added).

Annex A (4) therefore provides for two different types of risk assessment depending on whether the imposing Member was analysing the "likelihood"of entry, establishment or spread of a pest or disease" or rather analysing "the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins, or disease-causing organisms in food, beverages or feedstuffs".

As noted above, Section 727 satisfied the definition of an SPS measure under Annex A (1) (b) of the SPS Agreement. It would seem that SPS measures under Annex A (1) (a) and (c) would require risk assessments conducted pursuant to the definition under the first sentence ofAnnex A (4), while those which satisfy the definition of an SPS measure under Annex A(1)(b) would require that the risk assessment be conducted pursuant to the second sentence of Annex A(4).

With respect to the second sentence of Annex A (4) of the SPS Agreement, the Panels in US/Canada – Continued Suspension held that such a risk assessment required the imposing Member to:

i. identify the additives, contaminants, toxins or disease-causing organisms in food, beverages or feed stuffs at issue (if any);

ii. identify any possible adverse effect on human or animal health; and

iii. evaluate the potential for that adverse effect to arise from the presence of the identified additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[61]

The Panel noted that Appellate Body has found that the requirement to conduct a risk assessment was not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of an SPS measure. Rather the risk assessment must address the specific risk at issue. In Japan – Apples, the Appellate Body clarified that a risk assessment should refer in general to the harm concerned as well as to the precise agent that may possibly cause the harm. More recently, in US/Canada – Continued Suspension, the Appellate Body also clarified that the risk assessment cannot be entirely isolated from the appropriate level of protection.[62]

d. When was a measure "based" on a risk assessment?

The Appellate Body in EC – Hormones explained that "Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the SPS Agreement, required that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake." In other words, there must be a "rational relationship" between the SPS measure and the risk assessment. The Appellate Body went on to explain that this requirement was a substantive one. However, the Appellate Body had clarified that while Article 5.1 required that SPS measures be "based on" a risk assessment, this did not mean that the SPS measures had to "conform to" the risk assessment.[63]

Moreover, the risk assessment need not "come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure", nor does the risk assessment have to "embody only the view of a majority of the relevant scientific community." While recognizing that, in most cases, WTO Members "tend to base their legislative and administrative measures on 'mainstream' scientific opinion", the Appellate Body had observed that, "[i]n other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and

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61 Panel Report, Canada- Continued Suspension, para 7.479

62 Appellate Body Report, *US/Canada-Continued Suspension*, Para 559 and Appellate Body Report, *Japan-Apples,* Para 202.

63 Appellate Body Report, EC-Hormones, para 193 and Appellate Body Report, US/Canada-Continued Suspension para 528.

respected sources." The Appellate Body added that an approach based on a divergent opinion from a qualified and respected source, "does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety."

The Appellate Body in EC – Hormones determined that "Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment ... The SPS measure might well find its objective justification in a risk assessment carried out by another Member or an international organization."

e. Whether the United States had conducted a risk assessment and whether Section 727 is based on such a risk assessment?

China argued that the evidence demonstrates that Section 727 was not based on any risk assessment that specifically addresses risks posed by poultry products from China, let alone one that meets the requirements of Article 5.1 and 5.2. Additionally, China argued that the available evidence suggests that Section 727 would not be supported by the likely scientific conclusions of a risk assessment consistent with the requirements of the SPS Agreement.

The United States did not dispute that no risk assessment was conducted. In fact, the United States had not presented any risk assessment to this Panel. The United States had merely responded to a question from the Panel that there was a scientific basis underlying Section 727 as required by Article 2.2 of the SPS Agreement. In the context of its defense under Article XX (b) of the GATT 1994, though, the United States did present some evidence with respect to increased health and safety concerns with respect to China.

In particular, the United States argued, in the context of its defense under Article XX(b) of the GATT 1994, that China's food safety problems had been written about at length in reports from international organizations and governmental bodies, and they had also been the subject of academic study, such as an Asian Development Bank Policy Note, and some United Nations bodies reports, where it was stated that enforcement in China of food control places an excessive reliance on end-product testing with very little use of auditing as an inspection tool.

The United States also cited to a 2009 USDA report which elaborates on the problems with China's food safety system and cites some of the specific safety risks posed by imports from China. The USDA report indicated that China accounts for a disproportionate percentage of import refusals resulting from over 50 different types of food safety violations, the most common of which include "general filth, unsafe additives or chemicals, microbial contamination, inadequate labelling, and lack of proper manufacturer registrations." Additionally, the USDA report explained some of the problems with China's current system for verifying the safety of its exports, which failed to detect these numerous shipments of unsafe products to the United States. The United States contended that an academic study published by Global Health Governance reaches many of the same conclusions, expounding at length on some of the problems with enforcement of China's food safety laws as well as corruption. The United States stresses that numerous high-profile scandals have threatened the health of consumers and had led to bans on products from China.

The United States drew the Panel's attention to some other incidents related to China's food safety problems that had a direct impact on the United States, including smuggled poultry from China which potentially put consumers at risk for avian influenza. The United States also presented China's Ministry of Health statement in a March 2009 news release that "China's food security situation remains grim, with high risks and contradictions".

The Appellate Body had held that the risk assessment need not be conducted by the WTO Member imposing the SPS measure. So the fact that some of the studies had not been carried out by United States authorities did not mean they cannot constitute the risk assessment. However, the United States had not contended that these various studies form the "risk assessment" upon which Section 727 was based. Because the United States had not presented any arguments or evidence to prove the existence of a risk assessment, the Panel could only conclude that the United States had not based Section 727 on any risk assessment, whether conducted by its authorities or by any other entity.

Having examined the evidence presented by the parties, the Panel thus concluded that China had made a prima facie case that the United States had not conducted a risk assessment in respect of Section 727, within the terms of Articles 5.1, 5.2 and Annex A(4) of the SPS Agreement. The Panel further concluded that the United States had not rebutted the presumption of inconsistency. Therefore, the Panel found that Section 727 was not based on a risk assessment and was

therefore inconsistent with the obligations in Article 5.1 and 5.2 of the SPS Agreement.

f. Whether Section 727 was based on scientific principles and was not maintained without sufficient scientific evidence as required by Article 2.2 of the SPS Agreement?

China argued that Section 727 was not based on any scientific evidence let alone that which would be sufficient to meet the standards of Article 2.2 of the SPS Agreement. Additionally, China argued that the legislative history of Section 727 did not indicate that there was any scientific evidence underpinning the provision nor does it mention any specific health threat posed by Chinese poultry products that Section 727 was meant to address.

With respect to the United States' references, in its submission, to newspaper stories and USDA reports alleging "contamination" and China's food safety crises, China argued that none of this evidence was referenced in the JES, none describes any specific health threat posed by poultry products, and none indicates that there had been even one food safety crisis related to Chinese poultry. Thus, China concluded that for purposes of Articles 2.2 and Article 5.1 claims, these newspaper stories and reports were irrelevant to the question of whether Section 727 was enacted on the basis of specific, scientific evidence related to Chinese poultry.

The United States first argued that Section 727, which was not a substantive SPS measure designed to achieve the United States' ALOP, was not subject to the obligation in Article 2.2 to be based on scientific principles and not maintained without sufficient scientific evidence. Additionally, the United States argued that China had failed to address another difficulty in attempting to apply Articles 2.2 and 5.1 to the measure at issue, namely, that the process of determining equivalence for an exporting Member's SPS measures was not the same as the process of performing a risk assessment of products imported from another Member. In particular, the United States notes that:

"The determination that poultry products pose a risk of being unsafe, and therefore that measures are needed to protect against that risk, pre-dates Section 727 and applies regardless of origin (whether imported or domestically produced). Indeed, it is not contested in this dispute that imported poultry products can pose a risk of being unsafe."

The United States argued that evidence of China's food safety crises and enforcement problems support Section 727, especially in light of the fact that FSIS's equivalence system places a large reliance on the exporting country to enforce its own laws to ensure that the food being exported was safe. The United States produced a number of newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed. The United States thus contended that it follows scientifically from that evidence that there was a need to take additional action to ensure that exports from China would be safe.

Article 2.2 of the SPS Agreement which reads as follows:

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

Article 2.2 not only requires that measures be based on scientific principles, but that they not be maintained without sufficient scientific evidence, except as provided for in Article 5.7. The Appellate Body had interpreted the obligation in Article 2.2 to require that there be a rational or objective relationship between the SPS measure and the scientific evidence.

Additionally, the Panel in Japan – Apples (Article 21.5 – US[64]), noted that in order for scientific evidence to support a measure sufficiently, it seemed logical to the Panel that such scientific evidence must also be sufficient to demonstrate the existence of the risk which the measure was supposed to address. The Appellate Body explained that Articles 3.3, 5.1 and 5.7 provide relevant context for understanding the extent of the obligation in Article 2.2 not to maintain a measure without sufficient scientific evidence. The Panel found relevant context in the reference in Article 3.3 to "scientific justification" which was defined in the footnote to that Article as "examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement." Pursuant to the Appellate Body's reasoning in EC – Hormones, that this language implied that "scientific justification" was of the nature of a risk assessment required under Article 5.1. With respect to Article 5.7, which permits provisional measures when there was "insufficient scientific evidence", the Appellate Body had reasoned that the relevant scientific evidence would be considered "insufficient" for purposes

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64 Panel Report, *Japan-Apples (Art. 21.5-US),* para 8.45

of Article 5.7 "if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement."

Given the foregoing, it was the Panel's view that for the United States to maintain Section 727 with sufficient scientific evidence, the scientific evidence must bear a rational relationship to the measure, be sufficient to demonstrate the existence of the risk which the measure is supposed to address, and be of the kind necessary for a risk assessment.

As explained above, where an SPS measure was not based on a risk assessment as required in Article 5.1 and 5.2 of the SPS Agreement, this measure was presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence.

Additionally, with respect to the evidence the United States referred to, the Panel noted that while it dealt generally with food safety issues in China, it did not specifically address China's poultry inspection system. The Panel noted that the evidence did not address the existence of the risk which the measure was supposed to address. The United States had produced a number of newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed. Apart from the FSIS reports in the framework of the equivalence proceedings, the United States had not submitted to the Panel any specific scientific justification, notably through a risk assessment carried out according to the principles and disciplines in Article 5 and paragraph 4 of Annex A of the SPS Agreement, concerning the risk posed by poultry products from China.

The Panel accepted the United States' point that the general science on the safety of poultry products was well established prior to the imposition of Section 727. However, the evidence referred to by the United States did not establish the existence of a risk of consuming unsafe poultry from China. Therefore, the Panel found that the evidence of food safety enforcement problems presented by the United States was not "sufficient" within the meaning of Article 2.2. The Panel thus concluded that Section 727 was maintained without sufficient scientific evidence in contravention of the obligation in Article 2.2 of the SPS Agreement.

Hence, having found that Section 727 was not based on a risk assessment in violation of Article 5.1 and 5.2 of the SPS Agreement, and further, finding that the United States had not maintained Section 727 with sufficient scientific evidence,

the Panel found that Section 727 was not consistent with Article 2.2 of the SPS Agreement. In the absence of a risk assessment, the Panel found that the Section 727 was inconsistent with Article 5.1 and 5.2 of the SPS Agreement because it was not based on a risk assessment which took into account the factors set forth in Article 5.2. Additionally, the Panel found that Section 727 was inconsistent with Article 2.2 of the SPS Agreement because it was maintained without sufficient scientific evidence.

Whether section 727 was inconsistent with Article 5.5 of the SPS Agreement?

Relying on the Appellate Body Report in EC – Hormones, China claimed that Section 727 was inconsistent with Article 5.5 of the SPS Agreement because the United States applied different ALOPs to comparable situations, the application of such different ALOPs was arbitrary and the distinction in ALOPs leads to discrimination. In particular, China claimed that Section 727 resulted in distinctions in levels of protection "in different but comparable situations" because the United States imposed a different and stricter ALOP to Chinese poultry products compared to other WTO Members' poultry or to Chinese non-poultry food products which share a common risk of potential contaminants, namely Salmonella, Campylobacter and Listeria. China also referred to E. coli and Highly Pathogenic Avian Influenza (HPAI) virus.

With respect to the comparison of Chinese poultry to poultry from other WTO Members, China argued that it was one of just ten WTO Members that have obtained FSIS authorization to export poultry to the United States. However, it contended that, under Section 727, its poultry products were, in effect, treated as more dangerous than those originating in Members that have never obtained an equivalence determination from the FSIS. China thus argued that, regardless of the possibility of improving its food safety system for poultry, China was prevented by Section 727 from having such authorization considered, granted or implemented.

With respect to the comparison of Chinese poultry to other food products from China, China noted that neither the text nor the legislative history of Section 727, nor FSIS documentation asserts or otherwise provided contemporaneous evidence that poultry was more likely to be "contaminated" than other types of food products. China asserted that these contaminants were within the meaning of footnote 4 and were not unique to China as well as not only found in poultry products. China argues that, by forbidding the consideration, granting or implementation of authorization for Chinese poultry products, while offering the

possibility to every other WTO Member to seek and obtain FSIS authorization to export poultry products to the United States, Section 727 discriminates against China. China further argued that the distinction in ALOPs leads to discrimination because Section 727 blocked the importation of only Chinese poultry while other Chinese food products posing the same health risks may be imported.

The United States contended that, for both situations, China had not demonstrated a difference in the ALOPs applied. The United States submitted that there was only one ALOP and thus there was no distinction in its ALOP for poultry from China as opposed to that of the United States or other WTO Members. Moreover, the United States argued that Section 727 did not impose an "import ban" or preclude a finding of equivalence on Chinese poultry; rather it was just a procedural measure meant to ensure that China's food safety problems were fully considered in the process of determining equivalence due to the heightened risk posed by Chinese poultry. The United States explained that the FSIS operated under an equivalence regime while the FDA relies on "import alerts" and more rigorous border measures so such a comparison was inappropriate.

With respect to China's comparison of Chinese poultry to other food products from China, the United States asserted that China had not established that the types of risks addressed by the PPIA were the same as the risks associated with other types of food products and that poultry had a different ALOP than other food products.

The United States pointed out that China's food safety enforcement problems and food safety crises had been the subject of reports and articles by numerous well-regarded international organizations (including the WHO) and academics. Moreover, to justify whether there was discrimination in an arbitrary and unjustifiable manner between China and other WTO Members because of Section 727, the United States contended that China's proposed situations were not comparable to other WTO Members. This was because the United States argued, first, most Members had never attempted to export poultry products to United States; second, many of the equivalent WTO Members had been exporting to the United States for many years without any significant incident resulting in confidence and familiarity with their inspection system including their ability to resolve any problems that may arise such as in the case of Mexico.

a. Article 5.5 of the SPS Agreement

Article 5.5 of the SPS Agreement embodies a non-discrimination principle in respect of the application of the appropriate level of sanitary or phytosanitary protection ("ALOP"). This provision reads as follows:

"With the objective of achieving consistency in the application of the concept of appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."

Annex A(5) further defined the concept of ALOP as "the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory".

The Appellate Body had explained that there was an implicit obligation for Members to determine their ALOP. Although it need not be determined in quantitative terms, the ALOP cannot be determined "with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement ... becomes impossible". Precisely, the Appellate Body had ruled that if a Member failed to determine its ALOP, or does so with insufficient precision, then the ALOP "may be established by [the Panel] on the basis of the level of protection reflected in the SPS measure actually applied."[65]

The Appellate Body in EC – Hormones identified three conditions that must all be satisfied in order to establish a violation of Article 5.5 of the SPS Agreement, which are that:

i. the Member has set different levels of protection in "different situations";

ii. the levels of protection show "arbitrary or unjustifiable" differences in their treatment of different situations; and

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[65] Appellate Body Report, Australia-Salmon, para 207

iii. these arbitrary or unjustifiable differences lead to "discrimination or disguised restrictions" on trade[66].

Additionally, the Panel noted that the Panel in EC – Hormones held that "in order to give effect to all three elements contained in Article 5.5 and giving full meaning to the text and context of this provision. All three elements need to be distinguished and addressed separately." The Panel on Australia – Salmon (Article 21.5 – Canada) held that the complainant "bears the burden of demonstrating that the comparisons it refers to meet all three elements under Article 5.5."

The Panel must therefore determine whether China had met its burden of proof with respect to its claim of violation of Article 5.5 of the SPS Agreement. These steps ascertain whether China had presented any such comparisons to demonstrate that the three elements of Article 5.5 were met. In this respect, China had presented two possible comparisons:

i. a comparison of Chinese poultry vis-à-vis poultry from other WTO Members and

ii. a comparison of Chinese poultry vis-à-vis other Chinese food products.

b. The importation of Chinese poultry products vis-à-vis that of poultry products from other WTO Members

i. Whether Section 727 results in distinctions in ALOPS in different yet comparable situations

The Appellate Body had identified the first of the three elements to be assessed under Article 5.5 of the SPS Agreement as "the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations." Thus, the first element of Article 5.5 appears to have two, closely related aspects:

1. the existence of different situations; and

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66 Appellate Body Report, EC-Hormones, paras 214-215

2. and the existence of different ALOPs in such situations.

The Appellate Body, in EC—Hormones, noted that, although the situations must be "different", the situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that was, unless they present some common element or elements sufficient to render them comparable. According to the Appellate Body, if the situations proposed to be examined are totally different from one another, they would not be rationally comparable and the differences in ALOP cannot be examined for arbitrariness.

Several panels have addressed the question of what constitutes "common elements" or "elements sufficient to render" the different situations comparable. The Panel in EC – Hormones, for example, considered that for the purposes of its dispute, which dealt with an SPS measure to protect human health from contaminants in food, "different" yet comparable situations in the sense of Article 5.5 was those where the same substance or the same adverse health effect was involved.

With respect to an SPS measure imposed to protect plant or animal life or health from pests or disease, the Appellate Body in Australia – Salmon held that a "common element" could be "either a risk of entry, establishment or spread of the same or a similar disease, or a risk of the same or similar associated potential biological and economic consequences.

The Panel, therefore, examined whether poultry products from China and poultry products from other WTO Members were such "different situations" that were comparable. If the answer was affirmative, then examine whether the United States had made distinctions in ALOPs in that "different situation.

Whether different yet comparable situations exist?

The Panel had to decide whether it agreed with China that the importation of Chinese poultry products and that of poultry products from other WTO Members are two different but comparable situations within the meaning of Article 5.5 of the SPS Agreement.

China argued that the establishment or implementation of a rule allowing importation could not occur while the funding restriction remains in place, whereas other WTO Members might (if their regimes are deemed equivalent by FSIS)

have a rule established and implemented allowing imports of poultry products into the United States from those Members. Therefore, according to China, poultry products from China, which were subject to Section 727, was a "different situation" within the meaning of Article 5.5 of the SPS Agreement to poultry products from other WTO members, who had access to the regular FSIS procedures. In respect to the United States' position that there were no different situations since the ALOP was the same, China disagreed with the United States' narrow interpretation of "different situations" by quoting the Appellate Body decision in Australia – Salmon stating different situations might be compared if they have just one risk factor in common.

The United States argued that there was no distinction in its ALOP for poultry from China as opposed to that of the United States or other WTO Members and therefore there was no "different situation".

The crux of the United States' arguments seems to be that Section 727 was a supplement to the PPIA and was meant to further its goals of ensuring that poultry was wholesome, unadulterated, and fit for human consumption. The three pathogenic bacteria identified by China were not only identified by the United States as a concern with respect to Chinese poultry products, but were also identified as a basis for the implementation of the PPIA regime as a whole.

The Panel agreed that the risk of Salmonella, Campylobacter and Listeria being present in respect to both the poultry products from China and those from other WTO Members made the different situations – the importation of poultry products from China vis-à-vis that of poultry products from other WTO Members – comparable for the purposes of Article 5.5 of the SPS Agreement. The Panel therefore concluded that the importation of Chinese poultry products was a different yet comparable situation to that of poultry products from other WTO Members. Having made this conclusion, and as explained by the Appellate Body in EC – Hormones, the Panel now turned to consider whether the United States had applied distinctions in ALOPs in these two different yet comparable situations.

Whether distinctions in ALOPs exist?

The Panel recalled that China claimed that Section 727 constituted "less than zero risk" tolerance which eliminated any opportunity for only China to export its poultry products to the United States, even if Chinese poultry had been scientifically confirmed to meet the United States' ALOP. While on the other hand, the ALOP

for all other WTO Members' poultry provided in the FSIS procedures tolerates some risk as long as the specific WTO Member's inspection system had been deemed equivalent to the US system. Therefore, China concluded that the ALOP applied to Chinese poultry was "different" from – and much stricter than – the ALOP normally applied by the United States for imported poultry. China submitted that Section 727 was not necessary to ensure the compliance with the United States' ALOP since Section 727 prevented the only US Government employees capable of evaluating the safety of Chinese poultry products by means of budget restriction from conducting scientific audits, investigations and rule making in and for China.

The United States disagreed and argued that China was confusing the ALOP with the measures applied and that the PPIA sets the same ALOP for all poultry; it was just that the ALOP for poultry was achieved through a different mechanism, Section 727, with respect to China. The United States submitted that Section 727 did not impose an "import ban" or preclude a finding of equivalence on Chinese poultry; rather it was a procedural measure meant to ensure that China's food safety problems were fully considered in the process of determining equivalence due to the heightened risk posed by Chinese poultry.

The Panel recognized that the United States was free to decide its own ALOP and thus accepted that the United States' ALOP for poultry, in general, was embodied in Section 466 of the PPIA. This however did not mean that the Panel would not examine whether the ALOP actually being applied by the United States to poultry products from China differed from that in the PPIA. The Panel noted that the Appellate Body in Australia – Salmon explained that a panel might deduce an unexpressed ALOP from the measure being applied. In the view of the Panel, even in a case where a Member had expressed a particular ALOP, a panel should nevertheless examine the measure in question to determine whether that ALOP was the one actually being applied via that measure. To ignore the measure and rely solely on a Member's declared ALOP could permit a Member to evade the disciplines of Article 5.5 by simply declaring one generic ALOP for all SPS-related matters.

The United States correctly noted that the Panel in Australia – Salmon concluded that the application of different measures did not necessarily mean that there was an application of different ALOPs. However, the United States could not expect the Panel to completely divorce the determination of whether different ALOPs were being applied from the measures adopted. As noted above, substantial

differences in the SPS measures applicable in different yet comparable situations might demonstrate that the ALOPs were different.

An import ban did not necessarily reflect a different ALOP than an equivalence regime, as even an import ban accepts some minimal and inherent risk that contaminated poultry could enter the United States. However, the Panel noted that the Panel in Australia – Salmon found that an import ban for salmon was substantially different from permitting the importation of ornamental fish after control and therefore reflected a difference in the levels of protection considered to be appropriate in the sense of the first element of Article 5.5. The Panel found similarities in the present dispute to the one examined by the Panel in Australia – Salmon. The regular FSIS procedures prohibit importation of poultry products from a particular country only until that country had demonstrated that its SPS measures could achieve the ALOP expressed in the PPIA. However, the effect of Section 727 was to prohibit the importation of poultry from China in any instance, regardless of whether China demonstrated that its own SPS measures could achieve the ALOP expressed in the PPIA. The absolute import ban imposed by Section 727 reflected an ALOP substantially different from the conditional import ban under the regular FSIS procedures, because the regular FSIS procedures at least allow an avenue for an exporting Member to gain access to the United States market, which was not available in any case for Chinese poultry products.

The Panel in Australia – Salmon held that the determination of the ALOP was not dependent on the performance of a risk assessment. However, the Panel was of the view that to prove that such substantially different measures were needed to achieve the same ALOP, the United States would have to demonstrate that poultry products from China presented a greater risk than poultry products from other WTO Members.

The United States attempted to meet its burden by pointing out that no other WTO Members with the same systemic issues with respect to food safety were as far along in the equivalency process as China. Therefore, according to the United States, the measures applied to China were necessary to achieve the ALOP set forth in the PPIA that poultry imports be "safe". The United States seemed to leave open the option that if the FSIS was about to establish or implement a rule permitting another country with the same systemic issues exhibited in China to import poultry products, the US Congress would have contemplated similar action. However, the Panel considered this to be a purely speculative argument.

To counter this premise, China noted that Mexico had similar systemic problems yet the US Congress did not step in and order the FSIS to suspend Mexico's equivalency status or deny funding for the regular annual equivalency audits necessary to maintain Mexico's status as eligible to export to the United States.

In the view of the Panel, as the Panel in Australia – Salmon reasoned, a substantial difference in the measures applied such as, in this case, Section 727 versus standard FSIS procedures, did reflect a distinction in the ALOPs applied in two different but comparable situations; i.e. the importation of poultry products from China and that of poultry products from other WTO Members. The Panel, therefore, found that the standard FSIS procedures were so substantially different from Section 727 such that they reflect a distinction in ALOPs. Having found that the importation of poultry products from China and that of poultry products from other WTO Members were different yet comparable situations and that the United States was applying different ALOPs to such situations, the Panel concluded that the first element of Article 5.5 of the SPS Agreement was satisfied, with respect to this comparison. Therefore, the Panel then proceeded with the analysis of whether the distinction in ALOPs was arbitrary or unjustifiable.

ii. Arbitrary or unjustifiable differences in ALOPs

The second element of Article 5.5 involves the consideration of whether there was an "arbitrary or unjustifiable" distinction between the relevant ALOPs. In this respect, China argued that it was one of just ten WTO Members that have obtained the FSIS authorization to export poultry to the United States. However, it contended, under Section 727, its poultry products were, in effect, treated as more dangerous than those originating in WTO Members that had never obtained an equivalence determination from the FSIS. Regardless of the possibility of China improving its food safety system for poultry, it said, it was prevented by Section 727 from having such authorization considered, granted or implemented. China further argued that there was no legitimate justification why the FSIS procedures could not be applied to China to determine whether its poultry products might be exported to the United States and thus, the distinction in levels of sanitary protection was arbitrary and unjustifiable.

The United States responded that China had not established that any distinction in ALOPs was arbitrary or unjustifiable. The United States pointed out that China's food safety enforcement problems and food safety crises had been the subject of reports and articles by numerous well regarded international organizations

(including WHO) and academicians. Moreover, to justify whether there was discrimination between China and other WTO Members because of Section 727 in an arbitrary and unjustifiable manner, the United States contended that China's proposed situations were not comparable to other WTO Members. This was because, in its view, first, most Members had never attempted to export poultry products to United States; and second, many of the equivalent WTO Members had been exporting to the United States for many years without a significant incident resulting in confidence and familiarity with their inspection system. This included the ability to resolve any problems that might arise, such as in the case of Mexico.

As Section 727 was not based on a risk assessment and was maintained without sufficient scientific evidence, the Panel concluded that there was no justification based on scientific principles and founded in scientific evidence for the distinction in ALOPs, as reflected in the differences between the measures used to tackle the risk of potentially unsafe poultry – Section 727 for poultry products from China and the FSIS procedures for poultry products from other WTO Members.

The Panel, therefore, found that the distinction in ALOPs for poultry products for China and for poultry products from other WTO members was "arbitrary or unjustifiable" within the terms of Article 5.5 of the SPS Agreement. The Panel concluded that the second element of Article 5.5 of the SPS Agreement was satisfied, with respect to the importation of Chinese poultry products vis-à-vis that of poultry products from other WTO members.

iii. Discrimination or disguised restriction on international trade

Having found that both the first and the second elements of Article 5.5 of the SPS Agreement were met, the Panel proceeds to examine the third element of this provision, i.e. whether the distinction in ALOPs in different yet comparable situations results in discrimination or a disguised restriction on international trade.

Relying on the Appellate Body Report in Australia – Salmon, China argued that the Section 727 evinces all three "warning signals" that indicate discrimination was present. China also contended that an additional factor which demonstrates discrimination which was discussed by the Panel in Australia – Salmon, was also present. Specifically, China asserted that the distinction between the two ALOPs was arbitrary and unjustifiable, that the difference was significant, and there was a substantial difference in official conclusions about the two situations without scientific justification.

The United States contended that China relied solely on the Panel and Appellate Body reports in Australia – Salmon which were not applicable in this case because China had not even alleged any factors that might show a disguised trade restriction. The United States choose to focus on the lack of distinction in the ALOPs applied.

The Panel on Australia – Salmon identified three "warning signals" which indicate whether the application of distinctions in ALOPs in different situations results in discrimination or a disguised restriction on international trade, but explained that none of these "is... conclusive in its own right":

a. the arbitrary and unjustifiable character of differences in the levels of protection;

b. the "rather substantial" difference in the levels of protection; and

c. the inconsistency of the SPS measure at issue with Articles 5.1 and 2.2 of the SPS Agreement.

The Panel and Appellate Body in Australia – Salmon, also considered additional factors specific to the facts of that case. One of the additional factors in that case, which China referenced in its submissions, was that there were substantial differences in the conclusions concerning the measures required to address the perceived risk in a particular situation, in sequential reports issued by the importing Member government only one year apart.

The reasoning of the Panel in Australia – Salmon might be somewhat circular and appears to defeat the purpose of the conclusion that the three elements in Article 5.5 were cumulative and must all be present. Essentially, what the Panel was saying was that proof of the other two elements as well as inconsistency with Article 5.1 and 2.2 ipso facto equates to discrimination or a disguised restriction on trade with no further analysis being required. The Appellate Body seemed to have recognized that the analysis in Australia – Salmon did not fully address the third element of Article 5.5 when it noted in EC – Hormones that "the difference in levels of protection that is characterizable as arbitrary or unjustifiable was only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade."

The Appellate Body added that:

"[T]he presence of the second element – the arbitrary or unjustifiable character of differences in levels of protection considered by a Member as appropriate in differing situations – may in practical effect operate as a 'warning' signal that the implementing measure in its application might be a discriminatory measure or might be a restriction on international trade disguised as an SPS measure for the protection of human life or health. Nevertheless, the measure itself needs to be examined and appraised and, in the context of the differing levels of protection, shown to result in discrimination or a disguised restriction on international trade."

Therefore, it seemed, according to the Appellate Body that even if the presence of all three warning signals was demonstrated, that would not necessarily support a conclusion that the measure results in discrimination or a disguised restriction on trade. The Panel further noted that the Appellate Body in EC – Hormones stated that in the context of the third element of Article 5.5 of the SPS Agreement, the analysis should be on a case-by-case basis.

Nevertheless, since Australia – Salmon, parties had typically structured their arguments around the third element in Article 5.5 by discussing these warning signals and additional factors. That was also the case in the current proceedings. Accordingly, the Panel would examine whether China had demonstrated the warning signals and additional factors and then determine whether any additional proof was necessary to demonstrate discrimination.

The conclusion on whether the first warning signal was present flows from the analysis of the second element of Article 5.5. The Panel had found that there was a distinction in ALOPs and that this distinction was arbitrary or unjustifiable, therefore, the first warning signal was present and then Panel moved to the second warning signal.

The second warning signal was the "rather substantial" difference in the levels of protection. In this respect, China argued that there were "significant" differences in the applied ALOPs because one was less than zero and one accepted that there might be some minimal and inherent risk of importing unsafe poultry from an "equivalent" WTO Member. It cannot be assumed that an import ban reflects an ALOP of zero or, in fact, an ALOP different from a control regime. Conversely, it was also difficult to maintain that the mere fact that there was no way to fully guarantee zero exposure through a particular control regime meant that the ALOP

set by the importing Member was not, in fact, zero. Additionally, it was unclear whether a "stricter than zero" tolerance exists.

Following the Panel in Australia – Salmon, the Panel concluded that the ALOP reflected in Section 727, which imposed an absolute import ban on poultry products from China, was substantially different from the ALOP in the PPIA which was achieved via a conditional import ban which at least provides an avenue for WTO Members, other than China, to eventually achieve access to the United States market. Therefore, the second warning signal was also met. The Panel noted that even though it had brought claims under Articles 5.1 and 2.2, China did not argue that the warning signal of a violation of those articles was present. However, given the Panel's findings of violation of both provisions the Panel concluded that the third warning signal was also present.

Having concluded that the three warning signals were present, the Panel went ahead and determined whether any additional proof was necessary to demonstrate discrimination.

In determining whether discrimination exists, the Panel found the language of the Panel in Canada – Pharmaceutical Patents particularly interesting. The Panel and Appellate Body in Australia – Salmon, considered as an additional factor that proved discrimination the substantial differences in the conclusions concerning the measures required to address the perceived risk in a particular situation, in sequential reports issued by the importing Member government only one year apart. In this respect, China pointed to the "substantially different conclusions" on how to deal with Chinese poultry in a short period of time. China's argument focused on the fact that in 2006, the FSIS concluded that Chinese processed poultry was safe enough to satisfy the United States' ALOP articulated in the PPIA; yet in 2008 the US Congress supplanted that determination with a finding that Chinese processed poultry was so dangerous that the FSIS needed to be prevented from going forward with establishing and implementing a rule permitting its importation. The Panel agreed that this might be considered to be an "additional factor".

Furthermore, the fact that Section 727 only applies to poultry products from China was discriminatory by nature. Indeed, examining the measure itself in the context of the differences in the ALOPs, the Panel concluded that discrimination was occurring, in particular because Section 727 applies only to China. The Panel noted that the Panel in Canada – Pharmaceutical Patents considered that "discrimination" refers "to results of the unjustified imposition of differentially

disadvantageous treatment". Therefore, a determination that "discrimination" existed would still rest on whether the different treatment applied was "justified". Having determined that the differences in ALOPs were unjustified, the Panel could reasonably conclude that the differences in ALOPs result in discrimination against China.

The Appellate Body in US – Shrimp that "discrimination results not only when countries in which the same conditions prevail were differently treated, but also when the application of the measure at issue did not not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries." It would seem that a ban preventing the FSIS from considering China's application for equivalency would be just such a measure as that described by the Appellate Body.

Therefore, it seems reasonable to conclude that Section 727 resulted in discrimination against China. The Panel thus found that the arbitrary or unjustifiable distinction in ALOPs applied by the United States in respect of poultry products from China vis-à-vis poultry products from other WTO Members results in discrimination against China. Accordingly, the third element of Article 5.5 of the SPS Agreement was satisfied, with respect to the importation of Chinese poultry products vis-à-vis that of poultry products from other WTO Members.

Having found that the importation of poultry products from China and that of poultry products from other WTO Members were different yet comparable situations and that the United States was applying different ALOPs to such situations; that the distinction in ALOPs for poultry products from China and for poultry products from other WTO Members was "arbitrary or unjustifiable"; and that this arbitrary or unjustifiable distinction in ALOPs results in "discrimination " against China, the Panel concluded that the three elements of Article 5.5 of the SPS Agreement were present. Accordingly, the Panel found that Section 727 was inconsistent with Article 5.5 of the SPS Agreement.

The importation of Chinese poultry products vis-à-vis that of other food products from China

The second set of comparable situations presented by China referred to a comparison of the importation of Chinese poultry products and that of other food products from China. The Panel commenced the analysis by examining whether such different situations exist and if so, whether they were comparable.

At first, China broadly argued that "based on the logic of the JES, any food product from China could in theory be contaminated, since all food products produced in China were subject to the food safety laws that the United States claims in its submission were not enforced." China also argued that any food product, including but certainly not limited to poultry products, could be contaminated, for example, basil, peanut butter, and pet food contaminated with Salmonella; candy contaminated with lead; fish contaminated with mercury; and rice contaminated with unapproved genetic material. In China's view, the common element between these two situations was sharing common risk of potential contaminants which were pathogenic bacteria such as Salmonella, Campylobacter and Listeria in addition to E Coli and Highly Pathogenic Avian Influenza (HPAI) virus. China asserted that these contaminants were within the meaning of footnote 4 or disease-causing organism according to Annex A (1)(b), they were not unique to China, in addition they were not only found in poultry products.

The United States responded that China had not established that the types of risks addressed by the PPIA were the same as the risks associated with other types of food products and that poultry had a different ALOP than other food products. Moreover, the United States also clarified that FSIS operates under an equivalence regime while the FDA relies on "import alerts" and more rigorous border measures so the situations were not comparable.

The Panel noted that China had not contended that all Chinese food products could have Salmonella, Campylobacter and Listeria. It certainly had not argued that all Chinese food products could be potential sources of Avian influenza. It had instead initially argued that many Chinese food products could potentially be contaminated with the same pathogenic bacteria that the United States had indicated were of concern with respect to poultry imports. In China's response to a question from the Panel, China provided the following list of food products which could be contaminated by the pathogenic bacteria namely:

- Salmonella: Eggs, poultry, milk, juice, cheese, fruits, and vegetables.
- Listeria: Cheese, milk, deli meats, and hot dogs.
- Campylobacter: Poultry, and milk.
- E.coli: Meat, milk, juice, fruits and vegetables, and cheese.

China also provided tables taken from UN Comtrade on the potential for contamination in food groups imported from China. China had only provided the more specific information about the SPS measures applied to food products from China other than poultry products and that relating to which pathogenic bacteria affect which types of food products late in the proceedings. Indeed, China provided this information only in response to a question from the Panel during and after the second substantive meeting asking where that information could be found in China's prior submissions.

It was questionable whether the above list was sufficient to establish the common elements that make all "other food products" comparable to poultry products such that they were "different situations" within the meaning of Article 5.5. The Panel did not believe that Article 5.5 permits a "mix and match" approach but rather requires that China links the measures to which it alleges the United States applies a lower ALOP, with the risks it believes were comparable to those posed by poultry. It was certainly not for the Panel to examine every other food product exported by China to the United States to determine which ones had the same contaminants or adverse health effects as poultry and then examine whether the measures applied to those products exhibit the same ALOP as Section 727.

However, given that the Panel had already found that Section 727 was inconsistent with the obligations in Article 5.5 with respect to distinctions in ALOPs for imports of poultry products from China vis-à-vis poultry from other WTO Members, the Panel did not see how continuing to make a finding on the second comparable situations proposed by China would assist in obtaining a positive resolution to the dispute. Therefore, the Panel exercised judicial economy with respect to this aspect of China's claim under Article 5.5.

The Panel recalled that the principle of judicial economy was recognized in WTO law. The Appellate Body had consistently ruled that panels were not required to address all the claims made by a complaining party but rather a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties, provided that those claims were within its terms of reference. The Appellate Body had relied on the explicit aim of the dispute settlement mechanism, which was to secure a positive solution to a dispute, as provided in Article 3.7 of the DSU, or a satisfactory settlement of the matter as per Article 3.4 of the DSU. The Appellate Body had stressed that the basic aim of dispute settlement in the WTO was to settle disputes and not to "make law" by clarifying

existing provisions of the WTO Agreement that fall outside the context of resolving a particular dispute.

In Australia – Salmon, the Appellate Body cautioned panels against false judicial economy arguing that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result. The Panel believed that this was not the case in the current proceedings. In making findings under Article 5.5 of the SPS Agreement with respect to distinctions in ALOPs for imports of poultry products from China vis-à-vis poultry from other WTO Members, the Panel considered that it had effectively resolved China's claim under Article 5.5.

Whether section 727 was inconsistent with Article 2.3 of the SPS Agreement?

China argued that the United States was applying a higher level of protection to China which is arbitrary or unjustifiable and results in discrimination. China affirmed that the measures at issue restrict only China from seeking and obtaining authorization to export poultry products to the United States, which ultimately limits competitive opportunities and restricts imports of poultry products originating in China.

The United States contended that it was unclear whether Article 2.3 was meant to apply to a procedural requirement rather than a substantive SPS measure. In particular, the United States contended that it was unclear if Article 2.3 was intended to apply in addition to the main SPS equivalence provision, Article 4.1. The United States also argued that there was no need to look at Article 2.3 of the SPS Agreement, because the issues addressed under Article 2.3 were essentially the same as those under the chapeau of Article XX (b) of the GATT 1994.

Article 2.3 of the SPS Agreement provides:

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

The Panel in Australia – Salmon (Article 21.5 – Canada) found that there were three elements required in order to establish a violation of Article 2.3, first sentence:

i. that the measure discriminates between the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member;

ii. that the discrimination is arbitrary or unjustifiable; and

iii. that identical or similar conditions prevail in the territory of the Members compared.

The Panel in Australia – Salmon, upheld by the Appellate Body, noted that because Article 2.3 sets forth the "basic obligation" and Article 5 was a more specific enunciation of that obligation, a finding of a violation of Article 5.5 would necessarily imply a violation of Article 2.3.The Panel agreed with the reasoning of the Panel and the Appellate Body in Australia – Salmon and concluded that because Section 727 was inconsistent with Article 5.5 of the SPS Agreement, by virtue of a distinction in ALOPs which results in discrimination between Members, it was also inconsistent with the first sentence of Article 2.3 of the SPS Agreement.

The Panel found that the inconsistency of Section 727 with Article 5.5 of the SPS Agreement necessarily implies that Section 727 was also inconsistent with Article 2.3 of the SPS Agreement. Therefore, the Panel found that Section 727 was inconsistent with the first sentence of Article 2.3 of the SPS Agreement.

Whether the section 727 was inconsistent with Article 5.6 of the SPS Agreement?

China claimed that Section 727 was inconsistent with the obligation in Article 5.6 of the SPS Agreement that SPS measures not are unduly trade-restrictive. China referred to the findings of Australia – Salmon, where the Appellate Body stated that, to establish a violation of Article 5.6, a Member must demonstrate that there is an alternative SPS measure which:

i. is reasonably available taking into account technical and economic feasibility;

ii. achieves the Member's appropriate level of sanitary or phytosanitary protection; and

iii. is significantly less restrictive to trade than the contested SPS measure.

The United States reiterated its main point that the substantive obligations in Article 5 did not apply to equivalence regimes set up pursuant to Article 4 of the SPS Agreement. Specifically, the United States argued that Article 5.6 did not appear to apply to every procedural requirement adopted in the course of operating SPS measures. Instead, according to the United States, it appeared to apply to substantive measures "establishing or maintaining" the importing Member's ALOP.

Article 5.6 of the SPS Agreement which provides that:

"Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

China argued that Section 727 was more trade restrictive than required to achieve the United States' ALOP for poultry as expressed in the PPIA. The Panel recalled the findings that the United States applies a different ALOP via Section 727 from what it does via the PPIA. Indeed, China had argued this strenuously in the context of its claims under Article 5.5. The Panel noted that Article 5.5 dealt with determining whether a Member was applying distinctions that were arbitrary or unjustifiable in the application of ALOPs to the same risk. The Panel noted that the analysis under Article 5.5 was with respect to determining whether the Member was applying different ALOPs to the same risk. Article 5.6 dealt with whether a particular measure was more trade restrictive than required to achieve the Member's ALOP. In the view of the Panel , in a dispute where claims were made under both Articles 5.5 and 5.6 a finding of inconsistency with Article 5.5 couldnot be taken to mean that the ALOP used in the analysis under 5.6 would always necessarily be the less restrictive ALOP of those being applied. Therefore, a finding that a Member was applying different ALOPs cannot be taken to mean that the Panel was determining which ALOP the Member should apply. A finding

of inconsistency with Article 5.5 cannot deprive the importing Member of its prerogative to choose its own ALOP.

China had asked the Panel to assess the trade restrictiveness of the measure Section 727, vis-à-vis what is required by the ALOP in the PPIA and not the ALOP that it itself argued is reflected in Section 727. China was asking the Panel to gauge the trade restrictiveness of the measure vis-à-vis what was required by the ALOP it believed the United States should apply to its poultry products. The Panel thought it in appropriate to engage in a speculative exercise of what ALOP a Member should apply to protect its own territory from public health risks. In particular, the Panel recalled the reasoning of the Appellate Body in Australia – Salmon that "'the level of protection deemed appropriate by the Member establishing a sanitary ... measure' is a prerogative of the Member concerned and not of a panel or the Appellate Body."

Additionally, a determination of whether a measure was more trade restrictive than required to achieve the ALOP of a Member must be done by comparing the ALOP actually applied to the risks posed by the products. The Panel recalled its findings under Articles 5.1, 5.2 and 2.2 that the United States had not based Section 727 on a risk assessment and that it had maintained Section 727 without sufficient scientific evidence. Without knowing the level of risk posed by Chinese poultry products the Panel would have to enter into a hypothetical analysis that would be akin to the Panel doing its own risk assessment and then comparing that risk to the United States' ALOP to determine whether Section 727 was more trade restrictive than required. The Panel thought inappropriate role for a panel. In particular prior panels had explained that, a panel should not conduct its own risk assessment or impose any scientific opinion on the importing Member.

Given the above considerations, in the present case an analysis under Article 5.6 would be inappropriate for this Panel to engage in as it would be entirely speculative and be exceeding our role under Article 11 of the DSU to make an objective assessment of the matter. Accordingly, after careful consideration, the Panel refrained from ruling on China's claim under Article 5.6 of the SPS Agreement. For the above reasons, the Panel concluded that it would not be appropriate to precede and rule on China's claim under Article 5.6 of the SPS Agreement, and, thus, declined to do so.

Whether section 727 was inconsistent with Article 8 of the SPS Agreement?

China claimed that the United States had violated Article 8 of the SPS Agreement by failing to follow the requirements under Annex C(1)(a) of the SPS Agreement concerning WTO Members' obligations to "undertake and complete" the procedures for assessing compliance with a substantive SPS measure "without undue delays". China argued that the application of Section 727 unjustifiably delayed the application of the normal FSIS procedures to Chinese poultry products, and it could not be justified based on China's inaction. China maintained that the delay which resulted from the application of Section 727 was "undue" and constituted a violation of Article 8 of the SPS Agreement.

The United States contended that China had failed to show that Section 727 breached Article 8 and Annex C(1)(a) of the SPS Agreement first because these provisions apply to "control, inspection, and approval procedures" which do not include equivalence determinations under Article 4 of the SPS Agreement. Second, because China had not established the existence of any "undue delay".

The Panel therefore examined China's claim that the United States had acted inconsistently with Article 8 of the SPS Agreement by failing to observe the requirements of Annex C(1)(a) of the SPS Agreement, because Section 727 unduly delayed the application of the normal FSIS procedures to Chinese poultry products. The Panel then commenced its analysis by reviewing the text of Article 8 and Annex C (1)(a) of the SPS Agreement, and how these provisions had been interpreted in the past.

a. Article 8 and Annex C(1)(a) of the SPS Agreement

Article 8 of the SPS Agreement, entitled "Control, Inspection and Approval Procedures" requires, inter alia, that Members observe the provisions of Annex C in the operation of "control, inspection and approval procedures". Article 8 of the SPS Agreement reads as follows:

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

Annex C of the SPS Agreement which was also entitled "Control, inspection and approval procedures", in footnote 7, clarifies that "[c]ontrol, inspection and approval procedures include, inter alia, procedures for sampling, testing and certification."

Annex C(1)(a) of the SPS Agreement reads as follows:

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

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

The Panel in EC – Approval and Marketing of Biotech Products, was the first panel that examined the disciplines in Annex C(1)(a) thoroughly. The Panel found that Annex C (1) establishes obligations "with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures". In that respect, the measures before the Panel were SPS measures within the terms of Annex A(1) and, according to the Panel, also constituted procedures "to check and ensure the fulfillment of sanitary or phytosanitary measures" within the meaning of Annex C(1).

In that Panel's view, the first clause of Annex C (1) (a) determined that Members must ensure that approval procedures were "undertaken and completed without undue delay". With respect to the textual interpretation of the phrase "undertaken and completed", the Panel explained that the verb "undertake" makes clear that Members are required to begin, or start, approval procedures after receiving an application for approval, while the verb "complete" indicated that approval procedures were not only to be undertaken, but were also to be finished, or concluded. For that panel, the phrase "undertake and complete" covers all stages of approval procedures meaning that, once an application had been received, approval procedures must be started and then carried out from beginning to end.

The Panel in EC – Approval and Marketing of Biotech Products further considered that the ordinary meaning of the phrase "without undue delay" required that "approval procedures be undertaken and completed with no unjustifiable loss of time." Therefore, only "undue" delay in the undertaking or completion of approval procedures was contrary to the first clause of Annex C (1)(a). Regarding

"undue delay", what matters, according to the Panel, was whether there was a legitimate reason, or justification, for a given delay, not the length of a delay as such. The Panel also explained that the determination of "without undue delay" must be made on a case-by-case basis according to the relevant facts and circumstances of a specific case. In its view, delays attributable to action, or inaction, of an applicant must not be held against a Member maintaining the approval procedure.

The Panel in EC – Approval and Marketing of Biotech Products further considered that the phrase "without undue delay" relates to both elements of the phrase "undertake and complete". Thus Members must "undertake" approval procedures "without undue delay" and, subsequently, "complete" them "without undue delay".

Article 8 and Annex C (1) therefore apply to certain types of "procedures", namely those dealing with control, inspection and approval which are aimed at checking and ensuring the fulfillment of SPS measures. In order to determine whether both provisions apply to the specific circumstances of this dispute, the Panel would first examine what is understand by "control, inspection and approval procedures" to be. The Panel then proceeded to examine the FSIS procedures in order to ascertain whether they were "control, inspection, or approval procedures" within the scope of Annex C (1) of the SPS Agreement. If so, the Panel would then turn to examine whether Section 727 had the effect of causing an undue delay in the application of the normal FSIS procedures to Chinese poultry products failing to observe the requirements in Annex C(1)(a) of the SPS Agreement and thus being inconsistent with Article 8 of the SPS Agreement.

b. Whether the procedures applied by the FSIS in the equivalence determination process were control, inspection and approval procedures within the scope of Annex C(1) of the SPS Agreement?

Annex C (1) of the SPS Agreement expressly provides a general obligation for WTO Members to ensure that "any procedure", which aims to "check and ensure the fulfillment of sanitary and phytosanitary measures", complies with the specific provisions found in the immediately subsequent items (a) through (i). Accordingly, the nature and coverage of items (a) to (i) under Annex C (1) encompass a variety of general principles and guidance for Members to respect when carrying out "control, inspection and approval procedures" to check and ensure the fulfillment of a particular SPS measure.

The Panel in EC – Approval and Marketing of Biotech Products concluded that the scope of Annex C (1) covers "procedures" to "check and ensure the fulfillment of sanitary and phytosanitary measures".

The United States argued that Annex C of the SPS Agreement applied to "control, inspection and approval procedures" which did not include equivalence determinations as described under Article 4 of the SPS Agreement. To support this assertion, the United States affirmed that Article 8 made clear that Annex C did not apply to every SPS measure, but rather to a subset of SPS measures, namely "control, inspection or approval procedures". Furthermore, the United States alleged that Article 8 mentioned three specific types of SPS procedures, but does not mention the procedures used in equivalence determinations. In addition, the United States argued that Article 8 provides context for what is meant by "control, inspection, and approval procedures" in Article 8 and Annex C, specifying (i) systems for approving the use of additives, and (ii) systems for establishing tolerances for contaminants. According to the United States, both of these examples relate to the approval and control of "particular products or substances", and nothing in Article 8 indicated that "control, inspection or approval procedures" were intended to involve an examination of an exporting Member's SPS measure. The United States observed that these assertions were further corroborated by the text of Annex C, which indicated that "control, inspection or approval" procedures involved particular products or substances, and not the evaluation of the equivalence of another Member's regulatory system.

China argued that Annex C of the SPS Agreement applied to any "procedure to check and ensure the fulfillment of sanitary and phytosanitary measures" and that the list of measures in Article 8 was "illustrative rather than exhaustive". China further asserted that there was no basis to find that equivalence-related procedures were not "control, inspection, or approval procedures". China also argued that Article 8 of the SPS Agreement provided that Members "ensure that their procedures are not inconsistent with the provisions of this Agreement", indicating that Article 4 was one of the provisions of the SPS Agreement and, thus, Article 8 reinforces that Article 4 provides an additional obligation rather than some type of exception or safe haven.

The Panel did not feel that it was necessary to define the whole universe of what could fall within the scope of "control, inspection, and approval procedures." However, the Panel must determine whether Section 727 caused an undue delay in the operation of "control, inspection, and approval procedures." The Panel noted

that Section 727 affected the operation of the FSIS equivalence determination process, which both parties have agreed includes "procedures". Therefore, the question before the Panel was the narrow one of whether these types of equivalence procedures fall within the scope of "control, inspection, and approval procedures."

Considering the actual text of Annex C (1) of the SPS Agreement the Panel noted that Annex C (1) did not specify, nor exclude, any type of "procedures". According to the Panel, Annex C(1) basically required that "any procedure" was covered by its provisions so long as that "procedure" was aimed at "checking and ensuring the fulfillment of sanitary or phytosanitary measures", and was undertaken in the context of "control, inspection, or approval". In the Panel's view, no a priori exclusion was contemplated by the SPS Agreement.

The Panel found equally important to note that the SPS Agreement did not specify or limit, the SPS measures referred to in Annex C (1). Indeed, Annex C (1) of the SPS Agreement merely provided that any procedure to check and ensure the fulfillment of SPS measures was subject to the provisions of items (a) through (i).

The Panel understood that to deny that an equivalence determination process, which also had the ultimate effect of approving the importation of a product from a given WTO Member, as envisaged in any other "approval procedure", was subject to Annex C (1) of the SPS Agreement, would unfairly reward the ingenuity of some WTO Members and possibly create a dangerous safe haven for disguised protectionism. Such an understanding would result in an undesired precedent that may entice some WTO Members to circumvent the application of the SPS Agreement.

In the Panel's view, the disassociation of the FSIS equivalence determination process from the disciplines on "approval procedures" of Annex C(1) could ultimately result in an insurmountable loophole in the SPS Agreement, contrary to the first and fourth preambular paragraphs of the Agreement which determine that "[SPS] measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" and WTO Members' desire for the "establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade", respectively.

For instance, if a WTO Member was able to control imports only through the recognition of equivalence according to Article 4 of the SPS Agreement, it could perhaps indefinitely postpone and delay the importation of products from a given WTO Member by arguing that the SPS Agreement did not prescribe a time-frame for conclusion of equivalence processes. In this hypothetical situation, the indefinite delay of an equivalence process would completely undermine the application of the SPS Agreement, and impede the importation of certain products into the WTO Member maintaining the equivalence process based on the provisions of the SPS Agreement. In the Panel's view, this was certainly not what the drafters of the SPS Agreement had envisaged according to the preambular language seen above, nor would it be in accordance with the decision reached by WTO Members in the SPS Committee on the implementation of Article 4 of the SPS Agreement.

Accordingly, the Panel concluded that the United States' FSIS equivalence determination process for the importation of poultry and poultry products from other WTO Members qualifies as an "approval procedure" within the meaning of Annex C(1) of the SPS Agreement.

The Panel recalled that according to China's claim, the FSIS equivalence determination procedures were covered by Annex C (1) (a) of the SPS Agreement, i.e. "control, inspection and approval procedures". However, China also clarified that if the Panel found that the FSIS equivalence determination process encompasses only one type of the procedures covered by Annex C (1), it would be sufficient. On this basis, the Panel limited its analysis to the fact that the FSIS equivalence determination process was an "approval procedure" within the meaning of Annex C (1). The Panel therefore assessed whether Section 727 had affected the FSIS equivalence determination process in a manner inconsistent with the United States' obligations under Annex C(1)(a) of the SPS Agreement.

c. Whether Section 727 has resulted in an undue delay of the FSIS equivalence determination process in respect of poultry products from China within the meaning of Annex C(1)(a) of the SPS Agreement?

The Panel was called upon to decide whether, as claimed by China, Section 727 would have unjustifiably delayed the application of FSIS equivalence procedures until its expiration, resulting in an "undue delay" within the meaning of Annex C(1)(a) of the SPS Agreement.

The Panel had accept the United States' explanation that the effect of Section 727 in United States domestic law was limited to the explicit terms of that law, comprising a temporary restriction on USDA's ability to use appropriated funds to implement or establish a rule allowing poultry products to be imported into the United States during the 2009 fiscal year. Therefore, Section 727 precluded the FSIS from ultimately granting equivalence to poultry products from China.

The justification that the United States provided for the delay in the FSIS equivalence process caused by Section 727 was the risk posed by the importation of poultry products from China. The Panel was of the view that its findings concerning the lack of scientific justification in support of the arbitrary or unjustifiable distinction in ALOPs applied to poultry products from China and poultry products from other WTO Members were relevant in assessing the United States' alleged justification for the undue delay caused by Section 727.

The Panel recalled its findings where they found that Section 727 was inconsistent with Articles 5.1, 5.2 and 2.2 of the SPS Agreement because it was not based on a risk assessment and was maintained without sufficient scientific evidence. The Panel further recalled its consequent findings that there was no justification based on scientific evidence for the distinction in ALOPs applied to the risk of potentially unsafe poultry; and that, accordingly, the distinction in ALOPs for poultry products for China and for poultry products from other WTO Members was arbitrary or unjustifiable within the terms of Article 5.5 of the SPS Agreement. Accordingly, the Panel did not see how the delay in the completion of the FSIS approval procedures could be justified on the basis of arguments already rejected by the Panel.

The Panel recallede that under Annex C (1)(a) of the SPS Agreement, WTO Members were obliged to "undertake and complete" the procedures for assessing compliance with a substantive SPS measure "without undue delay". The Panel concluded that Section 727 completely foreclosed the possibility for "completion" of the FSIS equivalence process for Chinese poultry products resulting in an unjustified and therefore undue delay within the meaning of Annex C(1)(a) of the SPS Agreement. Therefore, the United States had failed to observe the requirements under Annex C (1) (a) of the SPS Agreement.

d. Whether by failing to observe the provisions of Annex C(1)(a) of the SPS Agreement, the United States has acted inconsistently with Article 8 of the SPS Agreement?

The Panel noted that Article 8 of the SPS Agreement required, inter alia, that WTO "Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures". In this respect, both parties agreed that the non-observance of the obligations in Annex C (1) (a) implied a violation of Article 8 of the SPS Agreement. This understanding was in line with the conclusions reached by the panel in EC – Approval and Marketing of Biotech Products.

Having found that Section 727 had caused an "undue delay" in the FSIS "approval procedures", by foreclosing any possibility of "completing" the FSIS equivalence determination process for Chinese poultry products to enter into the United States; having thus concluded that the United States had failed to observe the provisions of Annex C (1)(a) of the SPS Agreement, the Panel accordingly found that Section 727 was inconsistent with Article 8 of the SPS Agreement.

The Panel therefore found that, by failing to observe the provisions of Annex C(1)(a) of the SPS Agreement, Section 727 was inconsistent with Article 8 of the SPS Agreement.

Whether section 727 was inconsistent with Article I: 1 of the GATT 1994?

China argued that Section 727 was inconsistent with Article I: 1 of the GATT 1994 because it affords an advantage to all other WTO Members that was not extended immediately and unconditionally to the like poultry products from China. In its view, all WTO Members other than China were being offered the opportunity to export poultry products to the United States after successful completion of the procedures applied by the FSIS. It further asserted that Section 727 operated to exclude only Chinese poultry products from the competitive opportunity of entering the United States' market, while allowing poultry products from all other WTO Members that same opportunity. In doing so, Section 727 violated Article I:1 of the GATT, 1994.

The United States responded that China had not provided any basis for the Panel to make a finding under Article I: 1 of the GATT 1994. The United States argued that China failed to recognize that Section 727 only had meaning within the context of the overall operation of an equivalency-based food-safety regime under the PPIA. The United States contended that "under an equivalency-based regime, products of different WTO Members were necessarily treated differently: that was products of Members that were found to be equivalent may be imported,

while similar products of Members that had yet to be found equivalent may not be imported". It further contended that the Panel need not address Article I: 1 in order to solve this dispute, because in its view the core of the issue was whether Section 727 was justified by legitimate concerns with human and animal life and health. In the United States' view, it would not promote the resolution of this dispute for the Panel to analyze the application of Article I to equivalency-based regulatory regimes, or to the likeness of products with different levels of safety. The order of analysis thus proposed by the United States was to review the measures under Article XI, followed (if necessary) by findings under Article XX (b).

Article I: 1 of the GATT 1994 contains the Most-Favoured Nation (MFN) principle, which "has long been a cornerstone of the GATT and is one of the pillars of the WTO trading system."

Article I: 1 provides:

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

The Appellate Body in Canada – Autos[67] explained that the object and purpose of Article I: 1 of the GATT 1994. "is to prohibit discrimination among like products originating in or destined for different countries." The Appellate Body further explained that "[t]he prohibition of discrimination in Article I: 1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."

The Appellate Body in EC – Bananas III confirmed that, to establish a violation of Article I, there must be an advantage, of the type covered by Article I and

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[67] Appellate Body Report, Canada-Autos, para 69.

which was not accorded unconditionally to all "like products" of all WTO Members.[68]

In accordance with the approach followed by the Panel in EC – Bananas III (Article 21.5 – US), and upheld by the Appellate Body, the Panel will conduct its analysis by considering:

i. whether Section 727 is a measure of the kind subject to the disciplines of Article I:1 of the GATT 1994?

ii. whether it confers an advantage of the type covered by Article I, and, if so,

iii. whether the advantages are extended to all like products immediately and unconditionally?

Whether Section 727 was a measure subject to the disciplines of Article I:1 of the GATT 1994?

The first step in the Panel's analysis was to determine whether Section 727 was a measure subject to the disciplines of Article I: 1 of the GATT 1994. In this respect, China argued that Section 727 was a rule in connection with the importation of poultry products from China within the meaning of Article I: 1. For China, this was evident from the wording of Section 727, which referred to the establishment or implementation of a rule allowing the importation of poultry products into the United States from China.

The United States had not presented any arguments in this respect.

The Panel noted that prior panels and the Appellate Body had interpreted the terms "rules and formalities in connection with importation" to encompass a wide range of measures. As China pointed out, countervailing duties, additional bonding requirements and activity function rules had been found to be rules and formalities in connection with importation within the meaning of Article I: 1.

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[68] Panel Report, *EC-Bananas III* (Article 21.5-US), para 7.555, Panel Report *Indonesia/Autos*, para 14.138, citing to Appellate Body Report, *EC-Bananas III* para 206, Panel Report, Columbia-Ports of Entry, Para 3.732

The Panel recalled that Section 727 prohibited the FSIS from using appropriated funds to establish or implement a rule allowing poultry products from China to be imported into the United States. The establishment and implementation of a rule by the FSIS was a prerequisite for the importation of poultry products into the United States. The Panel also recalled Section 727, which was a legislative provision, was to prohibit the importation of Chinese poultry products into the United States.

The Panel found the reasoning of the Panel in India – Autos[69] with respect to the terms "in connection with importation" to be persuasive. The Panel concluded that "in connection with importation" as used in Article I, not only encompasses measures which directly relate to the process of importation but could also include those measures, such as Section 727, which relate to other aspects of the importation of a product or have an impact on actual importation. Given the foregoing, the Panel determined that Section 727 was a rule in connection with importation within the meaning of Article I: 1 of the GATT 1994.

Whether the United States conferred an advantage of the type covered by Article I:1 of the GATT 1994?

The Panel noted that the term "advantage" in Article I: 1 of the GATT 1994 has been broadly interpreted by panels and the Appellate Body. The Appellate Body in Canada – Autos examined the language in Article I: 1 "any advantage ... granted by any Member to any product" and gave a rather broad interpretation of the term "advantage":

"We note next that Article I:1 requires that 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.' (emphasis added)

The words of Article I:1 refer not to some advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to 'any advantage'; not to some products, but to 'any product '; and not to like products from some other Members, but to like products originating in or destined for 'all other ' Members."

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69 Panel Report, India-Autos, para 7.257

The Panel in EC – Bananas III considered that "advantages" within the meaning of Article I: 1 were those that create "more favourable competitive opportunities" or affect the commercial relationship between products of different origins. The PPIA and the FSIS procedures, any country might request a determination of eligibility for the importation of poultry products to the United States. Once a successful determination of equivalency was made and a final rule was published in the Federal Register, countries could start exporting poultry products to the United States. Thus, successful completion of the mentioned procedures was the only way that an importer could enter the United States market for poultry products. The opportunity to sell poultry products in the United States market was therefore a very favourable market opportunity and not having such an opportunity would mean a serious competitive disadvantage, or rather would amount to an exclusion from competition in the US market. Such an opportunity would also affect the commercial relationship between products of two different origins where one of the countries of origin was denied access to the PPIA and the FSIS procedures.

The Panel thus considered that the opportunity to export poultry products to the United States after successful completion of the PPIA and the FSIS procedures was an advantage within the meaning of Article I:1 of the GATT 1994 because it created market access opportunities and affects the commercial relationship between products of different origins.

Whether like products from other Members were granted an advantage within the meaning of Article I:1 of the GATT 1994?

The Panel noted that Article I: 1 required a comparison between like products originating from one country vis-à-vis products originating from a WTO Member. The products to be compared in this dispute were the products at issue – poultry products as defined by the PPIA originating from China vis à- vis poultry products originating in the territory of other WTO Members which have been deemed equivalent by the FSIS. China argued that the Panel should follow a hypothetical like product analysis as several panels have done when confronted with origin-based discrimination, while the United States argued that the Panel should rely on the approach of the Panel in the EC – Asbestos dispute because it dealt with the issue of "likeness" in the context of products with different safety levels.

The concept of like product had been abundantly interpreted in the prior decisions of panels and the Appellate Body. Whatever the provision at issue, the

Appellate Body had explained that a like product analysis must always be done on a case-by-case basis.

The traditional approach for determining "likeness" had, in the main, consisted of employing four general criteria:

i. "the properties, nature and quality of the products;

ii. the end-uses of the products;

iii. consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products; and

iv. the tariff classification of the products".[70]

A different approach used by panels and the Appellate Body to determine the likeness of the products had been to assume – hypothetically – that two like products exist in the market place when one of two situations arises: first cases concerning origin-based discrimination, and second, cases where it was not possible to make the like product comparison because of – for example – a ban on imports.

The Panel in China – Publications and Audiovisual Products[71] recalled the relevant WTO jurisprudence which supports a hypothetical like product analysis where a difference in treatment between domestic and imported products was based exclusively on the products' origin. In these cases, the complainant did not need to identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of "likeness". Instead, when origin was the sole criterion distinguishing the products, it had been sufficient for a complainant to demonstrate that there can or will be domestic and imported products that are "like". The Panels in Argentina – Hides and Leather and Canada – Wheat Exports and Grain Imports found in the context of Article III:2 of the GATT 1994, that "where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific products is not required and, consequently, it was not necessary to examine the various likeness criteria." The

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70 Appellate Body Report, Japan-Alcoholic Breverages II, Panel Report, US-Gasoline, para 6.8 and working Party on Border Tax Adjustments

71 Panel Report, *China-Publication of Audiovisual Products*, Para 7.1446

Panel also noted that panels had found that foreign origin could not serve as a basis for a determination that imported products were "unlike" domestic ones.[72]

The Panel in Colombia – Ports of Entry[73] applied a hypothetical like product analysis in respect of products originating from Panama and other WTO Members in the context of Article I: 1. The measure at issue affected products coming from Panama into Colombia, whether originating or not in Panama. Panama did not appear to produce goods for export to Colombia, but nevertheless the Panel considered Panama's claim. Based on the above jurisprudence under Article III of the GATT 1994, the Panel adopted a hypothetical likeness approach on the premise of an origin-based distinction that would arise if Panama were to produce the subject goods and export them to Colombia. The Panel considered that if Panama were to produce textiles, apparel and footwear, goods originating in Panama would be "like products" to those originating in other countries. For example, the funding restriction imposed by Section 727 was origin-based in respect of the products it affects, i.e. poultry products from China, and not from any other WTO Member. By targeting only China, Section 727 imposed origin-based discrimination.

Given this origin-based distinction the Panel believed it was appropriate to follow prior panels that had used a hypothetical like products analysis. In this sense, for the purposes of determining whether an advantage had been accorded immediately and unconditionally to other WTO Members and not to China, the Panel would assume that poultry products originating from China were like products to those originating from other WTO Members.

Whether the United States conferred an advantage that was not extended "immediately and unconditionally" to poultry products from China?

China argued that Section 727 was "inconsistent with Article I: 1 because it applies a condition in a manner that discriminates between like products of different origins." It stated that Section 727 applied solely to poultry products and that it removes the advantage of an opportunity to access the United States' market. For these reasons, China concluded that Section 727 did not operate on an MFN basis and could not be seen to unconditionally accord advantages to the like products of all WTO Members.

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72 Panel Report, US-FSC (Article 21.5-*EC II*, para 8.133

73 Appellate Body Report, Canada – periodicals, PP 20-21

The United States did not respond to the substance of China's claim under Article I:1, because in its view China had not met the threshold of establishing that poultry products from China are like those from other WTO Members.

The Panel in Colombia – Ports of Entry followed the reasoning of the Panel in Canada – Autos and considered that it could assess whether an advantage was conferred "immediately and unconditionally" "based on whether an advantage granted to textiles, apparel, or footwear of any Member was not similarly accorded to those products originating in Panama for reasons related to its origin or the conduct of Panama." Colombia argued that it could condition its customs procedures on the need to control and verify imported merchandise from Panama and to avoid circumvention of such laws and regulation through under-invoicing, fraud and smuggling, without violating Article I: 1 of the GATT 1994. The Panel reiterated the view expressed by the Canada – Autos panel that conditions attached to an advantage granted in connection with the importation of a product would violate Article I:1 of the GATT 1994 only when such conditions discriminated with respect to the origin of the products, and ruled that Article I:1 of the GATT 1994 prohibited Members from addressing such concerns through the use of customs rules that were applied on the basis of origin.

China argued that Section 727 was inconsistent with Article I:1 of the GATT 1994 as it applied a condition in a manner that discriminated between like products of different origins, given that it applies solely to Chinese poultry products, hence not being applied on MFN basis.

Section 727 prohibited FSIS from spending funds to establish or implement a rule allowing the importation of poultry products from China; it therefore applied solely to China. The Panel recalled that without the establishment or the implementation of a rule allowing the importation of poultry products – even if a country was determined by FSIS to provide equivalent food safety standards – it could not export poultry products to the United States. This meant that even if Chinese poultry production system was found to provide equivalent food safety standards as those applied in the United States, it would not be able to export poultry products because of the funding prohibition.

Further, the United States acknowledged that the purpose and effect of Section 727 was to prevent Chinese poultry products from being imported into the United States.

No other country was subject to the funding prohibition that Section 727 imposed on China. This meant that China was the only WTO Member that was denied the advantage that the Panel identified earlier – the opportunity to export poultry products to the United States after the successful completion of the FSIS procedures. Therefore, Section 727 discriminated against China with respect to other WTO Members by denying the above-mentioned advantage, and this discriminatory treatment meant that the United States was not extending an advantage "immediately and unconditionally".

For the above reasons, the Panel concluded that the United States was not extending an advantage immediately or unconditionally to the like products originating from China, advantage that it had extended to all other WTO Members. The Panel, therefore, found that Section 727 was inconsistent with Article I: 1 of the GATT 1994.

Whether section 727 was inconsistent with Article XI:1 of the GATT 1994?

China argued that Section 727 was inconsistent with Article XI: 1 of the GATT 1994 because it imposed a restriction on importation which negatively impacted the competitive opportunities for poultry products from China. In China's view, the measure instituted a *de facto* prohibition on the importation of poultry products from China. Further, it contended that since China could not participate in the FSIS approval procedures, the measure at issue effectively eliminates China's competitive opportunities in the United States market, thus constituting a restriction within the meaning of Article XI: 1 of the GATT 1994. In the alternative, China argued that to the extent that the practical impact of Section 727 was an import ban on Chinese poultry products, Section 727 instituted an import prohibition in the sense of Article XI: 1 of the GATT 1994.

The United States argued that China, as the complaining party, had the burden of establishing all of the elements of the alleged breach of Article XI: 1 of the GATT 1994. The United States contended that Section 727 met the requirement of subparagraph (b) of Article XX of the GATT 1994.

The United States had not contested China's claim under Article XI: 1 of the GATT 1994. The absence of refutation of a claim raises the question of what the role of the Panel should be in such a case. We note that in US – Shrimp (Ecuador[74])

[74] Panel Report, US-Shrimp (Ecuador) paras 7.7

and US – Shrimp (Thailand[75]), the Panels found that although the respondent was not seeking to refute the claims, in order to make an objective assessment of the matter before them they had to satisfy themselves whether the complainant had established a prima facie case of violation. In particular, the Panels considered whether the complainant had presented evidence and argument which "was sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explained the basis for the claimed inconsistency of the measure with that provision".

The establishment and implementation of a rule by FSIS in the Federal Register allowing the importation of poultry products from a given country was a prerequisite for the importation of such products. Without the establishment or implementation of this rule, countries were prohibited from importing poultry products into the United States.

Section 727 prohibited the FSIS to use appropriated funds to "establish" or "implement" a rule allowing the importation of poultry products from China. This restriction on the use of funds had the effect of prohibiting the importation of poultry products from China, because without a rule being established / implemented, Chinese poultry products were banned from entering the US market. Hence, Section 727 operated as a prohibition on the importation of poultry products from China into the United States.

The Panel, therefore, found that during the time Section 727 was in operation, it imposed a prohibition on the importation of poultry products from China and thus was inconsistent with Article XI: 1 of the GATT 1994.

Whether section 727 was justified under Article XX(B) of the GATT 1994?

The United States put forward an affirmative defence under Article XX (b) of the GATT 1994. For the United States, Section 727 was enacted in order to "protect human and animal life and health from the risk posed by the importation of poultry products from China". The United States invoked this provision as a defence in case the Panel found a violation of Article I:1 and XI of the GATT 1994 by Section 727.

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75 Panel Report, US-Shrimp (Thailand) para 7.20

When asked about the relationship between the SPS Agreement and Article XX (b) of the GATT 1994, the United States agreed that the SPS Agreement, as one of the covered agreements, was a context for Article XX (b), just as other parts of the WTO Agreement were context. The United States cautioned, however, by stating that a consideration of "context" under the VCLT occurred when there was a specific question of treaty interpretation. In its view, the fact that the SPS Agreement was context for Article XX (b) did not mean that any particular element of the SPS Agreement became a part of the legal text for the consideration of a justification under Article XX (b). In the United States' view, it would be incorrect to consider that Article XX (b) was to be interpreted as somehow incorporating all the obligations of the SPS Agreement. In the United States' view, there was nothing that made the SPS Agreement more relevant than, for example, Article XIV of the GATS.

When asked about which provisions of the SPS Agreement the Panel should examine as context for Article XX (b), the United States argued that it would be incorrect to view the SPS Agreement as altering the scope or adding to the scope of Article XX (b), or as necessarily being more "immediate" context than other provisions of the covered agreements.

China argued that the provisions of the SPS Agreement provide relevant and immediate context for interpreting Article XX (b). In China's view, the close relationship between Article XX (b) and the SPS Agreement was reflected in the preamble and the presumption of consistency set forth in Article 2.4 of the SPS Agreement. When asked about which provisions of the SPS Agreement should the Panel examine as context for Article XX (b), China responded that the Panel should take Articles 2, 3, 5, 6 and 8 of the SPS Agreement under consideration. China argued that these provisions relate to the justification for a given measure, along with disciplines on non-discrimination in the application of such measure.

United States argued that merely because the SPS Agreement was a context for Article XX (b) did not mean that Article XX (b) was to be interpreted as somehow incorporating all the obligations of the SPS Agreement. The Panel disagreed to a certain extent. The Panel concluded that the SPS Agreement explained the provisions of Article XX (b) in further detail and because the SPS Agreement only applies to SPS measures; the SPS Agreement thus explained in detail the provisions of Article XX (b) in respect of SPS measures. Since that was the case, the Panel had difficulty in accepting that an SPS measure which was found inconsistent with provisions of the SPS Agreement such as Articles 2 and

5, which were explanations of the disciplines of Article XX (b), could be justified under that same provision of the GATT 1994. Additionally, the Panel recalled that Article 2.1 of the SPS Agreement provided that Members had a right to take SPS measures necessary for the protection of human, animal, or plant life or health, provided that such measures are not inconsistent with the provisions of the SPS Agreement. Therefore, the Panel was of the view that an SPS measure which had been found inconsistent with Articles 2 and 5 of the SPS Agreement cannot be justified under Article XX (b) of the GATT 1994.

The Panel was not deciding that any analysis of Article XX (b) must be done with reference to the SPS Agreement. The Panel was only saying that, where an SPS measure was concerned, the provisions of the SPS Agreement became relevant for an analysis of Article XX (b) and, furthermore, where such an SPS measure had been found inconsistent with provisions of the SPS Agreement such as Articles 2 and 5, the disciplines of Article XX (b) could not be applied so as to justify such a measure.

The Panel concluded and found that it was inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the SPS Agreement; the United States had not demonstrated that Section 727 was justified under Article XX (b) of the GATT 1994.

Whether section 727 was inconsistent with Article 4.2 of the Agreement on agriculture?

The Panel observed that China claims that Section 727 violated Article 4.2 of the Agreement on Agriculture. In particular, China requested the Panel to find that Section 727 restricted the volume of Chinese poultry products that might enter the United States at zero, resulting in the maintenance of a "quantitative import restriction" inconsistent to Article 4.2 of the Agreement on Agriculture.

The Panel found that Section 727 was inconsistent with Article XI: 1 of the GATT 1994, entitled "General elimination of quantitative restrictions", because Section 727 operated as a prohibition on the importation of poultry products from China into the United States. The Panel, after careful consideration, on the basis of judicial economy, refrained from ruling on China's claim under Article 4.2 of the Agreement on Agriculture.

The principle of judicial economy was recognized in WTO law. The Appellate Body had consistently ruled that panels were not required to address all the claims

made by a complaining party provided they do not exercise judicial economy where only a partial resolution of a dispute would result. The Panel believed that this was not the case. Indeed, in making findings under Article XI:1 of the GATT 1994, the Panel considered that it has effectively resolved the aspects in this dispute related to the "restrictions" on Chinese poultry and poultry products into the United States.

The Panel found support for its exercise of judicial economy in the practice of panels and the Appellate Body in previous dispute settlement proceedings. For example, the Panel in US – 1916 Act (Japan), after finding a violation of Article VI, held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article XI although this did not mean that Article VI applied to the exclusion of Article XI:1. On that occasion, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.

For the above reasons, the Panel concluded that it would not be appropriate to precede and rule on China's claim under Article 4.2 of the Agreement on Agriculture, and, thus, declined to do so.

Conclusions and Recommendations

In light of the above findings, the Panel found that Section 727 was inconsistent with:

a. Articles 5.1 and 5.2 of the SPS Agreement because it was not based on a risk assessment which took into account the factors set forth in Article 5.2;

b. Article 2.2 of the SPS Agreement because it was maintained without sufficient scientific evidence;

c. Article 5.5 of the SPS Agreement because the distinction in ALOPs for poultry products from China and for poultry products from other WTO Members was arbitrary or unjustifiable and that this arbitrary or unjustifiable distinction in ALOPs results in discrimination against China;

d. Article 2.3 of the SPS Agreement, first sentence, because the inconsistency of Section 727 with Article 5.5 of the SPS Agreement necessarily implied

that Section 727 was also inconsistent with Article 2.3 of the SPS Agreement;

e. Article 8 of the SPS Agreement because Section 727 had caused an undue delay in the FSIS approval procedures and thus the United States failed to observe the provisions of Annex C(1)(a) of the SPS Agreement.

The Panel declined to rule on China's claim that Section 727 was inconsistent with Article 5.6 of the SPS Agreement.

The Panel further found that Section 727 was inconsistent with:

a. Article I:1 of the GATT 1994 because the United States was not extending an advantage immediately or unconditionally to the like products originating from China, advantage that it has extended to all other WTO Members;

b. Article XI: 1 of the GATT 1994, because during the time it was in operation, Section 727 imposed a prohibition on the importation of poultry products from China.

The Panel found Section 727 was not justified under Article XX (b) of the GATT 1994. The Panel found that it was inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the SPS Agreement.

Finally, the Panel declined to rule on China's claim that Section 727 was inconsistent with Article 4.2 of the Agreement on Agriculture.

Under Article 3.8 of the DSU, in cases where there was infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent that the United States had acted inconsistently with the specified provisions of the SPS Agreement and the GATT 1994, it had nullified or impaired benefits accruing to China under those agreements.

Article 19.1 of the DSU was explicit concerning the recommendation a panel was to make in the event it determines that a measure was inconsistent with a covered agreement: "it shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted).

However, given that the measure at issue, Section 727 had expired, the Panel did not recommend that the DSB request the United States to bring the relevant measure into conformity with its obligations under the SPS Agreement and the GATT 1994.

In this respect, the Panel noted that China had requested the Panel to make use of its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the United States could implement the recommendations and rulings of the DSB. In particular, China had requested the Panel to issue a recommendation that the United States did not revert to language similar to that in Section 727 in its future legislation.

The Panel had not made recommendations on measures other than Section 727 itself because these other measures, including future measures, were outside its terms of reference. The Panel noted that any findings of the Panel on the consistency of Section 727 with the relevant provisions of the covered agreements should clarify the obligations raised and provide some predictability for future cases dealing with the same or similar matters. The Panel also noted that Section 743, the most recent appropriations measure, already includes language different from that of Section 727.

The Panel therefore decided that, in the circumstances of the dispute, although it made rulings on the consistency of Section 727 with the SPS Agreement and the GATT 1994, it refrained from making recommendations under Article 19 of the DSU in the terms requested by China.

5. UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA WT/DS379/R 22 October 2010

Parties:
People's Republic of China
United States of America

Third Parties:
Argentina, Australia, Bahrain, Brazil, Canada, the European Communities, India, Japan, Kuwait, Mexico, Norway, Saudi Arabia, Chinese Taipei and Turkey

Factual Matrix:

On 19 September 2008, China requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXIII: 1 of the GATT 1994, Article 30 of the Agreement on Subsidies and Countervailing Measures and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. The consultations concerned definitive anti-dumping and countervailing duties imposed by the United States on imports of four products from China (circular welded carbon quality steel pipe, pneumatic off-the-road tires, light–walled rectangular pipe and tube, laminated woven sacks). These consultations failed to resolve the dispute.

The dispute concerned the definitive anti-dumping and countervailing duties imposed by the United States as a result of four anti-dumping and four countervailing duty investigations conducted by the United States Department of Commerce ("USDOC"), covering four products from China:

i. Circular Welded Carbon Quality Steel Pipe ("CWP");

ii. Certain New Pneumatic Off-the-Road Tires ("OTR");

iii. Light–Walled Rectangular Pipe and Tube ("LWR"); and

iv. Laminated Woven Sacks ("LWS").

China claimed that the final USDOC determinations that led to the imposition of the duties, the orders imposing the duties themselves, and certain aspects of the conduct of the underlying investigations were inconsistent with the United States' obligations under the covered Agreements. China also challenged an alleged imposition by the United States of "double remedies" resulting from the application, in the four sets of investigations at issue, of anti-dumping duties calculated under the US non-market economy ("NME") methodology simultaneously with countervailing duties on the same products. China also made "as such" claims against the alleged U.S. failure to provide the USDOC with legal authority to avoid the imposition of double remedies in such circumstances.

Parties' Requests for Findings and Recommendations

China

China requested that the Panel to make the following findings:

i. The USDOC's findings that the government of China provided a financial contribution in the form of goods in the four countervailing duty determinations were inconsistent with Article 1.1 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

ii. The USDOC's findings that private trading companies provided a financial contribution in the form of goods in the LWR, CWP, and OTR countervailing duty determinations were inconsistent with Article 1.1 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

iii. The USDOC's findings of benefit in the four countervailing duty determinations in respect of the goods allegedly provided by the government of China and private trading companies were inconsistent with Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

iv. The USDOC's inclusion of only positive benefits in its calculations of whether producers in the OTR countervailing duty investigation obtained benefits from the alleged provision of goods, while excluding negative benefits in those calculations, was inconsistent with Articles 10, 14, 19.1,

19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

v. The USDOC's findings of financial contribution and specificity in the OTR countervailing duty determination in respect of the alleged "policy lending" subsidy were inconsistent, respectively, with Article 1.1 and Article 2 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

vi. The USDOC's findings of benefit in the LWS, CWP, and OTR countervailing duty determinations in respect of the alleged "policy lending" subsidy were inconsistent with Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

vii. The USDOC's findings of specificity and benefit in the LWS countervailing duty determination in respect of the provision of land-use rights were inconsistent, respectively, with Article 2 and Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

viii. The USDOC's finding of benefit in the OTR countervailing duty determination in respect of the provision of land-use rights was inconsistent with Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

ix. In connection with the four sets of anti-dumping and countervailing duty determinations at issue, the USDOC's use of its NME methodology to determine normal value in the anti-dumping determinations, concurrently with a determination of subsidization and the imposition of countervailing duties on the same products, was inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Article VI of the GATT 1994;

x. The United States' failure to provide sufficient legal authority for the USDOC to avoid the imposition of double remedies for the same alleged acts of subsidization when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of

countervailing duties on the same product means that US law was, in all such instances, inconsistent "as such" with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Article VI of the GATT 1994;

xi. In each of the four sets of anti-dumping and countervailing duty determinations at issue, the USDOC's failure to extend to imports from China the same unconditional entitlement to the avoidance of a double remedy for the same alleged acts of subsidization that it extended to like products originating in the territory of other Members was inconsistent with Article I: 1 of the GATT 1994;

xii. The United States' failure to provide sufficient legal authority for the USDOC to avoid the imposition of double remedies for the same alleged acts of subsidization when it imposed anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product means that, in all such instances, the United States would fail to extend to imports from China the same unconditional entitlement to the avoidance of a double remedy that it extends to like products originating in the territory of other Members, in violation of Article I:1 of the GATT 1994;

xiii. The USDOC's failure in the four countervailing duty investigations to give the Government of China and interested parties 30 days to respond to all questionnaires used in the investigations was inconsistent with Article 12.1.1 of the SCM Agreement;

xiv. The USDOC's failure in the LWR and CWP countervailing duty investigations to notify respondent producers of the information it required and to provide them with an ample opportunity to present relevant evidence prior to resorting to facts available was inconsistent with Article 12.1 and Article 12.7 of the SCM Agreement.

United States

The United States requested that the Panel reject China's claims in their entirety. The United States requested that the Panel find that the measure identified in China's Request for the Establishment of a Panel as part of China's "as such" claims with respect to "double remedies" as well as China's "as such" claims on double remedies themselves fall outside the Panel's terms of reference.

General Principles applied in the dispute

Rules of treaty interpretation

Article 3.2 of the DSU directs panels to apply "customary rules of interpretation of public international law" in the interpretation of the provisions of the covered agreements. It was well settled in WTO law that the principles codified in Articles 31-33 of the Vienna Convention on the Law of Treaties ("Vienna Convention") were such customary rules.

Standard of review

Article 11 of the DSU sets out the standard of review applicable in WTO panel proceedings in general. This provision imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", both factual and legal. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

It is well settled that in reviewing (inter alia) a countervailing duty determination, a panel might not conduct a "*de novo* review" of the evidence or substitute its judgment for that of the competent authorities. A panel might not reject an agency's conclusions simply because the Panel would have arrived at a different outcome if it were making the determination itself. A panel must also limit its examination to the evidence that was before the agency during the course of the investigation, and must take into account all such evidence submitted by the parties to the dispute. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".

A panel reviewing an investigating authority's determination should examine whether the determination is "reasoned and adequate", and more specifically, whether the investigating authority provided a "reasoned and adequate" explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. For more guidance the Panel referred the judgement US – Softwood Lumber VI (Article 21.5 – Canada).

Burden of Proof

The general principles regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another Member shall assert and prove its claim. With respect to these general rules on allocation of the burden of proof, the Panel observed that China, as the complaining party in this dispute, must therefore make a prima facie case of violation of the relevant provisions of the WTO agreements it invoked, which the United States must refute. A prima facie case was one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the prima facie case. The Panel further noted that it was generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it was also for the United States to provide evidence supporting the facts which it asserts.

Main arguments of the parties

China:

China challenged as invalid the USDOC's findings in the investigations at issue that SOEs producing inputs, and SOCBs providing loans, were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. China considered inconsistent with that Article the USDOC's determinations that the provision of inputs and of loans by these entities constituted financial contributions by public bodies. China argued that in the absence of evidence that these entities were vested with and exercised governmental authority, as a matter of law their actions needed to be deemed those of private, not public, bodies. Given this, only if the USDOC had found that these entities were "entrusted or directed" in the sense of Article 1.1(a) (1) (iv) of the SCM Agreement to provide the inputs or the loans could it have lawfully concluded that that the financial contributions were made by the Government of China. China maintained that because the USDOC did not examine whether there had been such entrustment or direction, its determinations of financial contributions by the Government of China were inconsistent with Article 1.1 of the SCM Agreement, and as a consequence, with Articles 10 and 32.1 of the SCM Agreement, as well as with Article VI:3 of the GATT 1994.

China argued that the Appellate Body recognized in US – Countervailing Duty Investigation on DRAMS that under well-established principles of customary

international law, the actions of state owned corporate entities were prima facie private, and thus presumptively not attributable to a Member under Article 1.1 of the SCM Agreement. China argued that instead of focusing as it should have on whether the SOEs and SOCBs were "private bodies" that had been "entrusted or directed" by the Government of China or a public body to provide inputs and loans, respectively, the USDOC relied on a per se rule of majority government ownership in determining that these entities were "public bodies". In China's view, this interpretation of the term "public body" was impermissible under a correct application of the principles of treaty interpretation. For China, while government ownership was relevant to the question of control, and thus to the inquiry in Article 1.1(a)(1)(iv) as to whether a private body has been directed to perform governmental functions, ownership had little relevance in determining whether an entity is a public body.

China asserted, to be a "public body", an entity must be authorized by the law of the state to exercise functions of a governmental or public character, and the acts in question must be performed in the exercise of such authority. In this context China, paraphrasing the Appellate Body in Canada – Dairy, argues that a "public body" should be defined as "an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character". According to China, what distinguishes the conduct of public bodies from that of private bodies was not the degree of government ownership – the government may have ownership interests in both – but the source and nature of the authority the entities possess and exercise. China stated, therefore, that in the investigations at issue in the present dispute, absent actual evidence establishing that the state-owned entities were vested with authority to exercise governmental authority in connection with the provision of the alleged financial contributions at issue, as a matter of law those entities' actions must be deemed to be those of private entities.

China asserted that it was not arguing that government-owned entities can never be public bodies within the meaning of Article 1.1(a)(1), but rather that their conduct should be deemed presumptively private, and consistent with that presumption, their conduct ordinarily should be examined under the entrustment or direction standard of Article 1.1(a)(1)(iv) of the SCM Agreement. If the evidence in a particular case established that a government-owned entity was exercising delegated authority to perform functions of a governmental character, then it would be appropriate to conclude that it was a public body and that subparagraph (iv) was inapplicable. But absent such evidence, China argued, subparagraph (iv)

should apply and there was no legitimate justification in the text, context or object and purpose of the SCM Agreement for the arbitrary test the United States has advanced that would make such entities public bodies in all cases merely by virtue of their government ownership.

China relied on various dictionary definitions of the term "public" to argue that the ordinary meaning of the term "public body" requires the essential elements that such an entity acts for the welfare and best interests of a nation or community as a whole, and does so under the authority, or officially on behalf, of the nation or community as a whole. China argued further that the phrase in Article 1.1(a)(1), "a government or other public body" explicitly equates, and treats as "functional equivalents", the terms "government" and "public body". According to China, the Agreement differentiates between this type of entity and "private bodies" in Article 1.1(a) (1)(iv), the actions of which require "entrustment or direction" from a government to perform one of the functions enumerated in Article 1.1(a)(1)(i)-(iii) in order to be deemed financial contributions by a government. For China, the fact that entrustment or direction of the actions of private bodies brings those actions within the purview of "government financial contribution" demonstrates that in all cases, the sine qua non of a "financial contribution" was the exercise of some element of governmental authority in connection with performing functions of a governmental character.

China also considered that the definitions of the corresponding French and Spanish terms "organisme public" and "organismo público" in Article 1.1 of the SCM Agreement support its argument concerning the ordinary meaning of the term "public body". China argues that all three terms are presumed to have the same meaning under Article 33(3) of the Vienna Convention, and that the Panel must examine this meaning.

China disagreed with the United States concerning the meaning of the conjunction "or" in Article 1.1(a) (1) between the terms "government" and "public body". In China's view, this word did not suggest that the two terms must have wholly dissimilar and unrelated meanings, but only that the terms are not identical. China argued that "or" frequently connects words or phrases those were similar or functional equivalents, and cites the report of the US – Export Restraints panel's reference to the word "or" between the phrases "a government makes payments to a funding mechanism" and "entrusts or directs a private body" in subparagraph (iv) of Article 1.1(a) (1) as meaning that the two phrases captured equivalent government actions.

China further disagreed with the United States concerning the significance of the adjective "any" to modify "public body" in Article 1.1(a)(1) of the Agreement. According to China, the "any" only indicates that all entities that qualify as public bodies – however that term was defined – were captured within the scope of Article 1.1, but says nothing about the characteristics that define a public body, and offers no support for the United States' per se majority government ownership test.

China argued that its interpretation of the term "public body" also was supported contextually by the General Agreement on Trade in Services (the "GATS"). According to China, paragraph 5(c)(i) of the Annex on Financial Services to the GATS (the "GATS Financial Services Annex") defines the term "public entity" as an "entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes [...]". For China, this definition reflects a similar view of the functional equivalence between "government" and "public body" that, in China's view, exists in Article 1.1 of the SCM Agreement.

China referred to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Draft Articles") as compelling its interpretation of the term "public body" in Article 1.1 of the SCM Agreement.In this regard, concerning the interpretation of Article 1.1 of the SCM Agreement, China recalls that in US – Countervailing Duty Investigation on DRAMS the Appellate Body referred to the Draft Articles in the section of its report entitled "The meaning of the terms 'entrusts' and 'directs'" in Article 1.1(a)(1)(iv). China further argued that to the extent that the Panel in Korea – Commercial Vessels can be read as endorsing a test for determining whether an entity is a public body solely by reference to government ownership or control, its reasoning was not persuasive and should not be followed. According to China, defining "public body" solely by reference to government ownership or control cannot be reconciled with the Appellate Body's recognition in US – Countervailing Duty Investigation on DRAMS, consistent with customary international law, that the conduct of a state-owned corporate entity presumptively is not attributable to a government unless that entity is exercising governmental authority within the meaning of Article 5, or determined to be under the direction or control of the State within the meaning of Article 8, of the Draft Articles.

Concerning the object and purpose of the SCM Agreement, China considered that the United States' interpretation, if accepted, would have far-reaching and

troubling implications for the proper application of the SCM Agreement. Here, China disagreed with the argument advanced by the United States that a majority ownership rule was necessary to "prevent circumvention of the SCM Agreement [...] so that subsidizing governments cannot hide behind their ownership interests in enterprises to avoid the reach of the SCM Agreement." China considers this to be a baseless concern, because subparagraph (iv) of Article 1.1 is an acknowledged anti-circumvention provision that squarely addresses it. China considered that the interpretation advocated by the United States, which in its view was not based on the actual treaty standards, would flout the object and purpose of the SCM Agreement.

Concerning the USDOC's findings of financial contribution in the form of provision of inputs by SOEs, China argued that the determination that the SOEs were public bodies was flawed, such that the financial contribution findings were inconsistent with the SCM Agreement. In particular, China argues that for the USDOC to have validly concluded that the SOEs were public bodies, it would have had to, but did not, examine whether they were authorized by Chinese law to exercise functions of a governmental character or public character normally exercised by State actors, "and" the acts alleged to have constituted financial contributions were performed in the exercise of such authority. Rather, China argues, the USDOC applied a per se rule of majority ownership to conclude that the SOEs were public bodies. China made the same argument in respect of the USDOC's findings that the SOCBs were public bodies.

China criticized the USDOC for not applying the five-factor test that it had applied in certain prior cases: (i) government ownership; (ii) the government's presence on the entity's board of directors; (iii) the government's control over the entity's activities; (iv) the entity's pursuit of governmental policies or interests; and (v) whether the entity is created by statute.

United States

Concerning the ordinary meaning of "public body", the United States submitted that the definitions of the term "public" include: "belonging to, affecting, or concerning the community or nation", and that dictionary definitions identified by China include: "Relating or belonging to an entire community, state, or nation" and "of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation". United States noted that one of the dictionaries relied upon by China defines "public" as: "In general, and in most of the senses,

the opposite of private (adj.)", and that the word "private" means: "Of a service, business, etc.: provided or owned by an individual rather than the State or a public body". For the United States, this was an important point because the bodies at issue in the dispute are businesses. Accordingly, because the ordinary meaning of the term "public" is the opposite of "private", the meaning of the term "public" would include "provided or owned by the State or a public body rather than an individual". According to the United States, therefore, however the term "public" was examined, its ordinary meaning included the notion of belonging to, or being owned by, the state, and if an entity is owned by the state, the ordinary meaning of the term "public" indicates that it can be a "public body" under the SCM Agreement.

In terms of context, the United States noted that the term "public body" in Article 1.1(a)(1) was part of the disjunctive phrase "by a government or any public body [...]". By using two different terms to refer to the type of entity that can provide a financial contribution, the SCM Agreement expresses distinct and different meanings for the terms "government" and "public body". Treaty interpretation should give meaning and effect to all terms of a treaty, and "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility". The United States also argued that the word "any" before "public body" means, inter alia, "of whatever kind" of the being or thing at issue, and that through the use of the term "any", the SCM Agreement indicates that there might be different "kinds" of public bodies. For the United States, "any" also indicates that the drafters of the SCM Agreement did not intend the term "public body" to have a meaning that would relate back to the term "government".

The United States also disagreed with China that the French and Spanish versions of the SCM Agreement require reading the term "public body" as "government agency" (i.e., as the same as "government").

The United States rejected China's argument that Article 1.1(a)(1) "explicitly equates" the terms "government" and "public body" making them "functional equivalents", and that therefore the essence of a "public body" should be the same as the essence of a "government", namely to perform certain functions pursuant to government authority and power. In the view of the United States, if this were the case, there would have been no need for the use of two different terms in Article 1.1(a)(1). Pursuant to accepted rules of treaty interpretation, the terms "public body" and "government" cannot be equivalent. The United States argued that the term "private body" in Article 1.1(a)(1)(iv) was relevant context.

The United States found further context in China's Protocol of Accession, which "include[s] the commitments referred to in paragraph 342 of the Working Party Report" as an "integral part of the WTO Agreement". The United States cited language in the Report concerning the discussion of state owned enterprises in China (including banks) which in its view makes clear that China's state-owned enterprises are government actors, or at least public bodies, within the meaning of the SCM Agreement.

The United States disagreed with the contextual argument of China based on the term "public entity" in the GATS Financial Services Annex. The United States argues that the GATS is a different agreement with an entirely different field of application, and that the term "public entity" used in the GATS is different from the term "public body".

The United States pointed to prior statements of the Appellate Body and panels that the object and purpose of the SCM Agreement is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions" and "to impose multilateral disciplines on trade-distorting subsidization". Accordingly, the United States argued, the Appellate Body and panels have sought to ensure that the SCM Agreement not be interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. Consistent with this object and purpose, and the need to prevent circumvention of the SCM Agreement, in the view of the United States the term "public body" should be interpreted so that subsidizing governments cannot hide behind their ownership interests in enterprises to avoid the reach of the SCM Agreement.

The United States disagreed with China that the Draft Articles are relevant rules of international law for purposes of interpreting the term "public bodies". The United States argued that the Draft Articles are not an agreement relating to the SCM Agreement made in connection with the conclusion of the SCM Agreement, nor an instrument made by any parties relating to the SCM Agreement, in the sense of Article 31 of neither the Vienna Convention, nor one of the "covered agreements" set forth in Appendix 1 to the DSU. They thus are not "context" as that term is used in the Vienna Convention. Nor are the Draft Articles a subsequent agreement or practice regarding the interpretation or application of the SCM Agreement.

In this regard, the United States submitted that the Draft Articles state that their purpose is not to define the primary rules establishing obligations under international law, but rather to define when a state (as opposed to some other entity) is responsible for a breach of those primary rules. In the context of countervailing duties under the SCM Agreement, according to the United States the primary rule is contained in Article 10 of the SCM Agreement, and the question in the present dispute is whether the United States breached this primary obligation, about which the Draft Articles have nothing to say. The United States also noted the lex specialis clause of the Draft Articles. In the view of the United States, the SCM Agreement is a special rule of international law in the sense of that provision, which governs when a financial contribution occurs, and defines the "State" in a way that may produce different consequences from the Draft Articles, using the phrase "a government or any public body within the territory of a Member [. . .]", the proper interpretation of which is based on its ordinary meaning when read in its context and in light of the object and purpose of the SCM Agreement. The United States argues that the standards in the Draft Articles thus have no relevance or application to the special rule in Article 1.1(a)(1) of the SCM Agreement.

The United States agreed with the conclusion of the Panel in Korea – Commercial Vessels that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)". In the view of the United States, this reasoning is consistent with the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement. The United States stated that majority government ownership can demonstrate control, in that government ownership gives the government the ability to appoint managers and directors and thereby to oversee operations. For the United States, it would be an unusual situation where the owners of the entirety of, or a majority share in, a company could not appoint the leadership (and thereby oversee operations), or could not control the company.118 The United States thus agreed with the Korea – Commercial Vessels panel that in all cases, public body status "can be determined on the basis of government (or other public body) control", and notes that in analyzing control, although the Panel cited evidence that the government appointed various entities' managers and directors, and that the government approved and oversaw the entities' operations, it gave the most weight to government ownership of the body. It called the fact that one bank was almost fully government-owned "highly relevant and arguably determinative" in the question of government control.

The United States submitted that when concluding that a public body is one controlled by a government or other public body, the Panel rejected Korea's

argument that an entity is not a "public body" if it engages in market activities on commercial terms. The Panel noted that this would mean that the Panel should apply the "benefit" test in a "public body" analysis, such that on one day a given entity could provide financing on market terms, and thus constitute a "private" entity, while the next day it could make cash grants and then constitute a "public" body. For that panel, "the question of whether an entity is a public body should not depend on an examination of whether that entity acts pursuant to commercial principles". In the view of the United States, China repeats Korea's failed argument when it argues that an entity is only a public body when it engages in government functions, not commercial activities.120 The United States also agreed with the Korea – Commercial Vessels panel that pursuit of a public policy objective is not essential to a public body determination. The United States asserted that China's proposed elements of (i) legal authority to exercise functions of a governmental or public character, and (ii) actions performed in exercise of such authority, are similar to those rejected in Korea – Commercial Vessels.121 In the view of the United States, a standard of government ownership or control is consistent with the object and purpose of the SCM Agreement because it will ensure that subsidizing governments cannot hide behind their ownership interests, while at the same time not treating any entity with which a government has a merely tangential relationship as a public body.

The United States thus rejected China's argument that ownership and control are irrelevant to a "public body" analysis, and are only relevant to an "entrustment or direction" analysis pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement. The United States asserted that most of China's argument on this point flows from its mistaken reliance upon the Draft Articles, in particular Article 5, which China analogizes to the public body question, and Article 8, which it analogizes to the entrustment or direction question.

The United States maintained that the USDOC's determinations in the investigations at issue that certain state-owned enterprise producers of HRS, rubber, and petrochemicals were "public bodies" are consistent with Article 1.1(a)(1) of the SCM Agreement. According to the United States, the USDOC applied a rule of majority ownership to determine whether an entity was a public body, and found that if the government was the majority owner, then that producer was a public body. Given that the "public body" findings are consistent with the SCM Agreement, the United States argueed that there was no need for the USDOC to determine whether the government entrusted or directed the state-owned enterprises to provide goods for less than adequate remuneration.

Concerning the provision of loans by SOCBs in the OTR investigation, and the USDOC's determination that the SOCBs in question were public bodies, the United States rejected China's characterization that this determination was based on (i) whether there was a policy in place to provide preferential lending to the OTR industry, and (ii) whether there was evidence that the SOCBs provided preferential loans to the industry pursuant to this policy. Rather, the United States argues, the USDOC relied upon "'all information on the record'" and its finding in the 2007 Coated Free Sheet Paper countervailing duty investigation (the "CFS Paper investigation"). In the CFS Paper investigation, according to the United States, the USDOC found that the SOCBs were public bodies on the basis that they were controlled by the government, in which connection "[g]overnment ownership of the banks, of course, figured prominently". Other factors included the legacy of state control over the banks, the incomplete banking sector reforms in China, and government involvement in bank decision-making. The United States argued that the USDOC's finding in the OTR investigation thus was based on these same factors.

The United States rejected China's assertion that the USDOC should have applied a fact intensive inquiry to determine whether the input producers were empowered by Chinese law to exercise governmental authority and in fact were exercising that authority, rather than applying a rule of majority ownership. In the view of the United States, the USDOC's use of a five-factor approach in prior cases is irrelevant in the present dispute, as the only question for the Panel is whether the USDOC's determination in the challenged investigations that the Chinese state-owned enterprises are "public bod[ies]" is consistent with the SCM Agreement.

The United States nevertheless discussed the five-factor test to clarify for the Panel some of China's statements. According to the United States, these past cases indicate that the USDOC approaches public body issues on a case-by-case basis, with the five-factor test usually arising where there is not clear evidence of government ownership or control. For the United States, this makes sense as most of the five factors relate to ownership or control of an entity. The United States considered that these past decisions do not indicate a USDOC interpretation of the "public body" language in the SCM Agreement.

Finally, concerning burden, the United States objected to China's argument that the USDOC improperly placed the burden upon the Government of China to provide evidence pertaining to the public body question.

For these reasons, the United States asserted that the USDOC's findings that Chinese state-owned enterprises are "public bodies" are not inconsistent with the SCM Agreement, and that accordingly, the USDOC had no obligation to consider whether these entities were entrusted or directed to provide financial contributions.

Analysis by the Panel

Interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement

In examining China's claims concerning the USDOC's determinations in all four of the countervailing duty investigations at issue in this dispute that the SOEs that provided certain inputs were public bodies, and in the OTR investigation that the SOCBs that provided loans also were public bodies, the first issue that the Panel first addressed was the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

The relevant text of Article 1.1 of the SCM Agreement reads as follows:

"1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

[...]

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated [...] above." (emphasis added)

On its face, Article 1.1 of the SCM Agreement identifies three possible types of actors that could convey government financial contributions: "governments", "public bodies", and "private bodies" that have been "entrusted or directed" by the government to make a financial contribution. Given that the USDOC found that the entities in question were "public bodies", the focus of China's claim is the meaning of the term "public body" in the SCM Agreement. The Panel interpreted the entire phrase "a government or any public body within the territory of a

Member (referred to in this Agreement as 'government')" in order to find that meaning.

China's argument in this regard was that the terms "government" and "public body" were "functional equivalents", with the meaning of the latter (while not identical to "a government") being "'an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character'" (in essence, the same definition as that given by the Appellate Body to the term "government agency" in Article 9.1 of the Agreement on Agriculture).[76] For the United States, on the other hand, the terms "government" and "public body" had distinct meanings. The particular interpretative question thus posed by China's claim was how broad or narrow a meaning should be given to the term "public body", as used in Article 1.1(a)(1) of the SCM Agreement.

The Panel noted that the interpretative process under Article 31 of the Vienna Convention was a holistic one, that the ordinary meaning of treaty terms might be ascertained only in their context and in light of the object and purpose of the treaty[77], and that dictionary meanings alone are not necessarily capable of resolving complex questions of interpretation.[78] That said, the task of interpreting a treaty must begin with its specific terms.[79]

As the SCM Agreement contains no definition of either "government" or "public body", dictionary definitions provide a useful starting point. The definitions of "government" include: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry".[80] The definition of "to form a government" was consistent with this definition: "Establish an administration, esp. after a general election". These definitions seem to conform to the meaning of this term in common parlance as referring to the formal organs of government (agencies, offices, ministries, etc.). This was in fact the meaning ascribed to the term "government" by both parties.

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76 Paraphrasing the definition of "government agency" set forth by the Appellate Body in *Canada – Dairy*.

77 Appellate Body Report on *China – Publications and Audiovisual Products*, para. 348.

78 Appellate Body Report on *US – Gambling*, para. 164.

79 Appellate Body Report on *US – Carbon Steel*, para. 62.

80 Shorter Oxford English Dictionary, L. Brown (ed.) (Claredon Press, 1993), Vol. I, p. 1123 (the "Shorter Oxford English Dictionary").

The dictionary definition of "public" includes the following: "Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation". Both parties submitted definitions of the term "public" that are similar to this. China also submitted additional definitions which, in its view, indicate that the essential elements of a "public" body are that it acts for the welfare and best interests of a nation or community as a whole, and does so under the authority of, or officially on behalf of, the nation or community as a whole.

According to the Panel the dictionary definition of "body" includes: "a group of individuals regarded as an entity; a corporation"[81]; and "a number of individuals spoken of collectively, usually as united by some common tie, or as organized for some purpose; a collective whole or totality; a corporation; as, a legislative body, a clerical body".[82] On the basis of these definitions, therefore, the term "public body" standing alone could include, inter alia, "corporations" "belonging to the community or nation".

The Panel noted that there seems to be no universally-accepted definition of the term "public body", and China had not put one forward. The Panel held that China argued that the dictionary definitions of the word "public" compel a narrow reading of the term "public body" as something functionally equivalent to "government agency" or "government", i.e., as an entity authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority. It considered that the above definitions would appear to encompass, but could not be said to be limited to, such entities. According to the Panel different jurisdictions have varying definitions and practices as to what for purposes of their own domestic laws and systems are considered "public bodies".

The Panel also considered the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement, and in particular, of the term "public body", about which the parties have presented arguments. The French term for public body is "organisme public", and the Spanish is "organismo público". In French, the word "organisme" (in the non-biological sense) has the broad meaning of an organized grouping of elements (persons, offices, etc.) working to a common purpose (e.g., "institution formée d'un ensemble d'éléments coordonnés entre eux et remplissant des fonctions déterminées; [...], chacun des services ainsi coordonnés, ou des

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81 *Free Dictionary online* (accessed 28 April 2010) < http://www.thefreedictionary.com >.

82 *Accurate and Reliable Dictionary online* (accessed 28 April 2010) < http://ardictionary.com >

associations de personnes les constituant"[83], and "[e]nsemble des services, des bureaux affectés à une tâche").[84] The French word "public" also has a broad meaning, including related to, belonging to, or controlled by the State (e.g., "d'État, qui est sous contrôle de l'État, qui appartient à l'État, qui dépend de l'État, géré par l'État"). The Spanish term "organismo" is defined similarly to the French "organisme" as referring to a grouping of elements forming a body or institution (e.g., "conjunto de oficinas, dependencias o empleos que forman un cuerpo o institución"). The Spanish term "público", like the French "public", is defined as belonging to or related to the government (e.g., "perteneciente o relativo al Estado o a otra administración"). Here, as in the English, the Panel considered that while these definitions could encompass the narrow meaning espoused by China of the term public body, or organisme public, or organismo público, the Panel saw no indication that they were limited to that meaning. The Panel view was confirmed by examples that we find of uses of the terms "organisme public" and "organismo público" to cover, inter alia, government-owned or -controlled entities that are engaged in activities other than those of a strictly governmental character. The Panel was not persuaded by China's argument that the meaning of the terms "organisme public" and "organismo público" was limited to "government agency" or other entity vested with and exercising governmental authority, and thus that the English term "public body" must be understood to be the "functional equivalent" of "government".

The Panel held that a treaty term could only be properly understood in its context and in the light of the object and purpose of the treaty. The Panel turned its attention to the definition of the term, "public body" in Article 1.1(a)(1) of the SCM Agreement, and in particular how "public body" was related to the term "a government" in the drafting of the provision. In this regard, the question raised by China's claim was whether the clause "a government or any public body within the territory of a Member (referred to in this Agreement as 'government')", by collectively referring to the two terms "a government" and "any public body" as "government", meant that these terms must be read as "functional equivalents", such that a "public body" must possess characteristics similar to those of a

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[83] "Institution composed of inter-related elements, and performing a specific function; each of the services thus coordinated, or of the associations of the persons comprising it". (*Centre National de Ressources Textuelles et Lexicales* (accessed 28 April 2010) < http://www.cnrtl.fr/definition/organisme >).

[84] "Ensemble of services and offices devoted to a task". (Le Nouveau Petit Robert, J. Rey-Debove and A. Rey (ed.) (Dictionnaires Le Robert, 2002), p. 1798).

government, i.e., must be an entity which "exercises powers [or authority] vested in it by a 'government' for the purposes of performing functions of a 'governmental' character".

The Panel was of the view that in Article 1.1(a)(1) the terms "a government" and "any public body" were separated by the disjunctive "or", suggesting that they were two separate concepts rather than a single concept or nearly synonymous. In addition, the use of the word "a" before "government" at the beginning of the clause, and the use of the word "any" before "public body", further suggested that these terms had separate meanings. Furthermore, the word "any" before "public body" suggested a rather broader than narrower meaning of that term, i.e., as referring to "public bodies" of "any" kind. Taking these contextual elements together suggests a meaning of the term "public body" as something separate from and broader than "government" or "government agency", and the Panel considered that given the use of the words "a", "or" and "any", this reading of the phrase "a government or any public body" gives meaning to that phrase as a whole.

The Panel turned to the collective term "government" that was equated to the entire phrase "a government or any public body within the territory of a Member" in the clause at issue. While for China, the use of the collective expression "government" compels a reading of the terms "a government" and "any public body" as "functional equivalents", the Panel considered more likely that the use of the collective expression was merely a device to simplify the drafting, to avoid having to repeat the entire phrase "a government or any public body" throughout the SCM Agreement. This could easily be the case even if the two elements "a government" and "any public body" have very distinct meanings. The Panel noted that a similar drafting device was employed in Article 2.1 of the SCM Agreement, on specificity, where the undeniably very different concepts of "an enterprise or industry or group of enterprises or industries" are collectively referred to as "certain enterprises". In the view of the Panel , this collective expression was used to simplify the drafting of Article 2, as it obviates the need to repeat the entire long phrase "an enterprise or industry or group of enterprises or industries" every time this concept appears in the text. Yet, given that the term "certain enterprises" was defined as having the meaning of the longer phrase, where "certain enterprises" appears in Article 2 it must, by definition, refer to any of its underlying constituent elements. Thus, a subsidy that was limited to a single enterprise ("an enterprise") was, for purposes of the SCM Agreement, limited to "certain enterprises". Equally, a subsidy that was limited to, e.g., three industries (i.e., a "group of industries")

also is limited to "certain enterprises". This did not mean that a single enterprise was the functional equivalent of, or synonymous with, a group of industries. Nor must this be the case for the term "certain enterprises" to make sense in the text of the Agreement. In the same way, while the drafting of the phrase that we were examining did not on its face exclude an interpretation of the terms "any public body" and "a government" as "functional equivalents", the latter referring to entities vested with and exercising governmental authority, such an interpretation is certainly not necessary for the collective term "government" to make sense in the text of the SCM Agreement. To the contrary, entities of whatever type controlled by governments, along with formal governmental organs, could all be encompassed by the collective term "government" as that term subsequently is used throughout the Agreement.

The phrase "within the territory of a Member" that also appeared in the same phrase in Article 1.1(a)(1) of the SCM Agreement provides additional immediate context, as a further modifier to the collective term "government" that appeared in parentheses and that encompasses both "a government" and "any public body". Again, the entire phrase in Article 1.1(a) (1) reads "by a government or any public body within the territory of a Member (referred to in this Agreement as 'government')". This phrase seems to say, in essence, that where the author of the financial contribution is either an executive organ of any level of government, or a public body of any kind at any level of government, within the territory of a Member, the Agreement considers the financial contribution to have been made by the "government" of that "Member" (directly). In other words, the drafting "a government [...] within the territory of a Member" seems to connote a broad reading of the term "a government" to cover whatever forms and organs of government, be they national, provincial, municipal, etc., that may be present within the territory of a given Member. Similarly, the word "any" before "public body" also conveys a broad sense of that term, particularly when coupled with the phrase "within the territory of a Member", reinforcing that the word "or" means that "any public body" is something other than "a government" as such. Seen in its totality, therefore, in our view the collective term "government" – which equates to "a government within the territory of a Member, or any public body within the territory of a Member" – conveys breadth, suggesting a wide range of different possible types of entities whether formally part of, or owned by, or controlled by, any level of government.

According to the Panel the most important contextual element in Article 1.1(a)(1) was the term "private body" in Article 1.1(a)(1)(iv), and its relationship

with the terms "a government" and "any public body". In particular, we note that Article 1.1(a) (1) described three kinds of potential providers of subsidies for purposes of the SCM Agreement, namely "governments", "public bodies" and "private bodies". From the standpoint of pure logic, this was a complete universe of all potential actors: every entity (individual, corporation, association, agency, Ministry, etc.) must fall into one of these three categories. In other words, the SCM Agreement did not a priori rule out any entity from potentially coming within its scope. The specific question raised in this dispute was whether wholly or majority government-owned enterprises that produce and sell goods and services are more appropriately categorized as "governments", "public bodies" or "private bodies" for purposes of the SCM Agreement. Neither party argued, nor the Panel consider, that such enterprises could in any way be termed "government" as such. Rather, China's argument is that such enterprises are, as a matter of law, presumptively "private bodies", whose actions would be covered by the SCM Agreement only to the extent that those actions were the result of "entrustment or direction" by a government. Thus, the question is the correct basis on which to distinguish between "public" and "private" bodies.

The Panel found the dictionary definitions of the terms "private enterprise" ("a business etc. that is privately owned and not under State control")[85], and "public sector" ("that part of an economy, industry etc. controlled by the State") helpful in understanding the relationship between the terms "private body" and "public body". In particular, these definitions taken together suggest that a "public" body was any entity that was under State control, while a "private" body was an entity not controlled by the State, and that ownership is highly relevant to the question of control, a point which we address below. This was fully in keeping with the everyday notions of "private" meaning unrelated to the government and "public" meaning governmental in some sense. It also is consistent with the usage of the term "public body" (and its French and Spanish equivalents) by various governments, as discussed above. If the Panel was nonetheless to interpret the term "public body" narrowly, as meaning government agencies and other entities vested with and exercising governmental authority, and as presumptively excluding government-owned and/or government-controlled enterprises, by default this would mean that such entities would be "private bodies". In view of the Panel, such a reading would constitute a complete reversal of the ordinary meaning of the term "private body", and the Panel found no support for in the text of the SCM Agreement for such a reversal.

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[85] Shorter Oxford English Dictionary, Vol. II, p. 2359. (emphasis added).

A further contextual element informing the meaning of the term "any public body" was the list of types of financial contributions in Article 1.1(a)(1)(i)-(iii), i.e.:

> i. a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> ii. government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [footnote omitted];
>
> iii. a government provides goods or services other than general infrastructure, or purchases goods".

In particular, pursuant to the chapeau of Article 1.1(a) (1), these were the functions that "a government" or "any public body" might in the first instance perform directly (i.e., rather than by entrustment or direction of a private body in the sense of subparagraph (iv)). Among these functions were the provision of loans and loan guarantees, as well as the provision of goods or services, functions that were typically carried out by, indeed in the first instance are the core business of, firms or corporations rather than governments. Thus, to read the term "any public body" as presumptively excluding government-owned or -controlled corporations or any other types of public entities engaging in these sorts of typical business functions (absent specific evidence in a particular case that they are vested with and exercising governmental authority), would appear largely to deprive these provisions of their common sense meaning and role.

The Panel also noted the reasoning and concern of the Panel in Korea – Commercial Vessels, in respect of China's argument that "public bodies" were limited to "entities which exercise powers or authority vested in them by a 'government' for the purpose of performing functions of a 'governmental' character". In this regard, the Panel noted that China argued that only if, in a particular case, a government-owned or -controlled firm were actually exercising governmental authority to carry out governmental functions would such an entity, in that particular instance, be a "public body". We consider that such an approach would suffer from the same flaw of mixing considerations of benefit (behaviour in a particular instance) with determining the nature of the entity (without regard for its behaviour in a particular instance). Contrary to China's argument, under the SCM Agreement the question of the nature of the entity (i.e., whether it is "a

government or any public body") is entirely separate from the behaviour of that entity in a given instance (i.e., whether there is a financial contribution, whether a benefit is thereby conferred, and whether there is specificity).

After the foregoing detailed examination of the text of Article 1.1(a)(1) of the SCM Agreement in its context the Panel strongly suggested that a "public body" extends to entities controlled by governments, and was not limited to government agencies and other entities vested with and exercising governmental authority.

The object and purpose of the SCM Agreement had been characterized by the Appellate Body as "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time, the right of Members to impose such measures under certain conditions"[86], and by various panels as, inter alia, "to impose multilateral disciplines on subsidies which distort international trade"[87] and to "disciplin[e] trade-distorting subsidies in a way that provides legally binding security of expectations to Members".[88] As these statements indicate, subsidies were certain types of government interventions in markets on non-commercial terms, which interventions can distort trade to the detriment of other Members' interests.

In their discussions of the object and purpose of the SCM Agreement, including in respect of predictability and certainty, the Appellate Body and various panels have emphasized the importance of avoiding overly-narrow interpretations of the Agreement that would create loopholes by which Members could largely, if not entirely, escape the reach of these disciplines. For example, the Appellate Body stated in US – Softwood Lumber IV that:

"It is in furtherance of [the Agreement's] object and purpose [of strengthening GATT disciplines] that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money[...]."[89]

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86 Appellate Body Report on *US – Softwood Lumber IV*, para. 64.
87 Panel Report on *Brazil – Aircraft*, para. 7.26.
88 Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.39.
89 Appellate Body Report on *US – Softwood Lumber IV*, para. 64.

Similarly, the Panel in US – FSC (Article 21.5 – EC) stated that:

"[I]t is evident that the interpretation [of 'revenue foregone'] advanced by the United States would be irreconcilable with th[e] object and purpose [of disciplining trade distorting subsidies in a way that provides security to Members], given that it would offer governments 'carte-blanche' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability. In short, such an approach would eviscerate the subsidies disciplines in the SCM Agreement."[90] (emphasis original)

In keeping with this object and purpose, the Panel considered it important to read Article 1.1(a)(1) in a manner that does not allow avoidance of the SCM Agreement's disciplines by excluding whole categories of government non-commercial behaviour undertaken by government-controlled entities. In this regard, the Panel noted that the categorization of a given entity as a government, a public body or a private body under Article 1.1(a)(1) was simply the first filter in a multi-part analysis to determine whether a given measure is covered by the SCM Agreement. That first filter does not look at the behaviour (i.e., the measure), but rather was concerned with whether the entity undertaking the behaviour was or was not the WTO Member, i.e., the entity covered by the WTO Agreement. In this sense, the juxtaposition of "a government or any public body" with the term "private body" made clear that the SCM Agreement did not cover and thus did not discipline, in any way, any purely private "subsidies" or other purely private transactions, in which the government had no involvement (direct or via entrustment or direction).

In this connection, the Panel agreed with the following statement by the Korea – Commercial Vessels panel:

"We do not accept Korea's argument that there is only a 'financial contribution' in the meaning of Article 1.1(a)(1(i) if the relevant government or public body is engaged in 'government practice' such as regulation or taxation. Article 1.1(a)(1) states in relevant part that the term 'government' refers to both 'government' and 'public body'. Since the phrase 'government practice' in Article 1.1(a)(1)(i) therefore refers to the practice of both governments and public bodies, the practice at issue need not necessarily be purely 'governmental' in the narrow sense advocated by

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[90] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.39.

Korea. In this regard, we consider that the concept of 'financial contribution' is writ broadly to cover government and public body actions that might involve subsidization. Whether the government or public body action in fact gives rise to subsidization will depend on whether it gives rise to a 'benefit'. Since the concept of 'benefit' acts as a screen to filter out commercial conduct, it is not necessary to introduce such a screen into the concept of 'financial contribution'".[91]

Thus, to say that an entity was part of the SCM Agreement's collective term "government" was not to condemn that entity, or otherwise to cast it in a negative light. Rather, such a characterization simply allows a further analysis to be conducted as to whether the entity's behaviour in particular instances was covered by the SCM Agreement. Similarly, to say that certain behaviour of an entity was covered by the SCM Agreement (i.e., is a specific subsidy) in itself carried no negative connotation. Only in the particular, narrow instance of a prohibited subsidy did the existence of the subsidy give rise to such a connotation, and otherwise the existence of specific subsidies was a neutral event under the Agreement, actionable only where it causes, in particular instances, defined forms of adverse effects on another Member's interests.

In this sense, the Panel considered that interpreting "any public body" to mean any entity that was controlled by the government best serves the object and purpose of the SCM Agreement. This reading ensures that whatever form a public entity takes (whether agency, Ministry, board, corporation, etc.) the government that controls it was directly responsible for those of its actions that were relevant under the Agreement. In the view of the Panel, the particular form of government-controlled entity intervening in a market cannot be determinative of whether a government financial contribution (and hence potentially a subsidy) existed. To read "any public body" in Article 1.1(a)(1) as excusing from a Member government's direct responsibility a wide swathe of government-controlled entities engaging in exactly the sorts of transactions listed in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement would fundamentally undermine the Agreement's logic, coherence and effectiveness, and thus would be at odds with its object and purpose.

Here, the Panel agreed with the finding of the Panel in Korea – Commercial Vessels that a public body was an entity controlled by a government. In terms of the object and purpose of the SCM Agreement, the Panel considered particularly

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[91] Panel Report on *Korea – Commercial Vessels*, para. 7.28.

relevant that panel's statement that "it is the fact that a financial contribution is provided by a public body (or pursuant to entrustment or direction by a public body) that gives rise to the possibility that the financial contribution might be provided on below-market terms in order to advance public policy goals".[92] In the view of the Panel, it was the government's control of an entity that gives that entity the potential to intervene in markets so as to advance public policy goals, by providing financial contributions on better-than-market terms.

In short, the systemic implications for Members of interpreting "any public body" to mean any government-controlled entity were fully in line with the object and purpose of the SCM Agreement of effectively disciplining trade distorting subsidies provided by Member governments. These implications fall very far from disciplining, let alone condemning, every act of such entities. This interpretation simply meant that the actions of a government-controlled entity are, for purposes of the SCM Agreement, directly attributable to the government itself – no more, no less. Finding that a given entity was a public body did not speak to the nature of its actions, including whether they were even covered by the Agreement.

By contrast, the systemic implications of interpreting "any public body" as limited to government agencies or other entities vested with and exercising governmental authority would be to seriously undermine the entire SCM Agreement, something that could not be reconciled with the Agreement's object and purpose. Large numbers of government-controlled entities whose very raison d'être was to engage in the kinds of transactions identified in Article 1.1(a) (1)(i)-(iii) would be legally presumed to be unrelated to the government (i.e., effectively "private bodies"). Governments could easily hide behind the presumptively "private" nature of such entities, even while running those entities so as deliberately to provide trade-distorting subsidies. Yet, before the SCM Agreement could even apply to any such entity, such that an inquiry could be started into the possible existence of a subsidy and specificity, a particular instance of "entrustment or direction" in the sense of Article 1.1(a)(1)(iv) would need to be established. In the view of the Panel, this would be equivalent to inquiring whether the government "entrusted or directed" itself to do something, and would turning the "entrustment or direction of a private body" provision on its head.

The foregoing analysis of the ordinary meaning of the terms of the treaty at issue, in their context and in the light of the object and purpose of the treaty, led

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[92] Panel Report on *Korea – Commercial Vessels*, para. 7.44. (emphasis added).

the Panel to conclude that for the purposes of the SCM Agreement, "any public body" was any government-controlled entity. By contrast, in the view of the Panel, the narrow reading advanced by China is not supported either by the context of this term or by the object and purpose of the SCM Agreement and, to the contrary, would seriously weaken the integrity and effectiveness of the SCM Agreement.

The Panel recalled that China's arguments were not limited to the foregoing elements based on the SCM Agreement itself. Rather, China also had advanced arguments based on other international instruments that it considers relevant context for interpreting the term "any public body". The first of the other instruments cited by China is the Draft Articles. China argued that these Draft Articles constituted "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3) (c) of the Vienna Convention, and that they thus must be "taken into account" in the analysis of the term "public body". In particular, China considered that the Draft Articles codify customary international law with respect to certain principles of state responsibility, a proposition that in China's view has repeatedly been recognized by panels and the Appellate Body. As such, China argued, the term "public body" must be interpreted in a manner analogous to Article 5 of the Draft Articles such that the actions of state-owned corporate entities will be attributed to the State only when "empowered by the law of that State to exercise elements of the governmental authority [...] provided the person or entity is acting in that capacity in the particular instance").

The Panel first considered the status of the Draft Articles and subsequently turned to the China's argument that, the Panel must as a matter of law interpret the provisions of the SCM Agreement at issue in conformity with language and concepts in certain provisions of the Draft Articles. On the first question, the Panel was of the view that, China significantly overstated the status that had been accorded to the Draft Articles where they had been referred to by panels and the Appellate Body. Indeed, in not a single instance of such citations identified by China where the a panel or the Appellate Body identified the Draft Articles as "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3)(c) of the Vienna Convention. Rather, these Draft Articles had been as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements. In all cases, the exercise undertaken by these panels and the Appellate Body has been to interpret the WTO Agreement

on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty.

The Panel thus found no basis for the assertion that as a general matter the Appellate Body and panels had found that the Draft Articles must be "taken into account" as "rules of international law applicable in the relations between the parties" in interpreting the WTO Agreement. In any event, even by their own terms, the Draft Articles "do not attempt to define the content of the international obligations the breach of which gives rise to responsibility", i.e., they were not concerned with the substance of the underlying international obligations, but are rather concerned with determining whether a state was or was not responsible for a given action that may constitute a substantive breach of such an obligation. The Panel held that the Draft Articles were no way "relevant rules of international law applicable to the relations between the parties", such that we should "take them into account, together with the context" in the sense of Article 31(3)(c) of the Vienna Convention.

The second instrument invoked by China as context is the GATS; in particular it's Annex on Financial Services. This Annex contains the term "public entity", and China argued that this term must inform the meaning of the term "public body" in the SCM Agreement. The Panel noted that China's argument was the same as one raised by Korea in Korea – Commercial Vessels.[93] The Panel, like the Panel in Korea – Commercial Vessels, did not see the relevance for the interpretation of the term "public body" in Article 1.1 of the SCM Agreement, of the different term "public entity" in a different Agreement. Nor the Panel considered the term "non-governmental bodies" in Article I: 3 of the GATS, which China invoked, to be relevant to the interpretation of "public body" in Article 1.1(a) (1) of the SCM Agreement. These are very different terms in separate Agreements, and the Panel found no indication in either Agreement of any conceptual or other link between them.

Finally, in terms of other instruments, the Panel recalled that the United States pointed to the discussion in paragraph 172 of the Working Party Report on China's accession as relevant context making clear that China accepted that its state-owned enterprises (including banks) are government actors, or at least public bodies, within

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[93] Panel Report on *Korea – Commercial Vessels*, footnote 42.

the meaning of the SCM Agreement.[94] On this issue the Panel did not consider it necessary to analyze the cited language of the Working Party Report.

For the foregoing reasons, the Panel concluded that a "public body", as that term was used in Article 1.1 of the SCM Agreement, was any entity controlled by a government. In the view of the Panel, this was the correct interpretation, which emerged from an analysis of the ordinary meaning of the term in its context and in the light of the object and purpose of the provision and of the SCM Agreement.

The USDOC's determinations that certain SOEs and SOCBs were "public bodies"

Having interpreted the term "public body", the Panel turned its attention to the USDOC determinations in the four countervailing duty investigations that certain entities were public bodies, and that their respective provisions of inputs and loans thus were financial contributions by the government, in the sense of Article 1.1(a)(1) of the SCM Agreement.

Background

The USDOC made "public body" and "financial contribution" determinations in respect of (i) state-owned suppliers of inputs, including some transactions made through private trading companies (government provision of goods); and (ii) state-owned commercial banks (government provision of loans).

In the four investigations at issue, the USDOC determined that China's provision of inputs through state-owned producers (SOEs) constituted countervailable subsidies. It particular, the USDOC determined that the SOEs

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[94] The passage of paragraph 172 of the Working Party Report reads as follows:

"Some members of the Working Party, in view of the special characteristics of China's economy, sought to clarify that when state owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement. The representative of China noted, however, that such financial contributions would not necessarily give rise to a benefit within the meaning of Article 1.1(b) of the SCM Agreement. He pointed out that China's objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses. The Working Party took note of this commitment."

were "public bodies" that provided financial contributions in the form of certain goods – HRS, rubber, and petrochemicals – to investigated producers of, respectively, CWP, LWR, OTR, and LWS, for less than adequate remuneration thus conferring benefits to those producers, and that these subsidies were specific. Before the Panel, China challenged all of these public body determinations.

In three of the four investigations at issue (CWP, OTR and LWS), the USDOC also determined that loans provided by SOCBs to investigated producers constituted countervailable subsidies. In particular, the USDOC found that the SOCBs were "public bodies" providing financial contributions in the form of loans, that the loans were on terms more favourable than the market, and that these subsidies were specific. In the present dispute, China only challenged the USDOC's "public body" determination regarding SOCBs in the OTR investigation.

USDOC public body determinations in respect of government-owned input suppliers (SOEs)

In all of the investigations at issue, the USDOC determined that the SOE input suppliers were "public bodies" (referred to as "authorities" in the U.S. statute and thus in the USDOC's determinations) by applying a rule of majority government-ownership. Under this approach, the USDOC treated as a public body any input producer in which the government held a majority ownership share. Where the parties presented additional arguments and evidence related to this issue, the USDOC also referred to these in its determinations.

Assessment by the Panel

The Panel recalled its finding above that the meaning of "public body" in Article 1.1 of the SCM Agreement is an entity controlled by a government and noted that China's claim concerning the USDOC's determinations that the SOEs and SOCBs at issue were public bodies was based not only on its own, different, legal interpretation of the term "public body", but also on the public body analysis and conclusions of the USDOC in the four investigations. In particular, China claimed that these determinations by the USDOC were based on the application of a "per se majority ownership test", and that the USDOC did not conduct the "five-factor analysis" that it had applied in some prior cases, which China hold up as evidence that the USDOC had recognized that a "fact-intensive" inquiry (including an entity's pursuit of governmental policies or interests, and whether an entity is created by statute), was necessary to establish that an entity is a public

body in the sense of Article 1.1 of the SCM Agreement. More generally, China considered that the USDOC failed to meet its investigatory burden by improperly basing its public body determinations on a presumption that government-owned entities are public bodies, rather than gathering and analyzing the factual information necessary for the five-factor test.

The Panel started by considering China's statements concerning the five-factor test and noted China's disclaimer that it was not arguing about the consistency of the five-factor test with Article 1.1 of the SCM Agreement. The Panel viewed China's statements about the test as implying (as China had argued during the investigations), that the USDOC was obligated to have applied that test, in which government ownership was just one factor. Thus, for the sake of the completeness of its analysis, the Panel examined the potential relevance of the five-factor test to the concept of "public body" in Article 1.1 of the SCM Agreement. The Panel saw no basis in the SCM Agreement on which to conclude that consideration of these particular five factors (or any other specific factors) was a legal prerequisite for a valid finding that an entity was controlled by a government and thus a public body in the sense of the Article 1.1 of the SCM Agreement. Put another way, even if under U.S. law application of the five-factor test were mandatory for a finding that an entity is a "government authority" the failure to conduct that test in a given investigation would be a matter for the U.S. judicial review system, not the WTO.

SOE input suppliers as public bodies

Concerning the SOE input suppliers in the four investigations, the USDOC's public body determinations were principally based on the uncontested fact that these entities were majority government-owned. China characterized this as a simple per se majority ownership test. The Panel read the USDOC's determinations differently, however. In particular, the Panel did not see the USDOC's determinations as depicting the mechanical application of a per cent-of-ownership test, without regard for any other evidence or arguments. To the contrary, these determinations show that the USDOC examined all of the evidence and arguments that were before it in reaching its conclusions that the SOEs were public bodies.

In particular, in the CWP investigation, the USDOC noted that other than the levels of government ownership of certain companies producing HRS, the Government of China had not provided the information that was needed to consider the five-factor analysis, and that therefore the USDOC had applied a rule

of majority ownership. In this context, where ownership information was not available for certain HRS producers, the USDOC found them to be government-owned, and thus public bodies, on the basis of facts available.

In the LWR investigation, the USDOC determined that there was insufficient evidence on the record to perform the five-factor analysis in respect of HRS producers, because the Government of China had not provided such evidence. Rather, it had provided only ownership information, and only for some companies, but otherwise had not furnished information necessary to conduct the five-factor analysis. Despite this, the USDOC did include a specific, detailed discussion of the arguments advanced by the Government of China concerning the five factors in respect of one trading company, Baosteel, while stating that it made no finding as to whether a five-factor test was required. As described supra, the USDOC found that the evidence was insufficient to conclude that Baosteel was not a public body, and/or that the evidence contradicted the factual assertion in support of which it was advanced.

In the LWS investigation, the USDOC again found that there was insufficient evidence on the record for it to be able to conduct a five-factor analysis, as beyond the levels of government ownership of the companies in question, the Government of China had not provided the information necessary to conduct a complete analysis. The USDOC nevertheless conducted a detailed discussion of the Government of China's arguments and "limited" evidence on the five factors, concluding that either that evidence was not apposite to the questions examined, or disproved the Government of China's argument. Of particular relevance in this regard was the statement in the Government of China's questionnaire response that the State-Owned Assets Supervision and Administration Commission of the State Council played a role in managing SOEs "based on 'the rights attendant to the ownership of shares."

In the OTR investigation, the USDOC found that a five factor test is not necessary in the absence of evidence calling into question whether government ownership does not mean government control. The record documents before us make no mention of any party submitting evidence suggesting an absence of government control, and before us China points to none. Rather, the USDOC's OTR Countervailing Duty I&D Memo indicates that the Government of China and the respondent parties focused most of their argumentation on the USDOCs' failure to conduct an entrustment or direction analysis. Thus, it appears that there was no evidence other than that of the government's share of ownership of the

input suppliers before the USDOC in respect of whether these SOEs were public bodies.

On the basis of the review of the USDOC's public body determinations, the Panel found sufficient discussion and analysis to explain the basis for those determinations and the reasons therefore. In other words, it was clear to the Panel from these determinations what evidence was before the USDOC and, where there were gaps, the reasons for those gaps, and how the USDOC addressed them. It also was clear to the Panel from the determinations what specific arguments and evidence were presented to the USDOC and how the USDOC took them into consideration. In particular, the Panel noted the statements of the USDOC that in a number of instances, factual assertions were made without any supporting evidence, or with evidence that contradicted the assertions. The Panel further noted that the USDOC explained why it considered that it was not legally required to conduct the five-factor test, in particular that in making its public body findings, it relied on the evidence of record that the input suppliers in question were majority government-owned.

This then brought the Panel to the legal question of whether the evidence of government ownership of the SOE input producers was a sufficient basis on which to conclude that they were government controlled and thus public bodies. Here, the United States argued extensively before us that majority ownership indicates control, and indeed China also acknowledged that ownership can indicate control. The difference was that for China, government control was the wrong legal test for determining whether an entity is a public body.

The Panel reiterated that a public body was any entity controlled by a government, and in this regard it considered government ownership to be highly relevant (indeed potentially dispositive) evidence of government control. The Panel held in particular the everyday financial concept of a "controlling interest" in a company. The technical definition of what was needed for a controlling interest is a maximum of 50 per cent plus one share of the voting stock of a company, with the possibility that a much smaller voting block can be controlling, depending on how dispersed the ownership of the remaining shares is, and the extent to which the other shareholders participate in voting.[95]

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[95] "Controlling interest" is defined as:

"Strictly speaking, an ownership stake of any business which is 50% or more. In practice it means a sufficiently large stake in a company by an individual **shareholder** to allow

The Panel saw no reason to consider that the concept that "control" of a company resided with its majority owner, which was uncontested in the private sector, would be inapplicable to government-owned companies. Logically, quite the reverse should be true, given the generalized power of governments over economic affairs within their territories. As such, the Panel considered that, on its own, majority government ownership was clear and highly indicative evidence of government control, and thus of whether an entity was a public body for purposes of the SCM Agreement.

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effective control. In principle, a stake of 50% plus one share gives a blocking majority, but in practice effective control can be had with a smaller holding. Key holding levels are 25%, which can block changes in the articles of the company, 51%, which gives voting control, and 76%, which permits changes to the articles. In a **company** setting it usually means holding a majority of the **voting rights** which usually comes from the ownership of **equity**. The ability to capture ownership, or **acceptances** or pledges, of around this percentage of the voting equity in a company can be crucial in such situations as **contested takeovers**". (The Handbook of International Financial Terms, P. Moles (ed.) (Oxford University Press, 1999), p. 110). (emphasis original)

See also the following online dictionaries:

- From *Investment Dictionary*: "When one shareholder or a group acting in kind holds a high enough percentage of ownership in a company to enact changes at the highest level. By definition, this figure is 50 per cent of the outstanding shares or voting shares, plus one. However, controlling interest can be achieved with less than 50 per cent ownership of the stock if that person/group owns a significant proportion of the voting shares, because in many cases, not every share carries a vote in shareholder meetings."
- From *Financial & Investment Dictionary* and *Business Dictionary*: "Ownership of more than 50 per cent of a corporation's voting shares. A much smaller interest, owned individually or by a group in combination, can be controlling if the other shares are widely dispersed and not actively voted."
- From *Wikipedia*: "Controlling interest in a corporation means to have control of a large enough block of voting stock shares in a company such that no one stock holder or coalition of stock holders can successfully oppose a motion. In theory this normally means that controlling interest would be 50 per cent of the voting shares plus one.

  In practice, though, controlling interest can be far less than that, as it is rare that 100 per cent of a company's voting shareholders actively vote.

  In addition, a company that requires a 2/3 super-majority of shares to vote in favour of a motion, can grant, in effect, veto power to a minority shareholder or block of shareholders that own essentially 1/3 of the shares. Thus in some cases, a single

The Panel found no legal error, in analyzing whether an entity was a public body, in giving primacy to evidence of majority government-ownership. Of course, public body determinations were to be made case-by-case, on the basis of the evidence of record in a given investigation, and the authority's determination must explain its analysis based on the evidence before it, in order for that determination to be reasoned and adequate and thus consistent with the SCM Agreement. The Panel noted in this regard that there could be cases (however rare in practice) in which a government-owned entity was completely insulated (e.g., by law) from any government involvement in, or influence over, its operations, such that the entity was not controlled by the government and thus fell outside the scope of the term "public body". In such a situation, it would be the entity and the government in question that would have in their possession the information as to the absence of government control, and in our view it would be incumbent upon them, and certainly it would be in their interest, to bring that information to the attention of the investigating authority. To the extent that such evidence were placed on the record, the investigating authority would be required to include its analysis of that evidence in its determination as to whether the entity was or was not a public body.

In the investigations at issue in this dispute respondents advanced certain information and/or arguments regarding the question of public body in respect of SOE input producers – mainly based on the five-factor test that the respondents considered the USDOC was legally required to perform, and some of which went to the issue of control – and in all such instances the USDOC in its determinations discussed and responded to that information and those arguments. In no case did it appear that the USDOC refused to consider, or dismissed summarily, any such information or arguments, and China does not allege any such instances. The

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entity can essentially maintain control, with only 33.4 per cent of the outstanding shares. Ford Motor Company's former 33.9 per cent ownership of Mazda is an example of a controlling interest with minority shareholding."

- From *Investopedia*: "For the majority of large public companies (such as those that belong to the S&P 500), a shareholder with much less than 50 per cent of the outstanding shares can still cause a lot of shake-up at the company. Single shareholders with as little as 5-10 per cent ownership can push for their own seats on the board, or enact changes at shareholder meetings by publicly lobbying for them."

  (Answers.com (accessed 28 April 2010) < http://www.answers.com/topic/controlling-interest >).

USDOC did not find in any case that there was record evidence to indicate that in spite of being owned by the government, the SOEs in question were not public bodies. Furthermore, it is not the USDOC's factual findings as to the extent of government ownership or control of input suppliers that is the focus of China's challenge, but rather the legal relevance thereof as determinative of whether an entity is a public body. In particular, China advances the same argument that the respondents advanced in the investigations, namely that the USDOC – as a matter of law – should have treated the SOEs as private bodies, and thus conducted an entrustment or direction analysis.

The Panel therefore rejected this legal argument, as well as the legal test advanced by China, in respect of "public body". The Panel concluded that the USDOC's determinations that the SOE input suppliers were public bodies were based on relevant evidence of government control (which in these cases was principally evidence of government ownership), and that the determinations acknowledged and come to reasoned conclusions in respect of all of the additional evidence and arguments before it, including in particular those advanced by respondents, as to the question of public body. The Panel therefore found that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining in the four countervailing investigations at issue in this dispute that the SOE input producers were public bodies.

SOCBs as public bodies

The Panel now turned its attention to the USDOC's determination in the OTR investigation that the SOCBs were public bodies. In that case, the undisputed record evidence shows that the government owned the large majority share of the SOCBs, and exercised significant control over their operations. Before the Panel China did not contest these factual findings but instead argued that government ownership and control were not relevant to whether the banks in question were public bodies. Before the Panel China did not challenge either the factual evidence or the conclusions drawn there from by the USDOC as to the extent of government ownership of the SOCBs or the government's involvement in their operations. Rather, China argued that the USDOC's analysis was based on the legally incorrect and irrelevant element of government ownership and control, i.e., the same legal argument that it advances in respect of the SOE input suppliers.

For the same reasons as discussed supra in the context of the SOE input

producers, the Panel rejected China's arguments as to the interpretation of the term "public body", and as to the necessity of applying the five factor test or any other specific test to determine whether an entity is a public body. Rather, the Panel had found that the determinant of whether an entity was a public body was government control, and that majority government ownership was strong evidence of control.

The Panel had reviewed the determination in the OTR investigation, and the cross-referenced determination from the CFS Paper investigation, that the SOCBs were public bodies and noted the lengthy discussion in the CFS Paper determination of the evidence that the SOCBs during the period of investigation were either wholly or majority government-owned, and that there was extensive government involvement in and control over their operations. The Panel considered that the USDOC's findings constituted a sufficient basis for its public body determination in respect of the SOCBs. The Panel therefore concluded that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining that the SOCBs were public bodies.

Concluding remark

Having found that China had failed to establish that the United States acted inconsistently with its obligations in so far as its determinations of "public body" in the investigations before the Panel. This finding, on its own, did not mean in any way that the entity in question acted in a non-commercial manner, by conferring a benefit, nor that any such benefit was specific. Those elements were independent and as such each must established in order for a valid basis to exist for the imposition of a countervailing measure.

China's claims pertaining to Specificity

De jure specificity of SOCB lending to the tire industry

China claimed that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(a) of the SCM Agreement, by finding in the OTR investigation that preferential lending by SOCBs to the tire industry was *de jure* specific. China further claimed that, as a consequence, the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI: 3 of the GATT 1994.

Main arguments of the Parties

China

China submitted that the legislation upon which the USDOC relied as the basis for its finding of *de jure* specificity neither refers to the alleged subsidy, nor explicitly limits access to the alleged subsidy to the tire industry. China further argued that the SOCB loans were not made pursuant to the legislation in question.

According to China, a valid determination under Article 2.1(a) of the SCM Agreement that certain legislation confers a subsidy that was *de jure* specific requires the establishment of three elements: (i) that the legislation define or refer to all of the elements of a subsidy (i.e., the financial contribution and the benefits that will be conferred thereby); (ii) that the legislation explicitly limit the access to the subsidy to certain enterprises (i.e., that it must clearly and unambiguously provide that the relevant subsidy – the financial contribution and benefit – is only available to "certain enterprises", to the exclusion of other "certain enterprises"); and (iii) that the countervailed transaction must have been made pursuant to the subject legislation (i.e., must be an instance of the subsidy that the legislation defines, and the recipient must be among the "certain enterprises" to which the subsidy is explicitly limited).

China further claimed that in addition that pursuant to Article 2.4 of the SCM Agreement, any specificity determination must be "clearly substantiated on the basis of positive evidence", and argued that "clear substantiation" was an even higher standard than "positive evidence" as that term was interpreted by the Appellate Body in US – Hot-Rolled Steel.[96] In this regard, China submitted that evidence showing that a particular subsidy was broadly available throughout an economy was inconsistent with a valid finding of specificity.

China argued that the USDOC's specificity determination in respect of SOCB lending to the tire industry was deficient in respect of all three of the elements it considers to be necessary. First, China asserted, the USDOC relied on broad statements in various planning documents and then implicitly linked these

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[96] Appellate Body Report on *US – Hot-Rolled Steel*, para. 192.

statements to other statements in the same planning documents that refer to providing support to various industries. Second, China submitted, even assuming that the legislation at issue referred to the alleged subsidy, the USDOC's final determination provided no analysis of and made no findings as to whether the alleged subsidy was explicitly limited to companies in the tire industry. Finally, China asserted that the USDOC failed to demonstrate that the SOCB loans were made pursuant to the legislation on which the USDOC relied.

For these reasons, China contended that the USDOC did not clearly substantiate, based on positive evidence, its *de jure* specificity determination in the OTR investigation.

United States

The United States argued that the USDOC's *de jure* specificity finding in respect of SOCB loans to the tire industry was consistent with Article 2 of the SCM Agreement. According to the United States, the USDOC found the "policy lending" in question to be specific because the loans were provided as part of government programmes guiding financial institutions to lend to tire producers. The United States argued further that where an investigating authority clearly substantiates on the basis of positive evidence that access to a subsidy is explicitly limited, then a finding of specificity is consistent with Article 2 of the SCM Agreement; and the USDOC's finding of *de jure* specificity in respect of SOCB lending to the tire industry met this test.

The United States argued that the USDOC found that the Chinese laws, plans and policies – which operated at central, provincial and municipal levels of government – limited access to policy lending to a group of industries that explicitly included the OTR tires industry. Furthermore, the USDOC found that the provincial and municipal policies and plans were designed to implement central government plans and were intended to be consistent with those.

Regarding the interpretation of Article 2 of the SCM Agreement, the United States argued that this provision did not require the identification of legislation that defines the elements of a subsidy, as this would conflate the determination of specificity and benefit with that of financial contribution. The United States also disagreed with China that the range of projects in the planning documents was so broad as to render policy lending non-specific. In the view of the United States, the referenced projects concerned a "group of industries" (the terminology of

Article 2.1 of the SCM Agreement). The United States also noted that the USDOC found that the planning documents prohibited policy lending to projects in the "restricted" and "to be abolished" categories.

The United States further argued that the question of specificity in respect of the SOCB lending is different from that of benefit (i.e., the terms of the lending): specificity has to do with making credit available to certain enterprises, including tire companies.

Assessment by the Panel

The issues presented by this claim were: what the required analytical elements were for a valid finding of *de jure* specificity under Article 2.1(a) of the SCM Agreement; in this regard whether the three-part test advanced by China was required by that provision; and finally, on the basis of both the facts of the OTR investigation and applicable legal requirements, whether the USDOC's *de jure* specificity determination in respect of SOCB lending to the OTR tire industry was inconsistent with the United States' obligations under the SCM Agreement. Concerning the analytical elements for a valid finding of *de jure* specificity, China's claim raised both how the limitation of access to a subsidy must be structured, and the meaning of the term "certain enterprises".

a. Interpretation of Article 2.1 of the SCM Agreement

"Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the

granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of nonspecificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.3 In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation."

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[2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

i. Limitation of access

The Panel began its analysis of this claim by noting the general role in the SCM Agreement of the specificity requirement, which was related to the overall object and purpose of the SCM Agreement to discipline trade-distorting subsidies. In particular, the specificity provisions establish that the subsidies deemed under the Agreement to be potentially trade distortive were those that were targeted in some way to particular beneficiaries, rather than being broadly available throughout

the economy of a Member. In other words, the specificity requirement was not about the existence of a subsidy, which was dealt with in Article 1.1, but rather about access thereto. Article 2 of the SCM Agreement made clear that specificity can take a number of different forms (enterprise, industry, regional, as well as deemed specificity in the case of prohibited subsidies), and that the superficial appearance of non-specificity is not sufficient for a subsidy to avoid coverage by the SCM Agreement. In short, the issue under Article 2 of the Agreement was the limitation, on some basis, of access to the subsidy. Subsidies to which access was limited in any of the ways referred to in that provision are specific and thus covered by the SCM Agreement.

Furthermore, the limitation could be "explicit" (commonly referred to as "*de jure*") as per Article 2.1(a), or could be determined on the basis of how, in practice, an apparently non-specific subsidy was allocated (commonly referred to as "*de facto*") as per Article 2.1(c) of the SCM Agreement. In this regard, the Panel noted the balance struck in Article 2 of the SCM Agreement – a subsidy to which access was automatic based on neutral, horizontally-applicable economic criteria was not specific, and thus falls outside the scope of the SCM Agreement, but the appearance of non-specificity can be overridden by the facts of how the subsidy was allocated in practice. The Panel thus must guard against both an overly-broad reading of the specificity requirement which would sweep within the coverage of the SCM Agreement non-specific subsidies, and an overly-rigid or restrictive reading which would subvert the purpose of the specificity requirement, and thus undermine the effectiveness of the SCM Agreement.

In the provision at issue, Article 2.1(a) of the SCM Agreement, the text requires, and the parties do not dispute, that the limitation in question must be explicit. Where the parties disagree was with respect to how that explicit limitation must be structured for a measure to fall within the scope of Article 2.1(a) of the SCM Agreement.

Article 2.1(a) of the SCM Agreement establishes two bases on which *de jure* specificity can be established: either the granting authority, or the legislation pursuant to which it operates, "explicitly limits access to a subsidy to certain enterprises". The first element of the test advanced by China was that the granting authority, or the legislation setting forth the measure in question, must identify or specify the elements of a subsidy, i.e., financial contribution and benefit. The Panel understood that China based this contention on the words "explicitly" and "subsidy" in Article 2.1(a), i.e., that the granting authority, or the legislation pursuant

to which it operates, must explicitly limit access to a subsidy. For China, this meant that if the granting authority or the legislation in question did not explicitly set forth both the financial contribution and the benefit elements, the measure could be a *de jure* specific subsidy.

The first issue raised by this claim was whether, to explicitly limit access to a subsidy, a granting authority or legislation must specify all of the elements of a subsidy, i.e., financial contribution and benefit. As noted, for China, this was first and foremost a textual question following from the definition of "subsidy" in Article 1 of the SCM Agreement, i.e., that the use of the word "subsidy" in Article 2.1(a) required that both the financial contribution and the benefit be explicitly identified by the granting authority or the law. Another way to look at this issue, however, was from a functional standpoint. That was, functionally, could a granting authority or a legislation explicitly limit access to a "subsidy" without identifying both the financial contribution and the benefit flowing there from? Or put another way, would the only way for a granting authority or legislation to explicitly limit access to a subsidy be to explicitly identify both the financial contribution and the benefit, and explicitly limit access to both?

The Panel considered that there were many ways in which access to a subsidy could be explicitly limited. The Panel did not see that both the financial contribution and the benefit necessarily would have to be set forth explicitly to effect such a limitation. In particular, if access was explicitly limited to a particular type of financial contribution, which sometimes but not always gives rise to benefits, the particular cases in which the benefits existed would be *de jure* specific subsidies. This was because the explicit limitation of access to the financial contribution would have the effect of also limiting any benefits resulting from the financial contribution, without the limitation of access to the benefits itself needing to be explicit. Similarly, access could be explicitly limited to a particular set of benefits without the access to the underlying financial contributions also needing to be explicitly limited, and again, in the view of the Panel, the access to the "subsidy", the combination of the financial contribution and the benefit, would be explicitly limited.

The Panel had given hypothetical examples to illustrate this point. Suppose that a law established a government credit facility exclusively for the cardboard box industry, but was silent concerning the terms and conditions on which the financing was to be provided. In this example, it was clear that while access to the financial contribution would be explicitly limited to a particular industry, there

would be no explicit limitation of any benefits that might arise there from. Suppose that some of the financing under this facility were provided on better-than-market terms, i.e., those benefits were conferred. In this scenario, because by law only the cardboard box industry could obtain any financial contributions (the loans) under the programme, any benefits flowing there from necessarily also would be limited to the cardboard box industry, meaning that any subsidies under this programme would be *de jure* specific to that industry. Alternatively, suppose that a law established a government credit facility accessible to all enterprises in all industries and further provided that companies in the cardboard box industry (and only that industry) would get loans under this facility on better-than-market terms. In this second example, access to the financial contribution (the loans) would not be limited, but access to the benefits flowing there from would be – to a single industry. By virtue of this explicit limitation on access to the benefits, this subsidy also would be *de jure* specific.

The plain reading of Article 2.1(a) of the SCM Agreement would require explicit limitation of both the financial contribution and the benefit, such as China advocates, was not supported by the text of that provision. In the view of the Panel, it would limit *de jure* specificity to a single, narrow set of circumstances, in which a single piece of legislation (or perhaps more than one formally interrelated pieces of legislation) or some action by the granting authority, would explicitly set forth, in the form of a formal programme, the financial contribution and benefit elements (including the form they would take and how they would operate) and would then specify the particular eligible beneficiaries (and possibly also would state explicitly that only those beneficiaries were eligible). The Panel could not agree with such a reading, which in its view would exclude many situations in which access to a given subsidy was explicitly limited, by virtue of a limitation of access to either the financial contribution or the benefit.

A wide variety of possible forms of subsidization falls within the definition in Article 1 of the SCM Agreement, and there is nothing in Article 2 that would narrow down those forms, in a scenario of either *de jure* or *de facto* specificity. In this regard, Article 1.2 of the SCM Agreement treats the concepts of subsidy and specificity as separate. In particular, that provision established that subsidies in the sense of Article 1 were subject to the SCM Agreement only if they were specific in the sense of Article 2. Indeed, financial contribution, benefit and specificity were three independent and cumulative elements, all of which must be present for a measure to be covered by the SCM Agreement. Concerning financial contribution and benefit in this regard, the Panel noted the case of the Appellate

Body in Brazil – Aircraft, that these were independent concepts, both of which must be present for a measure to be a subsidy in the sense of the SCM Agreement.[97] Similarly, the Panel agreed with the approach taken by the Panels in EC – Countervailing Measures on DRAM Chips, US – Countervailing Duty Investigation on DRAMS, and Korea – Commercial Vessels, all of which analyzed the question of specificity separately from financial contribution and benefit. In EC – Countervailing Measures on DRAM Chips, the Panel overturned some of the European Communities' determinations as to the existence of financial contributions and the amounts of benefits pursuant to the measures at issue, but nevertheless as a separate matter considered, and upheld, the European Communities' specificity finding in respect of the measures as a whole.[98] The US – Countervailing Duty Investigation on DRAMS panel followed the same approach, affirming the investigating authority's finding of *de jure* specificity of the measures at issue while overturning some of the investigating authority's findings of financial contribution and benefit.[99] The Panel in Korea – Commercial Vessels likewise separately evaluated the existence of specificity of the measures before it from the questions of financial contribution and benefit.[100]

While ultimately all three elements (financial contribution, benefit and specificity) must be present for a given measure to be covered by the SCM Agreement, a formalistic reading of the specificity provisions as implying a particular conjunction of these elements, or a particular order of analysis, might have the effect of omitting from coverage measures which viewed in their entirety have all three necessary elements to be covered by the SCM Agreement. As the Panel noted above, in the particular case of *de jure* specificity, to require that a given legislation or granting authority lay out all elements of a specific subsidy, explicitly limiting access to both the financial contribution and the benefit, would have the effect of treating as non-*de jure* specific a wide variety of subsidies to which access was explicitly limited. This would mean that the only basis on which specificity could be found for such subsidies would be on a *de facto* basis, a fact-intensive, case-by-case inquiry that would be both illogical and entirely superfluous under the described scenarios where an explicit limitation of access to a subsidy existed.

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97 Appellate Body Report on *Brazil – Aircraft*, para. 157.

98 Panel Report on *EC – Countervailing Measures on DRAM Chips*, paras. 7.110, 7.186, 7.215 and 7.230

99 Panel Report on *US – Countervailing Duty Investigation on DRAMS*, paras. 7.206-7.208. *See* also *Japan DRAMs (Korea)*, paras. 7.253-7-254, 7-316, 7-361 and 7.375.

100 Panel Report on *Korea – Commercial Vessels*, para. 7.192.

Furthermore, where the details as to the actual distribution of the subsidy could not be obtained, the subsidy would be left outside the scope of the SCM Agreement in spite of its undeniably being explicitly limited to particular beneficiaries. The Panel considered that such a reading would frustrate the purpose of the specificity provisions, and would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance.

By the same token, the Panel saw no potential that being able to establish *de jure* specificity on the basis of an explicit limitation of access either to a financial contribution or to a set of benefits could improperly bring within the scope of the SCM Agreement measures that in fact are not specific subsidies. In whatever order the analysis was conducted, and regardless of whether access was explicitly limited in respect of the financial contribution or the benefit or both, the three elements of financial contribution, benefit and explicit limitation of access would be present, and the measure thus would be a *de jure* specific subsidy and hence covered by the SCM Agreement.

For the same reasons, the Panel disagreed with the third part of China's three-part test, i.e., that the specific transaction under investigation must be an instance of the subsidy that the legislation defines. The Panel considered that this was largely a restatement of China's argument that the *de jure* specificity provision requires the granting authority or the relevant legislation to identify both the financial contribution and the benefit. The Panel saw no limitation in the text to such a specific scenario, and thus no such requirement. Again, the Panel noted that subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit. Of course, where a countervailing measure was applied in respect of *de jure* specific subsidies, the limitation to "certain enterprises" must be explicit, but again the Panel considered that the limitation to those recipients could be in respect of the financial contribution, or the benefit, or both. Furthermore, for the application of a countervailing measure, there must be evidence that the subsidy that had been provided and was being countervailed was the subsidy that had been found to be specific, but this would be the case for any sort of specific subsidy, not just a *de jure* specific subsidy.

"Certain enterprises"

China's claim also raised the meaning of the term "certain enterprises" in Article 2.1 of the SCM Agreement. In particular, the second element of China's

three-part test was that the legislation pursuant to which the subsidy was provided must clearly provide that the subsidy (the financial contribution and benefit) was only available to "certain enterprises" to the exclusion of other "certain enterprises". The Panel understood that what China was emphasizing in this element was the explicit limitation to "certain enterprises". While Article 2.1(a) of the SCM Agreement requires such an explicit limitation, that provision did not address the related but separate question of the breadth or narrowness of the term "certain enterprises".

The relevant text of Article 2.1 of the SCM Agreement reads:

> "In order to determine whether a subsidy [...] is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises"), the following principles shall apply:"

Concerning the meaning of the term "certain enterprises", China cites with approval the statement of the panel in US – Upland Cotton that:

> "'[a]t some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products'".[101] (emphasis added by China)

China argued on the basis of this statement that "a 'group of enterprises or industries' within the meaning of Article 2 of the SCM Agreement must be 'sufficiently discrete' so that the 'group of enterprises or industries' represented no more than a 'limited group of producers of certain products'". China acknowledged that there was a certain amount of "indeterminacy" in the concept of specificity, but argued that the " 'encouraged' industries in China spanning 26 broad sectors of economic activity" identified in the GOC Catalogue (one of the documents on which the USDOC's *de jure* specificity determination was based), were too broad to be "specific" for purposes of the SCM Agreement.

China's argument pointed to two different elements of the availability of a subsidy: the diversity of the recipients, and the breadth of availability of the subsidy. Concerning diversity, the Panel understood China's argument to mean

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[101] Panel Report on *US – Upland Cotton*, para. 7.1142.

that the sheer diversity of the "encouraged" projects or industries, and of the economic sectors from which they come, as identified in the documents relied on by the USDOC, was too great to support a finding of specificity.

Starting with the text of the definition of "certain enterprises" the Panel saw nothing that addresses the question of diversity of the "certain enterprises". The text simply said that "certain enterprises" could be single enterprises or industries, or groups thereof, but in our view did not imply that there needs to be any similarity among them in order for them to constitute "certain enterprises". If anything, the context suggests the contrary. Article 2.1(b) of the SCM Agreement, on non-specificity, emphasizes entirely other factors, namely the non-selectivity of the eligibility criteria (economic in nature and horizontal in application) and the automaticity of eligibility, which speak to broad availability. Article 2.1(c), on *de facto* specificity, suggested that an apparently non-specific subsidy might be confirmed as non-specific even if the facts concerning its actual distribution show that it is being used by a narrow range of enterprises, again emphasizing the breadth of availability of a subsidy throughout an economy. In particular, this provision cautions that in examining whether *de facto* specificity exists based on patterns of usage, "account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority". This suggested that where the extent of the underlying economic diversification is low, lack of diversification in the distribution of benefits would not by itself give rise to a finding of *de facto* specificity. The Panel noted that the Panel in US – Upland Cotton based its analysis of specificity on how broadly available a subsidy is throughout an economy, and that the Panel in US – Softwood Lumber IV found that specificity has to do with subsidies that, either in law or in fact, "[are] not broadly available".[102] The Panel considered the breadth of availability of a given subsidy in an economy to be a fundamentally different concept from the diversity of activities of the subsidy's recipients.

For these reasons, the Panel did not consider that the sheer diversity of economic activities supported by a given subsidy was sufficient by itself to preclude that subsidy from being specific, and the Panel did not read US – Upland Cotton as standing for such a proposition. To the contrary, the main emphasis of the Panel in US – Upland Cotton was on the case-by-case nature of the analysis of the

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[102] Panel Report on *US – Upland Cotton*, paras. 7.1142-7.1152; and Panel Report on *US – Softwood Lumber IV*, para. 7.116.

breadth of availability of a subsidy in the context of a specificity finding[103], and the Panel considered that if anything the Panel was cautioning against interpreting the concept of specificity too narrowly. For example, the Panel emphasized that the SCM Agreement, as an agreement covering trade in goods, was applicable to all goods, and that the concept of specificity must be understood from that perspective.[104] The Panel noted as well in this context that the US – Upland Cotton panel found that a particular subsidy programme benefiting some 100 different agricultural commodities (crops as well as livestock) was a "sufficiently discrete" segment of the United States economy to qualify as specific for purposes of the SCM Agreement. The Panel took these as indications that that panel did not consider the economic diversity of beneficiaries, by itself, necessarily to bar a finding of specificity.

Indeed, there can be many examples of subsidies that could be specific in spite of benefiting very diverse recipients. For instance, a subsidy might be limited to producers of oranges, producers of dental implants, producers of computers, producers of scuba diving equipment, and producers of certain parts for the space shuttle. There was no question that these were extremely diverse industries – their products are essentially totally unrelated, and come from five very different sectors of the economy. Or a subsidy might be explicitly limited to one particular company in each of 200 distinct and unrelated industries or sectors. Again, there would be no question that the recipients were economically very diverse. Yet, (subject to the complete facts of the case), we consider that each of these subsidies could easily be specific, given its availability to only that particular "group of enterprises or industries".

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[103] In this regard, we agree with the *US – Upland Cotton* panel that: "The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis". (Panel Report on *US – Upland Cotton*, para. 7.1142).

[104] The panel specifically stated that: "the concept of specificity in Article 2 of the *SCM Agreement* is germane to the disciplines imposed by the *SCM Agreement*. The *SCM Agreement* is an agreement on trade in goods, in Anne1x 1A of the *WTO Agreement*. By its own terms, subject to considerations reflected in the text of some of its provisions, it applies in respect of *all* goods. The concept of specificity must be considered within the legal framework and frame of reference of that agreement as a whole". (emphasis original) (Id., para. 7.1144). The panel noted in this connection that the *Agreement on Agriculture* contains no specificity requirement. (Id., footnote 1274).

Thus, as a matter of legal interpretation, the Panel did not consider that economic diversity of subsidy recipients, by itself, was sufficient to prevent a subsidy from being *de jure* specific.

The second element of China's argument had to do with the breadth of availability of a subsidy which, as noted, was the question addressed by the US – Upland Cotton panel. The Panel agreed with that panel that the dividing line between a subsidy to which access was limited enough to be specific, as opposed to broadly enough available throughout an economy to be non-specific, is not precisely defined in the SCM Agreement and can only be determined on a case-by-case basis. The Panel, therefore, consider this question infra, in its analysis of the details of the USDOC's determination of *de jure* specificity in respect of lending by SOCBs to the OTR tire industry.

China also argued in regard to "certain enterprises" that "the legislation must provide that the relevant subsidy [...] is only available to 'certain enterprises', to the exclusion of other 'certain enterprises'". China did not make clear whether it was suggesting that Article 2.1(a) of the SCM Agreement required the granting authority or the legislation to identify explicitly both the "certain enterprises" that are and the "certain enterprises" that were not eligible for the subsidy. To the extent that China was making this argument, the Panel found no such requirement in Article 2.1(a) of the SCM Agreement. The provision stated that for *de jure* specificity to exist, the granting authority or the legislation must explicitly limit access to certain recipients, i.e., it must in some manner identify or define the eligible or affected enterprises, and these enterprises must be "certain enterprises" in the sense of Article 2.1(a) of the SCM Agreement. The Panel saw no requirement that in addition, the legislation must explicitly exclude from access the other "certain enterprises" that were not eligible.

USDOC *de jure* specificity determination

In the light of the foregoing considerations as to the interpretation of Article 2 of the SCM Agreement, the Panel took up China's arguments concerning the USDOC's determination that SOCB lending to the OTR tire industry was *de jure* specific. In particular, the Panel examined whether the USDOC provided a "reasoned and adequate" explanation as to: (i) how the evidence on the record

supported its factual findings; and (ii) how those factual findings supported its determination of *de jure* specificity.[105]

In the OTR investigation, the USDOC determined that China provided subsidies in the form of preferential lending by SOCBs (referred to by the USDOC as "policy lending") to the tire industry, in particular to two companies, GTC and Starbright. It determined that these subsidies were *de jure* specific on the basis that relevant Chinese laws, plans and policies explicitly limited access to such "policy lending" by SOCBs to a group of industries that included the OTR tires industry. USDOC based this determination on a finding that a number of central, provincial and municipal government planning documents provided for the development of the OTR tire industry, inter alia, through the provision of loan financing by SOCBs (i.e., government financial contributions) to the tire producers, in some instances identified by name. The USDOC's benefit determination in respect of this lending was made in a separate part of its determination, not on the basis of these planning documents.

In the light of the interpretations of Article 2.1(a), the Panel found no legal error in this separate analysis of these two elements.

The remaining question before the Panel in respect of the USDOC's *de jure* specificity determination, therefore, was whether that determination was reasonably supported by the documents on which it was based. The Panel considered, in particular whether the evidence before the USDOC supports its findings that the various planning documents identified "certain enterprises", which included the OTR tires industry, for development, inter alia, through the provision of loan financing, and whether documents on the record also support the USDOC's finding that that SOCBs were acting pursuant to the prescriptions of the planning documents when they provided loan financing to the OTR tire producers.

Turning now to the USDOC's findings and the related record evidence, the USDOC found that at the central government level the Government of China's Five-Year Plans set the overall economic policies for China, which policies then were implemented in detail through subsidiary central government-level instruments (the Implementing Regulations, the GOC Catalogue, the SETC Circular). The USDOC further found that the provincial and local governments implemented at their respective levels these national plans and policies. The USDOC stated, inter

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[105] Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 186.

alia, that the record indicated that GTC had been a "key target for economic development by Guizhou province and Guiyang municipality", citing specific references to GTC in their respective provincial and municipal five-year plans, and indicating that the plans also stated that lending should be allocated according to the plans, and that record evidence showed that GTC had received numerous project development loans from SOCBs. Summarizing its view of how these policies at the various levels of government were related, the USDOC found that "central level plans should be considered a central government policy or programme that local governments adopt and implement through their own five-year plans".

The Panel began its analysis by reviewing the USDOC's findings in respect of the central provincial as well municipal government-level planning documents. The Panel concluded that a reasonable and objective investigating authority could have determined, on the basis of the evidence on the record, that the Government of China, at the central level, explicitly identified "certain enterprises" in the sense of Article 2.1(a) of the SCM Agreement for encouragement and development (including the tire industry), and instructed the sub-central governments to implement this policy. The Panel further concluded that a reasonable and objective investigating authority could have determined that pursuant to these same planning documents, SOCBs (among other financial institutions) were instructed to provide financing to the "encouraged" projects. Thus, the Panel found no legal error in the USDOC's determination on the basis of these documents that government authorities at all levels of government in China (central, provincial and municipal) effectuated policies to ensure the provision of loans to the OTR tire industry.

The Panel was concluded that China had failed to establish that the USDOC's finding in the OTR investigation, that lending by SOCBs to the OTR tire industry (in particular to GTC and Starbright) was *de jure* specific, was inconsistent with the obligations of the United States under Article 2.1(a) of the SCM Agreement.

Regional Specificity of Land-Use Rights

Claims of China

China challenged the USDOC's determination in the LWS investigation that the provision of land-use rights to one company (Aifudi) located in the "New Century Industrial Park" (the "Industrial Park" or the "Park") was regionally specific. China claimed that this determination was inconsistent with Article 2 of the SCM

Agreement and, as a consequence, Articles 10 and 32.1 of the SCM Agreement and Article VI: 3 of the GATT 1994.

Main arguments of the Parties

China

China argued that for a subsidy to be regionally specific, it must be limited in three ways: (i) it must be limited to certain enterprises within a designated geographical region within the jurisdiction of the granting authority; (ii) it must be limited to "certain enterprises" as that term is defined in Article 2.1 of the SCM Agreement; and (iii) those certain enterprises must be located within the designated region. China argues that it follows a contrario from the limitations in Article 2.2, that if a subsidy is available to all enterprises within the designated region, then it is not regionally specific; and that if it is available to enterprises outside that region, it likewise is not regionally specific.

In respect of the provision of land-use rights in the New Century Industrial Park, China argued that it is implicit in its specificity analysis that the USDOC considered the industrial park to be the "designated geographical region" in the sense of Article 2.2 of the SCM Agreement. China considered, however, that the term "designated geographical region" should be understood to mean an economic or administrative subdivision (region) within a particular physical area of a country (geographical) that has been set apart for some special purpose (designated). China found contextual support for this reading of the term in Article 8.2(b) of the SCM Agreement (non-actionable subsidies), which referred to an eligible disadvantaged region, inter alia, as "a clearly designated contiguous geographical area with a definable economic and administrative identity". China argued that the similarity of the phrasing in Articles 2.2 and 8.2(b) meant that the same concepts should apply to the term "designated geographical region" in Article 2.2 of the SCM Agreement.

China cited the negotiating history of Article 2.2 of the SCM Agreement in support of its position. In response to a question from the Panel concerning the purpose of Article 2.2, in the light of this argument that for a subsidy to be specific under Article 2.2 it would need to be limited to only certain beneficiaries within the region, China stated that this provision addresses the particular circumstance in which a subsidy was in fact limited to certain enterprises located within such a region. China noted in this regard that unlike Article 2.1(a), Article 2.2 did not

refer to an "explicit limitation" of access to the subsidy by the granting authority or the legislation in question.

China argued that the New Century Industrial Park was not a designated geographical region in the sense of Article 2.2 of the SCM Agreement because it did not have its own definable economic and administrative identity and had not been designated for any purpose, let alone to provide subsidies. Rather, it was simply an area of land that Huantai County had rezoned from agricultural to industrial use, and which it decided to call the "New Century Industrial Park". China considered that the United States' argument, under which provision of land to any single company for less than adequate remuneration would be regionally specific to that land, would be "absurd". In particular, under the logic of the USDOC's "regional specificity" finding in respect of the Industrial Park, any parcel of land could be called "regionally specific".

China asserted that during the investigation, the USDOC made no finding that the alleged subsidy was limited to "certain" enterprises located "within" the Industrial Park (i.e., a subset of all enterprises in the Park), and thus that it was not limited in the manner required by Article 2.2 of the SCM Agreement. China further stated that the USDOC did not find that the alleged subsidy was limited to enterprises obtaining land use rights in the Industrial Park, to the exclusion of companies obtaining such rights elsewhere in the county where the Park is located. Finally, China argued, the USDOC's specificity finding was that the provision of land rights (i.e., the financial contribution) was limited to enterprises in an industrial park within the county's jurisdiction, whereas the Agreement requires that for a valid finding of specificity, the USDOC would have needed to find that the subsidy was limited to certain enterprises within the Park, to the exclusion of others within the Park, and to the exclusion of others located elsewhere in the county.

Finally, China argued, even if the USDOC had applied the legal framework advanced by China, the evidence would not support a finding that the alleged subsidy was limited to the Industrial Park. According to China, the evidence showed that all companies (with a small number of exceptions) within the Park paid the same lease rate, such that if there were a subsidy, it was not specific as all holders of the land-use rights paid the same rate. China stated that the evidence also demonstrated that commercial leaseholders elsewhere in the county paid the same or lower rates than those within the Park. Thus, any subsidy was not limited to the Park, the area considered by USDOC as the "designated geographic region".

United States

The United States argued that the USDOC found that China's provision of land-use rights to Aifudi was regionally specific because it was limited by a county to enterprises located in an industrial park within the county's jurisdiction. The United States argued that pursuant to Article 2.2 of the SCM Agreement, a subsidy is specific if it was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority, and Huantai County limited the land rights to enterprises located within a designated geographical region – the Industrial Park. The United States argued that China's interpretation - that a "designated geographical region" must have its own economic and administrative identity – is overly strict, as these requirements do not appear in Article 2.2 of the SCM Agreement. Nevertheless, even by this overly-restrictive definition, the industrial park would qualify. For the United States, "designated" means "'specified'" or "'called by a name'". Geographical means, inter alia, "'pertaining to, or of the nature of, geography'", with geography defined to include "'the features or arrangement of a region or a place, building, etc.'"; and "region" means, inter alia, "'[a] large tract of land; a country; a definable portion of the earth's surface". Thus, for the United States, a "designated geographical region" was a large tract of land, defined by the tract of land's feature or arrangement, called by a name or described. According to the United States, the Industrial Park met this definition.

The United States considered that it and China were of more or less the same view in terms of the meanings of "designated" and "geographical", but that they differ in respect of "region", where the United States' reading was much broader than China's "economic or administrative subdivision". Here, the United States disagreed that Article 8.2(b) of the SCM Agreement supports China's argument: among other things, if the drafters had meant "region" to connote "administrative or economic subdivision", they would not have had to include in Article 8.2(b) of the SCM Agreement the modifier "a definable economic and administrative identity" to the term "disadvantaged region".

The United States taken further issue with China's argument that Article 2.2 of the SCM Agreement requires that a subsidy must be limited to "certain enterprises" (i.e., a subset of enterprises) within the region in order to be regionally specific. For the United States this would render Article 2.2 itself redundant, as in any case, even without any geographical limitation, the subsidy would be specific to "certain enterprises" pursuant to Article 2.1(a), and such an interpretation would

be impermissible. Furthermore, the United States considered that Article 8.2(b) of the SCM Agreement supports its, not China's view, as that provision indicates that in order to be non-actionable, the specified regional subsidies among other things would need to be "non-specific" within the regions. Under China's interpretation, this would be unnecessary to specify, as such non-specific aid within a region would already fall outside the scope of the Agreement. The United States also pointed to Article 8.1(b) of the SCM Agreement which refers to the various non-actionable subsidies listed in Article 8.2 as specific, including the regional subsidies referred to in Article 8.2(b) which are, by definition, non-specific within the regions in question. According to the United States, here again, the non-specificity requirement in Article 8.2(b) would be unnecessary if those subsidies already were, in general, non-specific pursuant to Article 2.2 of the SCM Agreement.

Finally, the United States argued that the availability of similar subsidies to enterprises outside the region did not invalidate a finding of regional specificity. The United States asserted that if this were the case, governments could easily circumvent the SCM Agreement by providing a given subsidy to one company outside the region. According to the United States, the land-use rights subsidy at issue was used as an incentive to relocate producers to the Industrial Park, and was tied to the level of investment within the Park. The fact that the county granted other types of land-use rights to other leaseholders outside the Park was irrelevant to the regional specificity of the land-use subsidy provided to enterprises in the Park.

Concerning the facts of the investigation, the United States asserted that evidence on the record distinguished the way in which land-use rights were provided by the government in the Industrial Park, in that only enterprises with a certain level of investment qualified, and the subsidy was available only to enterprises willing to physically locate in the Park. In addition, the record evidence indicated that land-use rights were not provided in accordance with government-established requirements, as the land in question had not been converted from agricultural to industrial use at the time the land-use rights were provided to the enterprises in the Park. Furthermore, the local authorities had not conducted a formal appraisal of the land, as was required. In these ways, the United States argued, the provision by the county government of land-use rights in the Park was distinct from its provision of land-use rights outside the Park.

Assessment by the Panel

Interpretation of Article 2.2 of the SCM Agreement

The Panel began its analysis with the text of Article 2.2 of the SCM Agreement which reads as follows:

> "2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement."

The particular language in dispute between the parties was the first sentence. First, the parties disagreed whether the reference to "certain enterprises" meant that for specificity in the sense of Article 2.2 of the SCM Agreement to exist, there must be a limitation of a subsidy to a subset of enterprises located within a designated geographical region, or instead whether limitation of a subsidy on a purely geographic basis, to part of the territory within the jurisdiction of the granting authority, is sufficient. The parties also disagreed as to the meaning of "designated geographical region". For China, this language referred to a formal administrative entity, whereas for the United States it referred to any specified, identified large piece of land (whether or not it has a separate administrative identity or apparatus).

i. "Certain enterprises" as referred to in Article 2.2 of the SCM Agreement

Article 2.1 of the SCM Agreement defines the term "certain enterprises as follows:

> "In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:". (emphasis added)

Thus, the first question concerning the meaning of the term "certain enterprises" in Article 2.2 of the SCM Agreement was whether that phrase covers all enterprises located within the designated geographical region within the

jurisdiction of the granting authority, or is limited to some subset thereof. For China, this term should be understood to mean that only if a subsidy was limited to some subset of enterprises within the region was that subsidy regionally specific. For the United States, however, the reference to "certain enterprises" in the particular context of Article 2.2 serves to distinguish those enterprises within the designated region from those outside it. To try to answer this question, the Panel first substituted into the text of Article 2.2 of the SCM Agreement the full phrase that was equivalent to the contraction "certain enterprises". This would read, in pertinent part, "[a] subsidy which is limited to [an enterprise or industry or group of enterprises or industries] located within a designated geographical region within the jurisdiction" of a granting authority. The Panel did not consider, however, that the text of the provision, in isolation, either with or without this substitution, sheds particular light on the question at issue.

The Panel next turned to the context of the provision, the most relevant of which it found to be that afforded by Articles 8.1(b) and 8.2(b) of the SCM Agreement, as these Articles together shed considerable light on the question before the Panel. These provisions read, in relevant part:

"8.1 The following subsidies shall be considered as non actionable [footnote omitted]:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be nonactionable:

[...]

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development [footnote omitted] and nonspecific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria [footnote omitted], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

[...]."

The overall purpose and effect of Article 8 of the SCM Agreement during the period when it was in force[106], as indicated in Article 8.1(b), was not to change the specificity rule of Article 2 of the SCM Agreement. Rather, Article 8 gave a special non-actionable status to a limited subset of the universe of specific subsidies which, in the absence of that Article, would have been actionable by virtue of their specificity. Upon the lapsing of Article 8, the formerly non-actionable subsidies simply reverted to the same (actionable) status as all other specific subsidies.

Article 8.1(b) of the SCM Agreement explicitly identifies as "specific" all of the subsidies described in Article 8.2 as non-actionable. In particular, this provision describes the non-actionable subsidies as "subsidies which were specific within the meaning of Article 2 but which meet" the conditions provided for in the various sub-paragraphs of Article 8.2, including Article 8.2(b), covering assistance to disadvantaged regions. In other words, Article 8.1(b) makes clear that the subsidies for disadvantaged regions described in Article 8.2(b), as well as the other subsidies described in Article 8.2 are, by definition, "specific" within the meaning of the SCM Agreement. This of course was logical, as if these subsidies were not specific; they would not be covered by, and thus would not be actionable pursuant to, the SCM Agreement. Indeed, Article 8.1(a) of the SCM Agreement makes this

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[106] Pursuant to Article 31 of the SCM Agreement, Articles 6.1, 8 and 9 applied provisionally for five years from the entry into force of the WTO Agreement, and the period of application could have been extended by consensus decision of the SCM Committee. No such consensus was reached, however, and these provisions thus lapsed.

point explicitly, identifying as one of the two categories of non-actionable subsidies those "subsidies which were not specific within the meaning of Article 2".

As for Article 8.2(b) of the SCM Agreement, the relevant point for this dispute was that in order for a subsidy to a disadvantaged region to have had non-actionable status, that subsidy, inter alia, had to be "non-specific [...] within [an] eligible region [...]". What this means is that a subsidy to a particular, disadvantaged region was defined by the SCM Agreement as specific in the sense of Article 2 of the Agreement, in spite of being non-specific within the region in question. Had the non-specificity within the region been enough to render the subsidy non-specific in the sense of Article 2, this would have made Article 8.2(b) entirely redundant given, as just noted, that non-specific subsidies are not covered by, and thus not actionable in any way under, the SCM Agreement. Furthermore, in view of the fact that the regional aid in question, to be non-actionable, had to be non-specific within the region in question, the only possible basis for such aid to be specific pursuant to Article 2 was its geographical limitation, i.e., on the basis of Article 2.2 of the SCM Agreement on regional specificity.

Finally, the Panel considered the role of Article 2.2 within Article 2, especially in relation to Article2.1 of the SCM Agreement. Here, the Panel was concerned by the implications of China's argument that subsidies limited to a designated geographical region within the jurisdiction of a granting authority would have to be further limited to a subset of the enterprises located within that region in order to be specific in the sense of Article 2.2 of the SCM Agreement. In the view of the Panel, such an interpretation would be inconsistent with the principle of effective treaty interpretation: it would entirely deprive Article 2.2 of meaning and purpose, as any such subsidy already would be specific pursuant to Article 2.1 of the SCM Agreement. By the same token, to view Article 2.2 as a particular case of the specificity referred to in Article 2.1, i.e., where the "certain enterprises" in Article 2.2 were those located within the designated geographical region, did not render Article 2.2 redundant. This was particularly clear when Article 2.2 and Article 8.2(b) were considered together, given that Article 8.2(b) defined and singled out for special treatment under the disciplines of the SCM Agreement a subset of the regionally specific subsidies covered by Article 2.2 of the SCM Agreement.

China argued that the purpose of Article 2.2 of the SCM Agreement was to address "the particular circumstance in which a subsidy was in fact limited to certain enterprises located within" a designated geographical region, by which the Panel understood China to argue that specificity in the sense of Article 2.2 can

exist only in the *de facto*, and not in the *de jure*, sense. In the first place, such an interpretation would not resolve the issue, as a subsidy such as the one described by China already would be specific pursuant to Article 2.1(c) of the Agreement. Nor did the Panel see any limitation to *de facto* specificity in the text of Article 2.2 of the SCM Agreement. Indeed, the only textual basis that China offered in support of this argument was that, unlike Article 2.1(a), Article 2.2 does not refer to an "explicit limitation" of access to the subsidy by the granting authority or the legislation in question. Given, however, that regional specificity appears in its own article (Article 2.2), separate from the general provisions containing the respective definitions of *de jure* and *de facto* specificity, and given as well that Article 2.2 does not refer either to *de jure* or *de facto* specificity, we see no basis in the text for concluding that Article 2.2 would pertain only to a *de facto* situation, and not a *de jure* one, or vice versa. In the opinion of the Panel, such an interpretation not only is unsupported by the text, but also was considerably less plausible than one that would read Article 2.2 as a particular case of specificity, on the basis of geographic limitations, which could arise in either the *de jure* or the *de facto* sense.

On the basis of the foregoing analysis the Panel concluded that the term "certain enterprises" in Article 2.2 of the SCM Agreement referred to those enterprises located within, as opposed to outside, the designated geographical region in question, with no further limitation within the region being required.

China had raised arguments based on the negotiating history of Article 2.2 of the SCM Agreement. In particular, China compares the adopted Uruguay Round text of Article 2.2 of the SCM Agreement with the counterpart provision in the "Dunkel Draft" of the Agreement. China recalls that the Dunkel text read, in pertinent part:

> "A subsidy which is available to all enterprises located within a designated geographical region shall be specific irrespective of the nature of the granting authority".
>
> While the adopted language in the SCM Agreement reads:
>
> "A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

For China, the change of the language from "available to all enterprises" in the Dunkel Draft to "limited to certain enterprises" in the final, adopted Agreement means that the negotiators considered – and rejected – the meaning whereby a subsidy would be specific pursuant to Article 2.2 based on geographical limitation only.

In considering the above argument, the Panel noted that the changes between the Dunkel text and the adopted text of the SCM Agreement go beyond the substitution of the term "limited to certain enterprises" for "available to all enterprises", and that the meaning of this change can only be understood by looking at the entirety of the two sentences. In particular, the Dunkel text provided that even if a subsidy granted within a region were completely generally available, to "all enterprises" within a designated geographical region, it would have been specific, without regard to who the granting authority was or what its territorial reach was. In practical terms, this would have meant that even a subsidy granted by a provincial government to all enterprises within the entirety of its own territory would have been regionally specific.

By contrast, Article 2.2 of the SCM Agreement changes the focus of the provision, to the granting authority in juxtaposition with its geographical jurisdiction, such that only where a subsidy was limited to a subpart of the territory within the jurisdiction of the granting authority would specificity arise under this provision. It was this change in orientation and focus between the Dunkel text and the SCM Agreement that explains the need, from the point of view of technical drafting, to change "available to all" to "limited to certain". The negotiating history of the provision thus certainly did not detract from, and if anything supports, the conclusion that the Panel hadreached regarding the term "certain enterprises" in Article 2.2 of the SCM Agreement based on our analysis of that provision itself.

"Designated geographical region" in Article 2.2 of the SCM Agreement

A further question of legal interpretation raised by China's claim was whether a "designated geographical region" in the sense of Article 2.2 of the SCM Agreement must necessarily had some sort of formal administrative or economic identity as China argued, or whether any identified tract of land within the territory of a granting authority could be a "designated geographical region" for the purposes of a specificity finding pursuant to Article 2.2 of the Agreement. Starting with the text of Article 2.2, the Panel found no limitation of the kind advanced by China, nor did China point to one. Thus, the text on its own would appear to

allow any identified tract of land within the jurisdiction of a granting authority to be a "designated geographical region" in the sense of Article 2.2 of the SCM Agreement.

China's main support for its argument was the context provided by Article 8.2(b) of the SCM Agreement. In particular, China recalled that Article 8.2(b) required that a disadvantaged region in the sense of that provision, inter alia, had to be clearly designated and contiguous, and had to have a definable economic and administrative identity. China argued that due to the similarity of the language in Articles 2.2 and 8.2(b), the concepts in the latter provision should also apply to the term "designated geographical region" in Article 2.2 of the SCM Agreement.

The Panel noted first that in fact the texts of the two provisions were different. As an initial matter, the Panel considered that if the drafters had intended for their meanings to be the same, they would have used the same language in both places.

The purpose and function of Article 8 of the SCM Agreement was to confer non-actionable status on a certain subset of the subsidies that were specific in the sense of Article 2 of the SCM Agreement. Given this, the Panel considered that the context provided by Article 8.2(b) in respect of the meaning of the term "designated geographical region" in Article 2.2 pointed rather to the opposite conclusion from that drawn by China. In particular, the requirements in Article 8.2(b) imposed special restrictions and conditions the purpose of which was to define and circumscribe, from among the universe of subsidies that were specific on the basis of Article 2.2, those that were non-actionable. The need for these restrictions and conditions thus was obvious, i.e., to ensure that the assistance was in reality limited to generalized economic assistance to regions that were economically disadvantaged based on specified, quantifiable parameters, and to prevent the non-action ability provisions from being used to disguise what in fact were targeted, trade distortive subsidies. Indeed, without the additional restriction that a disadvantaged region, to qualify under Article 8.2(b), among other things had to have a definable economic and administrative identity, it would have been possible for Members to define any parcel of land – including, say, a particular, individual factory – as a "disadvantaged region" and on that basis to provide non-actionable subsidies to that plant, thus entirely avoiding the disciplines of the SCM Agreement. Similarly, if China's argument as to the meaning of "designated geographical region" in Article 2.2 were correct, it would become a simple matter to circumvent the SCM Agreement by providing subsidies through industrial parks or similar geographical areas, without targeting particular enterprises within those areas.

On the basis of the foregoing analysis, the Panel concluded that a "designated geographic region" in the sense of Article 2.2 of the SCM Agreement could encompass any identified tract of land within the jurisdiction of a granting authority.

USDOC regional specificity determination

Having reached its conclusions regarding the legal interpretation of Article 2.2 of the SCM Agreement, the Panel now turned to the USDOC's regional specificity determination in the LWS investigation, in respect of the provision of allegedly subsidized land-use rights.

Assessment by the Panel

The question before the Panel in respect of the LWS investigation was whether the USDOC's finding that the provision of land-use rights to Aifudi was regionally-specific was consistent with the SCM Agreement. The United States argued that there was a financial contribution by a government (provision of land-use rights which are totally controlled by the government), and that the particular land-use rights in question – those to Aifudi, which were in the Industrial Park – were regionally specific because they were available only to the companies operating in the Industrial Park. The United States also argued that there was very little record evidence on prices of land-use outside the Park, and that even if there were some subsidies conferred to some land-users outside the Park that would not alter the fact that land-users in the Park were receiving land-use subsidies by virtue of their location (i.e., regionally-specific subsidies).

China, in addition to its legal arguments that regional specificity cannot be determined on the basis of a geographic limitation alone, and that an industrial park cannot be a designated geographic region, argues that the evidence of record did not show that any benefit was enjoyed by Aifudi that was not also enjoyed by other companies inside the Industrial Park and, moreover, showed that the price for land-use in the Industrial Park was if anything higher than that outside the Park in Huantai County. As such, according to China, being located in the Industrial Park conferred no special advantage. China thus seemed to be saying that even if any subsidy existed, it was generally available to purchasers of land-use rights in Huantai County. China also argued that by the USDOC's logic, the provision by a government of any piece of land would be regionally specific purely by virtue of the geographical nature of land; an outcome that China considers would be absurd.

The Panel held that it was not necessary for a granting authority or the relevant legislation to identify all elements of a specific subsidy for a valid finding of *de jure* specificity. The Panel therefore found no legal error in the USDOC having based its determination of regional specificity on the element of the financial contribution, i.e., on the provision of land-use rights by Huantai County.

The Panel held that the USDOC's determination of regional specificity in respect of the provision of land-use rights to Aifudi was inconsistent with the obligations of the United States under Article 2 of the SCM Agreement.

The Panel's Analysis on Chinese RMB Benchmarks

The Panel first noted that the chapeau of Article 14 laid down guidelines which allowed sufficient flexibility to the investigating authority. The calculation of a benefit through a government loan occurs if there was a comparable benefit from a commercial loan. Hence, the benchmark to be employed must be commercial, as also stated in Canada-Aircraft.

The term 'comparable' indicated that not just any commercial loan could be used for the comparison but that it should have been established around the same time, should have the same structure, and similar maturity, the same size, be denominated in the same currency etc. The benchmark loan should be one which the borrower could have reasonably obtained from the market. The manner in which the borrower would be evaluated, his risk profile, collateral etc are important in establishing the same.

The "ideal" benchmark would be the as stated by the Panel in para 10.116 an actual loan from a commercial lender, with the same size, maturity, structure and currency to the investigated entity. Considering an exact fit might never be possible, the Panel considered whether finding an incompatibility would necessarily dictate that the investigating authority should conclude that there is no comparable commercial loan. The Panel on the reading of Article 14(b) came to the conclusion that adjustments were sometimes possible.

With specific regard to the RMB denominated loans the Panel noted that though the currency base was a very important factor, the equivalence of the loan in one currency could always be determined through conversion into another currency through swap transactions. Interest rates in a particular country need not

always be accepted as the "commercial" rates. In China, the government influence over interest rates was a feature of their monetary policy. In the cases where the governmental role as a lender is major, and it exerts control over lending and interest rates – the resort to a "commercial" benchmark inside the country would be a wasteful exercise.

The Panel then considered the USDOC determinations to not rely on the interest rates in China as benchmarks for SOCB loans. The findings were that of the three types of loans: SOCBs loans, Chinese national interest rates, and Foreign Bank lending, none were reliable because the SOCB laons were themselves the loans against which the comparison was made, the Chinese national interest rates were not reliable because of China's intervention in the banking sector which reflected government intervention in the rates and that the banking sector had significant distortions owing to which even Foreign Bank lending couldn't be comparable. Furthermore the CFS Paper investigation was also summarized and the individual investigations in CWS, LWR and LWS were considered. The Panel on a consideration of the level of assessment in the CFS Paper investigation found that the requisite level of standard of review had been attained and that China had not established that the United States had acted inconsistently with its obligations under Article 14(b) of the SCM Agreement.

Article 14(d) of the SCM Agreement and USDOC –Land Use Rights

The Panel had found that the USDOC's decision to not rely on Chinese prices for land-use rights as benchmarks was inconsistent with Article 14(d) of the SCM Agreement. The Panel then went on to consider whether the actual prices used by the USDOC as benchmarks also violated the obligations under Article 14(d) of the SCM Agreement.

Adequacy of remuneration is a condition which is to be determined 'in relation to prevailing market conditions for the good or service in question in the country of provision or purchase'[107]. China had specifically advanced that it was difficult to find a comparable commercial price for land considering it was very characteristic of the physical, social, political and economic environment in a country. Hence, China advanced that any proxy without the relevant adjustments would be inadmissible as a potential benchmark. The USDOC had performed no adjustments

[107] As set down in *US-Softwood Lumber IV*.

on the Thai benchmarks used. The USDOC advanced that its adjustments burden had been subsumed in its acute selection of Thailand prices as a benchmark.

The USDOC had taken into consideration factors such as per capita GNI, population density, the types of land transaction and the land in industrial zones as a separate category etc. The Panel hence found that China had not established that the benchmarks relied upon were inconsistent with the obligations of the United States under Article 14(d) of the SCM agreement.

Article 14(b) of the SCM Agreement of the Loan Benchmarks used by the USDOC in the RMB denominated loans

The Panel started by reiterating that where the level of government distortion was so considerable, it was permissible to resort to out-of-country benchmarks or to use constructed proxies for what the borrower "would pay' on a comparable commercial loan. Hence the point to be established is that the benchmark used by the USDOC was inconsistent with Article 14(b) of the SCM Agreement.

The basis for such evaluation of choice of benchmark was decided as being to consider whether the method used was one which a reasonable and objective investigating authority could use. The USDOC had started using a lot of other currencies as the source for the proxy interest rate. Furthermore the USDOC had relied on the interest rates of those countries which were deemed to be similar to China. Though the benchmark was not perfect, it was deemed to be reasonable and even-handed. Hence, the Panel noted that China had not established that the USDOC had violated its obligations under Article 14(b) of the SCM Agreement.

Article 14(b) of the SCM Agreement of the Loan Benchmark used by the USDOC in US Dollar Denominated Loans

The Panel noted that the base of the claim lay in 'difference of timing' and that the commercial benchmarks would have to reflect the rates from those days the loans were taken out considering the LIBOR changes every day. The USDOC had referred to the inherent flexibility which was to be afforded in Article 14(b) with respect to the methodology followed. The Panel observed that the USDOC had failed to establish that the LIBOR average annual rate was comparable to the specific rates in question and hence found in favour of China in establishing that the United States had acted inconsistently with Article 14(b) of the SCM Agreement.

"Credit" or "Offset" for Unsubsidized Transactions ["Zeroing" analogous]

China's claim was based on the premise that the USDOC had excluded negative "benefits" and only considered "positive" benefits in the OTR investigation for the provision of rubber inputs and the same constituted an arbitrary methodology under Articles 10, 14, 19.1,, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994. China referred to the use of the word "product" in Article VI:3 of the GATT, Articles 10, 19.3 and 19.4 of the SCM Agreement, subsidization was to determined for the "product as a whole" and "margin of subsidization" like "margin of dumping" could be calculated for the product as whole. China referred to earlier AB and panel findings on Zeroing to infer that though multiple averaging might be permitted, the margin of subsidization could only be undertaken on the basis of aggregating all the intermediate values. Further China stated that "Adequate remuneration analysis" under Article 14 must occur over a period of time to make a finding where goods are purchased frequently.

The United States responded by stating the USDOC was not required to provide credit in calculations for instances where SOEs provided rubber inputs for adequate remuneration. Article 14 affords flexibility in calculating benefit in CVD investigations. In US-Countervailing Measures on Certain EC Products (Article 21.5-EC), it was stated that Article 14 did not lay down any specific 'level of aggregation' at which benefit calculation must be calculated. There is no requirement to consider cases where no benefit has been conferred. Benefit occurs only where the firm incurred an advantage. The use of 'margin of dumping' reasoning is flawed because there is no reference to the term 'dumping' or 'margin' in the SCM agreement.

The Panel understood China's claims to be two-pronged. One was what the Panel characterised as being "temporal" i.e. finding it there was an obligation to set off positive and "negative" benefits from government provision of a good. The Panel held there was no such obligation under Article 14(d) of the SCM agreement. Secondly, the question was whether all the rubber inputs must have been treated as a single "good" as under Article 14(d) and an overall net benefit amount was required to be calculated for 'rubber' products for each tire producer. The Panel found there was no such requirement to treat all the goods as a block. Finally the Panel commented on the 'degree of flexibility' accorded under Article 14 of the SCM agreement. The AB in Japan-DRAMs (Korea) had also stated that the chapeau of Article 14 accorded some latitude to choose an appropriate method

for calculation of a benefit. The chapeau of Article 14 as considered in US-Softwood Lumber IV states that 'any' method used by the investigating authority must be provided for in a legislation or regulation and the same must be transparent and adequately explained. There is more than one method which is permissible. The use of the word 'guidelines' in Article 14 points out that there is a certain framework within which the calculation may be performed though the precise detailed method is not laid down. The Panel though allowed that there was a certain amount of aggregation of benefits from distinct subsidies in over a period of time in the investigation in a countervailing duty analysis, the same is not analogous to "zeroing" and a positive transaction is not offset by a "negative" benefit. Dealing specifically with the fact situation at hand – the OTR investigation, the Panel found that the main thrust of the claim was on the identification of benchmarks and not on Article 14(d). Specifically, the Panel noted that performing benefit calculations on a monthly basis was allowable within the flexible limits in Article 14(d).

Provision of SOE-produced inputs by Private Trading companies

The foundation of China's claim was based on an arguendo. Even if the Panel were to find(like it did) that State-owned enterprises (SOEs) were indeed public bodies, China argued that where the inputs produced by the State-owned enterprises had been purchased from private trading bodies, by the producers of the investigated products in CWP, LWR and OTR investigations there was an inconsistency with Article 1.1 of the SCM Agreement because there was no finding made that the trading companies had been "entrusted" or "directed" to provide the goods as under Article 1.1(a)(1)(iv) of SCM agreement. Further this was based on the unlawful presumption that the trading companies received and passed-through countervailable benefits from their purchasers of the inputs from the SOEs. Hence the claim was put down in two parts.

Financial Contribution

The first part of China's claim dealt with the issue of the USDOC not having considered whether the private trading companies had been "entrusted" or "directed" to provide inputs to the producers identifying an inconsistency with Article 1.1 of the SCM Agreement. The Panel noted that China's arguments and the claim for establishment of panel differed widely. The Panel firstly noted that under Article 1 of the SCM Agreement, there must be a financial contribution and a benefit must have been conferred. There is no specification as to the recipient

of the financial contribution and the benefit being the same.[108] The treatment in US –Softwood Lumber IV was that even where the initial recipient of the subsidy retained all the benefits from the government or some and passed them on the producer, the analysis did not seek to identify the extent of financial contribution made by the government at every point of time through entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement. The initial contribution to the initial recipient was sufficient to identify that there was a financial contribution by the government. However, the question of benefit conferred was a separate analysis.

Pass-Through Analysis

The second part was the pass-through analysis. China's claim was to be considered after the Panel found that there was no requirement by the USDOC to examine as under Article 1.1 of the SCM Agreement whether the trading companies were entrusted or directed by the government to make financial contributions in the form of provision of goods to the producers of the investigated products.[109] The methodology used by the USDOC to determine whether there was a benefit to the tire producers was to calculate the difference between the price paid by the producers to the trading companies and the applicable benchmark price.[110] The Panel noted that there were multiple ways in which trading companies operated – they could be a distributor/stockist and take ownership and physical possession of goods or enter into contracts and purchase in bulk and then make individual sales from the bulk sales. Price fluctuations in the market between the time the trading company purchased inputs and sold them to the producers would not have been covered leading to discrepancies in the usage of the benchmark price. Hence the Panel noted the US' methodology was far from being flawless. Dealing specifically with the OTR determination where the producers involved had provided complete details of the private trading partners from whom they had purchased

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108 *US-Countervailing Measures on Certain EC Products* and *Mexico-Olive Oil.*

109 This issue covered the CWP, LWR and OTR investigations. Considering it had been found that the USDOC had resorted to "facts available" incorrectly in the investigation in violation of its obligations under Article 12.7 of the SCM Agreement, the panel decided in para 12.40 not to deal with the pass-through issue. Hence the pass-through issue dealt with only the OTR investigation.

110 Australia, referring to *US-Countervailing Measures on Certain EC Products* and *US-Softwood Lumber IV* stated that when trading companies are mere intermediaries in a transaction a complete pass-through analysis may not be necessary.

the inputs, the USDOC had failed to consider the extent to which the operations the private trader undertook might have influenced the USDOC methodology. Considering the USDOC had not accounted for any of these factors, and there might be a discrepancy in the way how a benefit larger than that conferred by the government itself might have been allegedly conferred on the companies, the Panel held the USDOC had acted inconsistently with the United States' obligations under Article 1.1 and Article 14 of the SCM Agreement.

Double remedies

The "double remedies" claim is based on the concurrent imposition of anti-dumping and countervailing duties calculated pursuant to the USDOC's NME methodology on products from China. USDOC used NME methodology on the Anti-dumping investigations from China. Earlier, in Wire Rode from Poland and Czechoslovakia, the USDOC had observed that it was not possible to identify a "bounty" or "grant" as laid down in U.S. countervailing duty law because of the pervasive role played by the governments in such centrally-planned economies. This view was reaffirmed in Georgetown Steel. However, in 2007, in CFS Paper, the USDOC had stated that though not yet a market economy, China's economy had matured sufficiently to identify and countervail subsidies in China. However, the USDOC continued to maintain the NME status for applying the U.S. antidumping regime. Though no duties were imposed in the CFS Paper case, this was the first application of the same principles and countervailing duties to an NME.

The essential factum dealing with the "double remedy" is that the domestic subsidies are "offset" twice – one through the imposition of the countervailing duties and second in the manner of calculation of anti-dumping duties. The USDOC had stated that there was no venue in which avoidance of "double remedy" could be effectuated in the countervailing duty investigations though there was room in anti-dumping. Still in the CWP and OTR anti-dumping investigations no adjustments had been made for double remedies. The USDOC while dealing with Non-market economy countries in anti-dumping investigations generally calculates the normal value on the basis of surrogate values taken from countries it considers to be market economies.[111] The NME methodology involves the following steps. The USDOC determines the quantities of the factors

[111] The normal value is generally calculated on the basis of prices or costs of production incurred by the investigated producer. Refer to Article 2 of the Anti-Dumping Agreement.

of production used by the producer in producing the investigated good, these are multiplied by the prices of the factors with surrogate values from a market economy country and finally the SG&A [selling, general and administrative] expenses are calculated on the basis of the ratios of the costs to the costs of the inputs in the surrogate country.

"As such" – China noted that there was a failure on part of the United States to have provided legal authority to avoid the imposition of a double remedy which was inconsistent with Articles 10, 19.3, 19.4 and 32.1 of the SCM agreement and Article VI of the GATT 1994. The United States had noted that this claim by China had not been part of the consultation and should therefore not be included in the Panel's terms of reference. Secondly, the United States referred to Article 6.2 of the DSU to observe that the party is supposed to have identified "specific measures at issue" in a dispute. Furthermore the "omission" that China referred to had no legal basis. There had been an extension from an "as applied" claim to an "as such" claim. China in return stated that there need be no rigid formulation of issues during the consultation process so long as the "legal basis" for the claims had been identified beforehand. The Panel however, frowned upon such inclusion and cited the case of US-Shrimp(Thailand)/US-Customs Bond Directive and it noted that the mere mention of a related measure would justify the inclusion of overarching laws and regulations which provide general authority including constitutional provisions. China had referred to US-Continued Zeroing to construe that the distinction between "As such" and "as applied" claims is irrelevant to a panel's consideration of terms of reference. The Panel in this case noted that the specific observation in that case was only related to that measure being considered by the Panel and not uniformly to all other cases. The Panel hence concluded that the "As such" measure was outside of the terms of its reference.

"As applied" Claims

China claimed with reference to the four sets of determinations, the USDOC's use of NME methodology to determine normal value in the anti-dumping determination and concurrently impose countervailing duties was inconsistent with Articles 10, 19.3, 19.4 and 32.1 of the SCM agreement and Article VI of the GATT 1994. On the same line of argument China further stated that China was being deprived of being treated like other nations which would be granted the avoidance of double remedy condition which was in violation of GATT Article I:1.

Procedurally China asserted that the US had acted inconsistently with Article 12.1 of the SCM agreement while failing to provide interested parties with information on the USDOC and under Article 12.8 of the SCM agreement the USDOC had failed to inform China and the other interest parties of the essential facts under consideration which had formed the basis for the USDOC's determinations as under the "double remedy" case.

This issue is one of the most significant amongst the ones dealt with by the Panel in this case. China submitted that a double remedy arose in all the cases where there was concurrent imposition of countervailing duties and anti-dumping duties calculated using the NME methodology. The Panel observed that under Articles 19.3 and 19.4 of the SCM Agreement overlapping was not precluded. While using the NME methodology, the producer is assumed to be receiving non-subsidized costs of production and any trade-distorting effects are captured effectively. Where the countervailing investigation occurs concurrently, the producer is against placed in the position of having market-determined costs-of-production, the same subsidy is offset twice.

The USDOC had traditionally posited that it would not apply countervailing duties to those countries it deemed to be non-market economies. This position had been reversed in the CFS Paper case. The four instances at issue represent the first instances in which the USDOC had imposed anti-dumping duties calculated as under the NME methodology. Traditionally the USDOC had tried to ensure that countervailing on subsidization did not occur twice. If subsidies are added to the producer's cost of production, and countervailing duties are deducted from the export price, and a producer's reported costs where the costs do not reflect subsidies received to determine the constructed value are the channels through which countervailing duties could end up getting collected a second time.

GPX International Tire v. United States

The 2009 decision of the U.S. Court of International Trade performed a judicial review of the countervailing determination in the OTR investigation where the CIT held the USDOC is obligated to avoid offsetting the same subsidies twice because of use of the NME Methodology. The United States submitted that the CIT ruling was subject to appeal and it was mostly erroneously founded.

The United States stated that just because there were overlapping rationales for the NME methodology being used in the AD investigation and the

Countervailing investigation, it did not indicate that there were double remedies inherent in this. The Panel in para 14.72 noted that taking both sides of the dumping margin equation into consideration meant that double remedies might result from the use of NME methodology because of the dumping margin comparison between an unsubsidized normal value and a subsidized export price. The difference is founded not only in the price discrimination but also the subsidies granted to the investigated producer. This had been observed by the U.S. Government Accountability Report in its 2005 report which dealt with the implications of the United Stated applying countervailing duty laws to China. Similarly, the Panel observed the GPX case is also similarly founded and observes that both indicate a likelihood that domestic subsidies might be double counted.

China had based its claim on Article 10 of the SCM Agreement read in light of Articles 19.1, 19.3 and 19.4 of the SCM agreement to impute on the United States an affirmative legal obligation to (i) ensure that it does not impose countervailing duties to offset subsidies which it simultaneously offsets through the methods by which it calculated anti-dumping duties; (ii) take "all necessary steps" to pre-empt against this; and (iii) ensure that investigating authorities investigate and make a determination as to the "precise amount of a subsidy attributed to the imported products under investigation" by accounting for the use of the NME methodology. China brought about the analogy of extinction of subsidies in the context of privatization as discussed in US-Countervailing Measures on Certain EC Products to illustrate that similar to the case where privatization might result in there being arms-length sale at some point ensuring thereby that the benefits of the subsidy have already been offset, similarly, the dumping margin calculation following the NME methodology should be taken into consideration before commencing anti-dumping. The Panel considered this analogy to be pertinent though the final observations did not serve China's interests.

China cited Article 19.3 of the SCM agreement to argue that countervailing duties must be imposed "in appropriate amounts" which should be determined in light and purpose of the duty. Specifically, China's claim under Article 19.4 was that the "amount of the subsidy" is not what is should have been determined under WTO rules. The Panel considered the provisions of Article 19.4 of the SCM agreement to read that "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." The fundamental disagreement between the parties is that following the USDOC's use of the NME methodology the effect had been to offset the subsidies which meant

there were no extant subsidies to countervail against. The Panel further noted that the prohibition against double remedies in Article VI:5 is limited only to export subsidies.

China argued that there was supposed to be some 'discipline' to be observed while imposing these trade remedies. The fact that Article 15 of the Tokyo Round Subsidies Code had not been replicated in the SCM Agreement, according to China, did not imply that those obligations had been removed, but rather that the negotiators did not deem it important enough to continue to be retained owing to it not being practised anywhere else. The Panel deemed this issue to be part of the context on which to base its interpretation on. The Panel concluded that the drafters of the SCM agreement did not intend to allow the provision to address the issue of double remedies. The United States firstly argued that nowhere in the covered agreements did there exist a prohibition against the imposition of a double remedy with respect to domestic subsidies. Article 15 of the Tokyo Round Subsidies Code which had stated that with respect to NMEs, there could be imposition of either anti-dumping or countervailing duties had not been carried over to future negotiations. The Panel hence concluded that no violation by the United States had been proved as under Article 19.4 of the SCM agreement.

Article 19.3 of the SCM Agreement provides that, "When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, in ..." The provision hence imposes two obligations on Member countries – one to ensure that the levy of duties is conducted on a non-discriminatory basis and secondly that they are levied in "appropriate amounts" in each case. China's interpretation of the term "appropriate" is proper and fitting in light of the purpose of the duty. Hence, China stated that it was not appropriate to offset a subsidy that the investigating authority simultaneously offsets through the manner in which it calculated anti-dumping duties in respect of the same products. In support of this claim, China stated that a corresponding case in anti-dumping where the Panel had considered the provisions under Article 9.2 of the AD Agreement also dealt with "appropriate" as meaning the purpose of the agreement. The Panel disagreed with the interpretation and the implication identified by China and noted that the methodology under which anti-dumping duties are calculated, has no impact on whether the amount of the concurrent countervailing duty collected is "appropriate" or not. Again, in the analysis under Article 19.3, the Panel noted that the drafters had not intended to address the question of double remedies.

The essential question then is whether there is no prohibition against a double remedy or the possible occurrence of double counting under the WTO regime.

The Panel reiterated that China had failed to establish that imposition of anti-dumping duties under an NME methodology effected the existence of the subsidy or reduced the amount of the subsidy which should be taken into consideration during the calculation of the concurrent countervailing investigation. Hence no violation of Article 10 of the SCM agreement or Article VI:3 of the GATT 1994 were found. China's claims under Article 32.1 of the SCM agreement had been dependent on the other claims and were hence not addressed by the Panel.

USDOC's violation of Article 12.1.1 – 30 day time period for questionnaires

The Panel identified three types of "questionnaires": (i) initial ; (ii) supplemental; (iii) new allegations based. China and the United States differed on the stands they took as regards the application of Article 12.1.1 of the SCM agreement to all three questionnaires. Whilst China stated the 30 day waiting period applied to all three, the United States posited that it applied to only the inital questionnaire.

The Panel considered the following aspects. The dictionary meaning of "questionnaire" was not to be held as being dispositive of the meaning of terms in WTO agreements and that sometimes it is necessary to conduct an analysis on the basis of the object and purpose of the agreement in question. Hence the Panel demonstrated a shift from literary interpretation to purposive interpretation. The Panel considered Article 12 of the SCM agreement entitled 'Evidence" which is based on certain tenets of due process such as that the parties be given "notice" of the information they consider relevant and be allowed ample opportunity to present evidence. The Panel noted that the footnote 40 to Article 12.1.1 specifically focussed on allowing the "ample opportunity" requirement to exporter by allowing them more than 30 days to respond (additional mandatory period of one week). The reference to the word "questionnaire" from paragraphs 6 and 7 of Annex VI indicates that the term "questionnaire" refers to a specific form of communication fulfilling a certain purpose, which is given to different recipients. Not every communication from the investigative authority and the parties constitutes a questionnaire which must be given a 30 day waiting limit – this would not be in

tandem with the due process requirement in Article 12 of the SCM agreement.[112] This questionnaire has been held as being only the initial questionnaire which forms the basis of future claims. This was also raised in Egypt-Steel Rebar where the Panel rejected the requests for Turkey's claim that the follow-up questionnaire also being allowed 30 days to respond. On a consideration of the basic provision in Article 12.1.1 of the SCM agreement, there is no indication on the type of questionnaire.[113] "Questionnaires" as referred to in Article 12.1.1 of the SCM agreement only referred to the initial comprehensive questionnaires issued by an investigative authority following the initiation of countervailing duty investigation. The rationale accorded for having allowed this 30 day limit is that the initial questionnaires are very comprehensive in nature. The Panel's treatment of the supplemental and new allegations questionnaires was based on the premise that they did not require as much information, but were requests for information arising from earlier received information.

The USDOC allowed less than 30 days to respond to the "supplementation" and "new allegation" questionnaires. The Panel first considered the substance of the data collected by the initial questionnaires. The supplemental questionnaires were in the nature of being a follow-up to the initial questionnaire (clarifications, explanations, details, confirmations).The new allegation questionnaires contained the same standard information requests as in Appendices 1 and 2 of the initial investigation questionnaires.[114] Sometimes, they might have contained only questions related to the specific programmes concerned. China however argued that the new allegation questionnaires in –so far as they related to the newly initiated investigations qualified as the "full initial questionnaires" in this regard. Though the Panel found more merit in this point that the supplemental questionnaire point, they still noted that the new allegation questionnaires did not include the full range of questions in the initial questionnaire. Hence the Panel found there was no violation of Article 12.1.1 of the SCM agreement in the United States having provided less than 30 days to respond to the "supplemental" and "new allegation" questionnaires.

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112 This has been considered with respect to the right to expect a time extension on the 30 day limit in *Mexico-Anti-Dumping Measures on Rice* where they panel found that there may be limitations on the investigating authority's flexibility to accord time extensions.

113 "Article 12.1.1 "Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days to reply".

114 An easy way to bypass the 30 day requirement for initial questionnaires is to later append those questions in questionnaires given in the latter half of the investigation process.

USDOC's application of "FACTS AVAILABLE"

The USDOC stated that its resort to "Facts available" had been triggered by the failure by the producers to present evidence about the amount of Hot-Rolled Steel purchased through trading companies from State-owned enterprises. The same was alleged as being inconsistent with the United States' obligations under Articles 12.1 and Articles 12.7 of the SCM agreement. Despite the United States not contesting the claim made by China, but offering a justification to it, it was noted by the Panel that it was still incumbent upon China to establish a prima facie case. A prima facie case is one which in the absence of effective refutation would cause the Panel to rule in favour of the complaining party. Article 12.7 of the SCM agreement forms the basis of China's claim. "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." Hence the Panel noted that as under Article 12.7, resort to "Facts available" was only justified in those cases where the party either refuses access to necessary information within a reasonable period or otherwise fails to provide such information within a reasonable period or significantly impedes the investigation. Particularly in the LWR and CWP countervailing duty investigation, the producers had not refused access or in any way impeded access to information for the investigation. The United States had nonetheless resorted to usage of "Facts available". The USDOC had done so without requesting information from the investigated producers on the amount of SOE-sourced HRs purchased from trading companies. Hence, the Panel held that the USDOC had acted inconsistently with its obligations as under Article 12.7 in resorting to "facts available".

Conclusions and Recommendations

For the reasons set out above, the Panel concluded:

(a) in respect of China's claims concerning the USDOC's determinations of financial contributions in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining in the relevant investigations at issue that SOEs and SOCBs constituted "public bodies";

(ii) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1 of the SCM Agreement by failing to determine, in the LWR, CWP, and OTR investigations, that trading companies were "entrusted" or "directed" by the government to make financial contributions to producers of the investigated products, in the form of the provision of goods;

(b) in respect of China's claims concerning the USDOC's specificity determinations in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(a) of the SCM Agreement by determining in the OTR investigation that lending by SOCBs to the OTR tire industry was *de jure* specific;

(ii) The USDOC acted inconsistently with the obligations of the United States under Article 2 of the SCM Agreement by determining that the government provision of land-use rights, in the LWS investigation, was regionally-specific;

(c) in respect of China's claims concerning the USDOC's benefit determinations in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Articles 10, 14, 19.1, 19.4 or 32.1 of the SCM Agreement or Article VI:3 of the GATT 1994 by failing to conduct a pass-through analysis in the OTR investigation to determine whether any subsidy benefits received by trading companies selling rubber inputs were passed through to the OTR producers purchasing those inputs;

(ii) The USDOC acted inconsistently with the obligations of the United States under Articles 1.1 and 14 of the SCM Agreement by failing to ensure in the OTR investigation that the methodology it used to establish the existence and amount of benefit to tire producers from their purchases of SOE-produced inputs from trading companies did not calculate a benefit amount in excess of that conferred by the government provision of those inputs;

(iii) In the light of its findings in respect of China's claims on facts available (paragraph 17.1(f)(ii), infra), the Panel applied judicial economy in respect of China's claims concerning the USDOC's benefit determinations in the LWR and CWP investigations regarding the provision of HRS by trading companies;

(iv) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by not "offsetting" positive benefit amounts with "negative" benefit amounts, either across different kinds of rubber or across different months of the period of investigation, in the OTR investigation; and that China thus also did not establish that the United States also thereby acted inconsistently with its obligations under Articles 10, 19.1, 19.4, or 32.1 of the SCM Agreement, or Article VI:3 of the GATT 1994;

(v) China's claims in respect of the benchmarks actually used by the USDOC to calculate the benefit from the provision of loans and land-use rights by China in the LWS, OTR and CWP investigations, respectively, fall within our terms of reference;

(vi) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for HRS in the CWP and LWR investigations and for BOPP in the LWS investigation;

(vii) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by rejecting interest rates in China as benchmarks for calculating the benefit from RMB-denominated loans from SOCBs, in the CWP, LWS and OTR investigations, or that the benchmarks actually used in respect of the RMB-denominated loans were inconsistent with those obligations;

(viii) The USDOC acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by using average annual interest rates as benchmarks for GTC's U.S. dollar-denominated loans from SOCBs in the OTR investigation;

(ix) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting land-use prices in China as benchmarks for government-provided land-use rights in the LWS and OTR investigations, or that the benchmarks actually used were inconsistent with those obligations;

(d) In respect of China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with its claims referred to at paragraphs 17.1 (a)(i) and (ii), (b)(i) and (ii), and (c)(ii), (iv), (vi), (vii), (viii) and (ix): as indicated at paragraph 13.1, the Panel applied judicial economy.

(e) in respect of China's double remedy claims, that:

(i) The "omission" challenged by China as part of its "as such" claims with respect to double remedies falls outside our terms of reference; consequently, we also find that China's "as such" claims under Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Articles VI and I:1 of the GATT 1994 equally fall outside our terms of reference;

(ii) China did not establish that the United States acted inconsistently with its obligations under Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement or under Article VI:3 of GATT 1994 by reason of the USDOC's use of its NME methodology in the four anti-dumping investigations at issue and the imposition of anti-dumping duties on that basis concurrently with the imposition of countervailing duties on the same products in the four countervailing duty investigations at issue;

(iii) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Articles 12.1 and 12.8 of the SCM Agreement by failing to give the Government of China and interested parties "notice" of the information it required to evaluate the existence of a double remedy, and to inform them of the essential facts under consideration that would "form the basis" for its determination in respect of double remedies, in the four countervailing duty investigations at issue;

(iv) China did not establish that the United States acted inconsistently with its obligations under Article I:1 of GATT 1994 when, as a result of the

investigations at issue, it concurrently imposed anti-dumping duties calculated under the U.S. NME methodology and countervailing duties;

(f) in respect of China's claims of procedural violations in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 12.1.1 of the SCM Agreement by failing to provide the Government of China and investigated producers at least 30 days to respond to the "supplemental" questionnaires and "new allegation" questionnaires used in the four countervailing duty investigations at issue;

(ii) The USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by applying facts available in the LWR and CWP investigations to determine the amount of HRS investigated producers purchased from trading companies that originated from SOEs; and

(iii) China's claim of violation of Article 12.1 was outside our terms of reference as it is not included in China's request for establishment of the Panel.

Under Article 3.8 of the DSU, in cases where there was infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent that the United States had acted inconsistently with certain provisions of the SCM Agreement and of the GATT 1994, it had nullified or impaired benefits accruing to China under these agreements.

Pursuant to Article 19.1 of the DSU, having found that the United States had acted inconsistently with provisions of the SCM Agreement and of the GATT 1994 as set out above, the Panel recommended that the United States bring its measures into conformity with its obligations under those Agreements.

6. THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM PHILIPPINES, WT/DS371/R, 15 November 2010

Parties:
Philippines
Thailand

Third Parties:
Australia, China, the European Union3, India, Chinese Taipei and the United States

Factual Matrix:

On 7 February 2008, the Philippines requested consultations with Thailand pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII: 1 the "GATT 1994", and Article 19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. Consultations were held but failed to produce a mutually agreed solution. On 29 September 2008, the Philippines requested the establishment of a panel. At its meeting on 17 November 2008, the Dispute Settlement Body of the WTO established a panel.

Philippines requested consultations with Thailand concerning a number of Thai fiscal and customs measures affecting cigarettes from the Philippines. Such measures include Thailand's customs valuation practices, excise tax, health tax, TV tax, VAT regime, retail licensing requirements and import guarantees imposed upon cigarette importers. The Philippines claimed that Thailand administers these measures in a partial and unreasonable manner and thereby violated Article X: 3(a) of the GATT 1994.

In addition, the Philippines made separate claims in respect of various customs valuation measures affecting imports of cigarettes. The Philippines claimed that as a result of these measures, Thailand acted inconsistently with various provisions of the Customs Valuation Agreement and the interpretative notes to these provisions, as well as paragraphs 1 and 2 of the General Introductory Commentary; and various provisions of Articles II and VII of the GATT 1994. According to the Philippines, Thailand did not use transaction value as the primary basis for customs valuation as required and failed to conform to the sequence of valuation

methods mandated by the Customs Valuation Agreement; rather it used a valuation method with no basis in the Agreement.

The Philippines further claimed that Thailand's ad valorem excise tax, health tax and TV tax, on both imported and domestic cigarettes, were inconsistent with Article III:2, first and second sentence and Article X:1 of the GATT 1994 which required the publication of trade laws and regulations of general application. The Philippines also claimed that Thailand's VAT regime was inconsistent with Articles III: 2, first and second sentence, III:4 and X:1 of the GATT 1994.

In addition, the Philippines claimed that Thailand's dual license requirement that required that tobacco and/or cigarette retailers hold separate licenses to sell domestic and imported cigarettes was inconsistent with Article III:4 of the GATT 1994, because it provided less favourable treatment for imported products than for like domestic products.

Arguments of the parties

Arguments for Philippines

Thailand violated Article X: 3(a) of the GATT 1994 by failing to administer its customs and internal tax rules in a "reasonable" and "impartial" manner.

A. The dual role of TTM Officials as Senior Thai Government Officials was inconsistent with Article X: 3(a) of the GATT 1994. It was not "reasonable" "appropriate" or "suitable" or "impartial" to vest government officials that are TTM Directors with decision-making power over imported and domestic cigarettes, and over domestic producers and importers of these goods.

B. Thailand had failed to ensure that administrative appeals against customs valuation decisions were resolved promptly, as required by Articles X: 3(a) and X: 3(b) of the GATT 1994.

C. Thailand failed to respect Article X:3(b) of the GATT 1994 because it provided no legal mechanism whatsoever for the administrative or judicial review of decisions taken by Thai Customs to collect guarantees for customs duties and internal taxes potentially due on the finally assessed customs value.

Thailand violated numerous provisions of the Customs Valuation Agreement

A. Thailand rejected declared transaction value for two reasons, namely because: (1) the importer and exporter are related; and, (2) another, unspecified importer imports "the same type of goods" at "3 – 4 times" the value of Thailand's declared transaction value. Neither of the two reasons relied on by Thailand provides such a valid basis in accordance with Article 1. Thailand's first reason – that the importer and exporter are related – is expressly excluded in Article 1.2(a) as the sole reason for rejecting transaction value. Thailand's second reason – that another, unspecified importer imports "the same type of goods" at "3-4 times" higher prices – is also flawed. The price declared by one importer cannot, in itself, be the grounds for rejecting the declared transaction value of another importer.

B. Thailand failed to comply with its duty under Article 1.2(a) of the Customs Valuation Agreement to communicate the "grounds" for considering that the relationship between PM Thailand and PM Philippines influenced the price.

C. Thailand further violated Article 16 of the Customs Valuation Agreement. First, Thailand failed to explain adequately why it rejected PM Thailand's declared transaction values. Thailand's stated ground was that PM Thailand and PM Philippines are related, but it did not explain how this relationship allegedly influenced the price between the parties. Moreover, Thailand's one-sentence reference to imports from another importer "with 3-4 times price difference" is vague and unclear, and failed to explain: who that "importer" is; from where it imports its goods; why its prices serve as an indicator of what PM Thailand declared transaction values should be; and what adjustments, if any, were made for that comparison. Second, the communication's bald reference to the use of a "Fall Back" valuation method, based on a deductive method, failed to explain precisely how and on what basis Thai Customs calculated the assessed values. Third, Thailand also failed to explain why the assessed values are internally inconsistent.

D. Thailand violated Article 5 of the Customs Valuation Agreement because it had no valid reasons for declining to use the deductive valuation method under this provision. Thailand's reason was that PM Thailand could not submit audited financial statements for 2006. However, Article 5 does

not require that the importer's "profits and general expenses" be based on the audited financial statement for the year of importation.

E. Thailand valued PM Thailand's imports using the "Fall Back" method under Article 7 of the Customs Valuation Agreement, although it failed to disclose the specific methodology used. Under Article 7, customs value must be determined using "reasonable means", which requires the use of objective criteria that generate transparent, consistent, and predictable results. Thailand failed to use "reasonable means" in its valuation of PM Thailand's entries as evidenced by its inconsistent and erratic decisions for PM Thailand's entries. Further, Thailand's inconsistent and erratic decision-making demonstrates that Thailand violated Article 7.2(g) by using "arbitrary or fictitious values".

F. Thailand violated Article 10 of the Customs Valuation Agreement by disclosing in the Thai media confidential customs valuation information provided by PM Thailand.

Claims pertaining to VAT

A. Under Thai law, the tax basis for VAT was a government-fixed MRSP determined for each domestic and imported brand. To comply with Article X: 1 of the GATT 1994 Thailand must publish the "essential information" concerning (a) the overall methodology used to determine the MRSPs for each brand; (b) the methodology used to obtain data, including price surveys in Thailand and other countries, and (c) the data relied upon by DG Excise in making its regulations or rulings, including the results of any surveys. Contrary to Article X: 1 of the GATT 1994, Thailand had not published laws or regulations addressing any of this information.

B. Thailand violated Article III: 2 of the GATT 1994 because it imposed VAT on imported cigarettes "in excess" of VAT imposed on "like" domestic cigarettes. Imported cigarettes were taxed "in excess" of domestic cigarettes because MRSPs are higher for imported than for domestic cigarettes.

C. Thailand also violated Article III:2 of the GATT 1994 by exempting resellers of domestic cigarettes from VAT liability but not so exempting

resellers of imported cigarettes. Thus, re-sales of imported products are subject to VAT, whereas re-sales of domestic products were not.

Resellers were also subject to VAT related administrative requirements from which resellers of domestic cigarettes are exempt. These administrative requirements include the requirement to prepare and deliver a tax invoice; to maintain VAT records; and to accept tax audits. Also, if a reseller of imported cigarettes wished to eliminate its VAT liability on re-sales, it must claim a tax credit for VAT paid by the entity from which it bought the cigarettes. To obtain the tax credit, the reseller was subject to an administrative procedure. These administrative requirements constitute less favourable treatment for imported cigarettes than for domestic cigarettes resulting in violation of Article III: 4

D. Thailand failed to administer its VAT system in a uniform, reasonable and impartial manner, as required by Article X:3(a) of the GATT 1994. The Philippines' claim focused on the VAT base, i.e., the MRSP. Thailand's administration of the VAT system had not been "uniform", because the MRSP tax base for imported cigarettes has been administered using different criteria and different calculation inputs.

Finally, Thailand's administration of its VAT system was not "reasonable" because Thailand failed to establish and apply generally applicable criteria for determining the MRSP. Reasonable administration of a tax required that generally applicable rules be established to regulate the way in which a tax base was determined with respect to subject products.

Claims pertaining to the excise, health, and television taxes

A. Under Thai law, the government-determined ex factory price was the basis for the excise, health and television tax on domestic cigarettes. Thailand published only the amount of the ex factory price, without providing any further information on how that price is determined. However, as the Panel found in Dominican Republic – Import and Sale of Cigarettes, Article X:1 requires Thailand to publish the methodologies, formulae and data used to determine the ex factory prices. As Thailand had not done so, it violates Article X: 1 of GATT, 1994.

B. Thailand violated Article X: 1of GATT, 1994 by failing to publish laws and regulations governing the release of guarantees for potential liability for health, excise and television taxes

C. Thailand's administration was not uniform within the meaning of Article X: 3(a), because the excise tax was sometimes administered on the basis of the assessed customs value (where that assessment is correctly made by Thai Customs) and sometimes on the basis of another value that was not the correctly assessed customs value (where Thai Customs has been found to have incorrectly assessed the customs value). Thailand's administration was also not reasonable.

Thailand's administration of the excise, health and television taxes lacked even handedness. In particular, whereas imported cigarettes were sometimes taxed in excess of the lawful tax base, domestic cigarettes were taxed on the basis of the ex factory price, and never taxed in excess of that price.

Arguments on behalf of Thailand

Claims under the Customs Valuation Agreement

A. The Customs Valuation Agreement did not explain or qualify what kind of information constitutes "doubts" about the acceptability of the price. Thai Customs had legitimate doubts about the acceptability of the transfer price between PM Thailand and PM Philippines as the customs value. The doubts were based on information from other importers who were importing the same product at three times the transfer price.

The importer, not the customs administration, had the burden of establishing that the relationship between buyer and seller did not influence the price. Thai Customs could not rely on the transaction value as the basis for customs value for the entries listed in the Philippines' panel request, because the importer had failed to resolve the doubts about the acceptability of the price.

Thai Customs clearly explained in writing to PM Thailand that the transaction values were not being used as the basis for customs value "because the importer had yet to prove if the said relationship influences the customs value determination or not" and "it could not be proven whether the relationship has an influence on the determination of customs value or not".

B. Thai Customs fully informed PM Thailand how the customs value was actually determined. In the 12 April 2007 letter, Thai Customs explained that "in the determination of customs values, Method 6, which was the 'fall back' method, using the deductive method, was used under Article 7 of the GATT 1994"

C. Thai Customs considered that its own regulations prevented it from using the deductive value under Article 5 of the Customs Valuation Agreement where current financial information was not available but permitted it to use the deductive value under Method 6 using the most recent available financial information. Article 5 of the Customs Valuation Agreement did not require that the customs administration use company data from the year of importation in determining the deductive value. This meant that Thai Customs' determination of the deductive value using the most recent available financial information was consistent with Article 5 of the Customs Valuation Agreement.

Claims under Article III of the GATT 1994

A. The Appellate Body has clarified that the definition of "like products" in Article III: 2, first sentence, should be construed narrowly; and only "perfectly substitutable products fall within Article III: 2, first sentence". The Philippines' evidence regarding the five "major cigarette brands" consists primarily of data on so-called "switch in" and "switch out" ratios , which are poor indicators of consumer perceptions of substitutability. Thus, the Philippines had failed to discharge its burden of proving that all imported cigarettes and all domestic cigarettes are "perfectly substitutable" and, therefore, "like products".

Article III: 2 did not prescribe a particular system of internal taxation and it was not inconsistent with Article III: 2 to use a fixed price as the VAT tax base. A comparison between the tax base chosen by a Member (e.g., the MRSPs) and a tax base that was not chosen by the Member (e.g., the retail price) could not in itself establish that a Member's tax base is applied inconsistently with Article III: 2. Both ad valorem and specific taxes (and a mix of the two) were permissible under Article III: 2. Thus, the Philippines' argument simply attempted to show that there was a difference between the MRSP and the retail price for one imported brand and not for domestic brands. It was not evidence of discrimination.

Also, the MRSPs were calculated in the same manner for both imported and domestic brands.

B. According to Thailand, the tax burden on imported and domestic cigarettes was exactly the same. In practice, wholesalers and retailers incur no net VAT liability with respect to re-sales of either imported or domestic cigarettes.

C. The Philippines claimed that Thailand acted inconsistently with Article III: 4 because a reseller of imported cigarettes was subject to administrative requirements that were not imposed on resellers of domestic cigarettes. However, the Philippines had failed to establish that any differences between the reporting requirements modify the conditions of competition in favour of domestic cigarettes or results in "less favourable" treatment of imported cigarettes.

First, any differences were minimal. The reason for this minor difference in treatment was that because TTM is legally responsible for all taxes on the cigarettes they sell and, as a government entity subject to government control and audit, presents no risk of tax underpayment, there was no need to submit resellers to the normal VAT reporting, collection and enforcement mechanisms. Since importers such as PM Thailand were not legally responsible for all taxes on their cigarettes, the resellers of those cigarettes present the same risk of underpayment as any other sale of a product – domestic or imported – subject to VAT. The re-sales of the imported cigarettes were, therefore, subject to the same normal VAT reporting, collection and enforcement mechanisms as other products subject to VAT. The Philippines failed to explain how this difference "modifies the conditions of competition in the relevant market to the detriment of imported products".

If the Panel considered that the minor differences in reporting requirements for sales of imported and domestic cigarettes modify the conditions of competition to the detriment of imported products, Thailand submitted that these differences are justifiable under paragraph (d) and the chapeau of Article XX of the GATT 1994.

Claims under Article X of the GATT 1994

A. The Philippines' claim did not refer to the manner in which Thailand actually administered any of its "laws, regulations, decisions, and rulings".

The Philippines' claim related exclusively to how Thailand could administer its customs laws and regulations rather than to how Thailand actually does so. Moreover, the only evidence provided by the Philippines was two quotes from Thailand's Minister of Finance in the press. These statements were not sufficient evidence to support a claim that Thailand had failed to administer its customs and tax laws in a reasonable and impartial manner under Article X: 3(a).

B. Article X: 3(a) does not impose a specific time limit on the completion of administrative proceedings. Even if Article X: 3(a) could be interpreted to contain standards governing the completion of administrative proceedings, the Philippines had failed to establish that any delays in Thailand's administrative proceedings were "unreasonable" in the context of the time taken by other similarly-situated WTO Members to complete similar proceedings or in the context of the backlog of appeals faced by Thailand following the coming into effect of the Customs Valuation Agreement.

C. Article 42 of Thailand's Act on Establishment of Administrative Court and Administrative Court Procedures, BE 2542 (1999) provided a right to challenge all Thai government administrative actions (as described in Article 9), including orders requiring guarantees. Therefore, contrary to the Philippines' assertion, Thai law provided importers with ways to contest guarantees.

In any event, Article X:3(b) of the GATT 1994, read in the light of the provisions of the Customs Valuation Agreement, did not confer a right to appeal regarding amounts of guarantees required pending final assessment of customs duties on imports.

D. There was nothing in the Philippines' panel request to suggest that it intended to make a claim under Article X: 3 regarding how Thailand calculated the MRSPs. The Philippines had not "plainly connect[ed]" the use of guarantee values to calculate MRSPs with obligations under Article X: 3(a) of the GATT 1994 in a manner that "presents the problem clearly". In addition, the factual basis for this claim consisted primarily of the September 2006 and March 2007 MRSP notices, which were not within the Panel's terms of reference.

E. Article X:1 of the GATT 1994 made it clear that Article X did not deal with specific transactions, but rather with rules 'of general application'". For this reason, "the particular treatment accorded to each individual shipment could not be considered a measure 'of general application' within the meaning of Article X".

With respect to the "overall methodology" used to determine the MRSPs, this methodology was stated in the beginning of every published MRSP notice. Regarding the "overall methodology" used to determine the ex factory price, Thailand had published Sections 5ter and 5quater of the Tobacco Act BE 2509 and the Notice of Tobacco and Chew Tobacco Ex Factory Price that describe how the ex factory price is to be calculated. Thus, the Philippines claim that Thailand had not published the "overall methodology" used to determine MRSPs and ex factory prices must be rejected.

F. Article X governs the publication and administration of rules, not the substantive content of the rules themselves. The Philippines fails to identify an existing rule of general application under Thai law that Thailand has failed to publish.

G. The ground that Thailand administered its laws inconsistently with Article X: 3(a) simply because the c.i.f. value was sometimes revised, this could not be a violation of a WTO obligation. . In any event, exporters may request refunds whenever the c.i.f. value used as the basis for the excise, health and television taxes was revised downward.

ANALYSIS BY THE PANEL

I. Custom Valuation Agreement

Article 1.1 and 1.2 of the Customs valuation Agreement

a. Existence of a general rule in violation of Articles 1.1 and 1.2:

The Panel was of the view that the alleged method at issue was attributable to Thailand as Thai Customs and Thai Excise both consist of appointed government officials accountable to the Thai government. However, after referring to Japan-

Film,[115] the Panel held that the content of the official memoranda was to be applied generally or prospectively in future cases. The Philippines was also not certain whether the alleged general rule may be applied to imports in the future. The Panel held that given the high standard required to prove the existence of such an unwritten rule, it could not uphold the Philippines' contentions.

b. Inconsistency of the Thai rejection of the declared Transaction values:

With regards to the obligations imposed on the customs authorities under Article 1.2(a) the Panel held that the customs authorities must ensure that the importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers were responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value.

As far as the examination of the circumstances around the sale was concerned, the Panel said that in the light of the nature of the obligation to "examine" the circumstances of the sale, considered in the due process objective of Article 1.2(a) as well as the Customs Valuation Agreement in its entirety, the absence of any explanations on why the information provided was considered insufficient and consequently led Thai Customs to reject the transaction value renders Thai Customs' examination inconsistent with Article 1.2(a).

Finally, regarding the adequacy of the reasons stated the Panel said that the Thai customs authorities did not provide sufficient grounds for the rejection of transactional price and was therefore inconsistent with the Customs Valuation Agreement of the WTO.

Article 16 of the Customs Valuation Agreement

a. Extent of the Explanation required under Article 16:

The Panel held that although not as extensive and detailed explanations as required under the WTO Agreements on trade remedy measures, the explanation

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[115] Panel Report, Japan-Film, para 10388 and Panel Report, US-Underwear, Para 7.65

to be provided under Article 16 of the Customs Valuation Agreement must be sufficient to make clear and give details of how the customs value of the importer's goods was determined, including the basis for rejecting the transaction value and other valuation methods that sequentially precede the method actually used by the customs authorities.

b. Violation of Article 16:

To decide upon the issue of consistency with Article 16 the Panel held that it's important to look into whether the explanation was substantively sufficient to make clear and give details of the manner in which the customs value of the cigarettes at issue was determined. The Panel opined that a mere statement that the importer could not prove whether its relationship with the exporter did not influence the price did not fulfill the customs authority's obligation to explain the reason for rejecting the transaction value. Further, the statement that simply names the method used for valuation without any further elaboration could not constitute an "explanation" within the meaning of Article 16 as it fails to make clear or give details of the manner in which the customs value of the cigarettes at issue was determined.

Articles 5 and 7 of the Customs Valuation Agreement

a. Deductive valuation method:

The Panel in its examination of the Philippines claim addressed the question of whether the valuation of Customs used the deductive valuation method under Article 5 or Article 7. It was important for the Panel to determine the specific provision under which the Thai customs used the deductive valuation method particularly because of the sequencing obligation envisaged under the Customs Valuation Agreement. In this regard the pertinent evidence that was produced by the Philippines was the admission by the Thai customs authority that the deductive valuation method used was pursuant to Method 6 of Thai's Customs' regulations which corresponds to the 'fall back' method of Article 7. Therefore, in the light of the above evidence the Panel concluded that Thai Customs used the deductive valuation method under Article 7.

b. Application of the deductive valuation method in violation of Article 7.1:

The text of Article 7.1, read together with paragraph 2 of the Interpretative Note to Article 7, provided that when using a deductive valuation method under article 7.1, a customs authority was required to apply the same principles that would be applied under Article 5, with allowance for a reasonable flexibility where Article 5 could not be strictly applied. Regarding the deductions for sales allowances, provincial taxes and transportation costs, the parties did not dispute that these items are, in principle, deductible under Article 5.1(a). The parties also appeared to agree that deductions under Article 5.1(a) were not automatic, but must be based on relevant information and data. The parties, however, disagreed on the type of evidence required from the importer for the deduction of these items.

With respect to the sales allowances, the Panel observed that, it was reasonable for the customs administration to accept deductions only for sales allowances that were tied to the particular unit price for the GAQ sale that is being used in the deductive value calculation. So, Thailand, as the party claiming that sales allowances might only be deducted when tied to the particular unit price for the GAQ sale, had the burden of proving its position with supporting evidence. Thailand, however, failed to do so.

With respect to the Provincial Taxes, the Panel concluded that state and local taxes were deductible if included in the resale price upon which the [deductive value] was based but that would not necessary imply that that was the only situation in which state and local taxes can be deducted.

With respect to the Transportation Costs the Panel rejected Thailand's argument that transportation costs needed to be specifically linked to the GAQ sale for a deduction to be made under Article 5.

The Panel concluded that Thai Customs' decision not to deduct the three items at issue was not supported by the evidence before it at the time of determination and is therefore in violation of Article 7.1

c. Violation of Article 7.3:

The letter of explanations provided by the Thai customs authorities, according to the Panel did not satisfy the requirements under Article 7.3 and

therefore the Thai customs authorities acted inconsistently with the obligations under Article 7.3.

Article 10 of the Customs Valuation Agreement

The Panel examined the definition of confidential information under Article 10. The Panel observed that that information can be considered as confidential if it was not in the public domain and if its disclosure would be likely inter alia: "to be of significant competitive advantage to a competitor, to have a significant adverse effect upon the party who submitted the information, to prejudice the commercial position of a person who supplied or who is the subject of the information." The Thai authorities had tried to justify public disclosure of confidential information on the grounds that although import volumes might be confidential information, they would not be confidential either when a company is the sole importer of a given good. The Panel in this regard noted that PM Thailand was not the sole cigarette importer in Thailand. Therefore, the Panel concluded that Thailand acted in violation of Article 10 by disclosing confidential customs valuation information provided by PM Thailand to Thai Customs in the Thai media.

II. Article III: 2, First Sentence of the GATT 1994 – VAT for Cigarettes

Like product analysis

a. Comparison between "all" imported and "all" domestic products:

The Panel decided to first identify the scope of imported and domestic products that were to be compared in the present dispute for the like product analysis under Article III:2, first sentence. On this point the Panel concluded that although presenting evidence showing likeness between all imported and all domestic cigarettes would definitely satisfy the likeness requirement of Article III:2, first sentence, it did not find it necessary to conduct such an analysis for the purpose of this dispute.

b. Price segments of imported and domestic cigarettes- like or not:

The Panel analysed the likeness of the imported and domestic cigarettes on three criteria. Firstly, with respect to the physical properties and characteristics of cigarettes, secondly the end uses of both the products, thirdly, tariff classification and lastly Thai internal taxes and regulations. The Panel concluded that domestic

and imported cigarettes were like products because the Philippines had established a prima facie case for it and Thailand on the other hand was not able to prove otherwise.

Excess Taxation Analysis

a. Comparison of absolute value of the MRSPs for imported cigarettes than for domestic cigarettes:

On this issue the Panel felt that a comparison of the absolute MRSP numbers for imported and domestic cigarettes, without considering the specific nature of the MRSP, including how MRSPs were established and/or revised under the Thai VAT system, was not sufficient to demonstrate an allegedly discriminatory VAT applied to imported cigarettes. Therefore, they concluded that higher MRSPs, in absolute terms, for imported cigarettes compared to MRSPs for domestic cigarettes establish that imported cigarettes were not taxed in excess of like domestic cigarettes within the meaning of Article III:2, first sentence.

b. Difference in the determination of the MRSPs for imported and domestic cigarettes:

In order to determine whether Thailand violated its obligations under the first sentence of Article III: 2 by subjecting imported cigarettes to excessive taxation, The Panel felt the need to examine whether Thai Excise departed from the general methodology that it has explained is normally applied in determining the MRSP for both imported and domestic cigarettes.

The Panel noted that Thailand did not dispute that the methodology used to determine these MRSPs significantly departed from the general methodology. It was also not disputed that this methodology was used for the determination of the MRSPs, particularly their "marketing cost" component, for the imported cigarettes concerned only, and not for domestic cigarettes. Also, the MRSPs for domestic cigarettes matched their RSPs. However, the gap between the MRSPs and the RSPs, existing for the imported cigarettes only, was translated into a higher VAT burden on the imported cigarettes than on the domestic cigarettes, because the VAT is based on the MRSP and not on the RSP.

The Panel was also not convinced with Thailand's argument that because the c.i.f. values, which were being rejected by Thai Customs at that time, and "marketing

costs" built into the proposed MRSPs by the importers could not be relied upon, it used retail price information from other countries in the region to determine "marketing costs" for imported cigarettes in Thailand in a departure from its normal methodology. The Panel in its opinion stated that even if there was a legitimate basis for doubting the current marketing costs, the marketing costs determined based on the retail price survey for Marlboro and for L&M are drastically higher than the previous marketing costs

Therefore, the Panel concluded that Thai Excise departed from the general methodology in determining the 2006 and 2007 MRSPs for the imported cigarettes. This in turn resulted in a VAT imposed on the imported cigarettes in excess of that on like domestic cigarettes inconsistently with Article III: 2, first sentence.

III. Article III: 2 of The GATT 1994 – VAT Exemption For Resellers Of Domestic Cigarettes

Like Product Analysis

The above discussion in the issue reveals that the Panel had established domestic and imported cigarettes to be like products.

Excess Taxation Analysis

a. Scope of Article III:2:

The Panel referred to the Appellate Body report in the Alcoholic Beverages to understand the scope of the term 'in excess of' which says that even the smallest amount of excess taxation was considered inconsistent with WTO obligations. Therefore, the Panel rejected Thailand's claims that the scope of scrutiny of a given measure for its consistency with Article III: 2, first sentence, can simply be limited to whether the final consumer ultimately pays the same VAT for imported and domestic cigarettes. The Panel therefore concluded that the fact that VAT was in principle a consumer tax that normally is passed on to the final consumer did not eliminate the possibility that imported cigarettes might still be exposed to potential excess taxation under a Member's specific VAT system through the manner in which resellers of imported cigarettes in the distribution chain are held liable for the VAT obligations.

b. Violation of Article III: 2:

The Philippines claimed that the VAT exemption for the resale of domestic cigarettes under Thai law was a *de jure* violation of Article III: 2, first sentence. Thailand asserted that the Philippines misinterprets the Thai VAT system and that there was no excess taxation for imported cigarettes because the VAT payable by imported cigarette resellers is automatically neutralized with a tax credit before the liability is due. The Panel observed that the VAT liability on resellers of imported cigarettes was not automatically offset, as claimed by Thailand, as it requires the resellers to fulfill some administrative requirements and the failure to satisfy these requirements means that the reseller of imported cigarettes remains subject to VAT. It was the opinion of the Panel that the fact that this potential liability did not exist for domestic cigarette resellers under the Thai law, by virtue of a *de jure* exemption of resale of domestic cigarettes, leads to excess taxation for imported cigarettes and consequently a *de jure* violation of the first sentence of Article III:2.

IV. Article III:4 of The GATT 1994- VAT Exemption for Resellers of Domestic Cigarettes

Less Favourable Treatment

a. Imposition of additional burden:

The Panel concluded that under Thai law, imported cigarettes were subject to additional administrative requirements in the following three aspects: First, resellers of imported cigarettes must file form Por. Por 30 pursuant to Section 83 of the Revenue Code, whereas resellers carrying only domestic cigarettes were exempted from this obligation. Second, the obligation to file and maintain various reports under Section 87 of the Revenue Code such as input/output reports, goods and raw material reports, and books and records for accounting purposes was more complicated for imported cigarette resellers. Specifically, the Panel found that domestic cigarette resellers were exempt from filing revenue and expense reports and need not maintain VAT related information for accounting and auditing purposes. Resellers of imported cigarettes, on the other hand, must file both input/output tax reports and goods/raw materials reports and must maintain books and records for accounting and auditing purposes which include VAT related information. Finally, only resellers of imported cigarettes were potentially subject to penalties and surcharges for failure to comply with VAT related requirements pursuant to Division 14 of the Thai Revenue Code.

	Resellers of Domestic Cigarettes	Resellers of Imported Cigarettes
Filing Form Por.Por 30, pursuant to Section 83 of the Revenue Code	No obligation to file.	Obligation to file except for small businesses. If domestic cigarettes are also sold, obligation to report them under item 3 of the Form.
Filing and maintaining of various reports pursuant to Section 87 of the Revenue Code	No revenue/expense report must be filed.	Input/output tax reports must be filed (note: more burdensome than revenue/ expense reports).
	Goods and raw materials reports do not have to be prepared.	Goods and raw material reports must be prepared.
	Books and records for accounting purposes must be prepared and maintained.	Books and records for accounting purposes must be prepared and maintained, including VAT related information.
Potential penalties, surcharges, and sanctions pursuant to Divisions 13 and 14 of the Thai Revenue Code	No risk to be sanctioned due to general VAT exemption.	Risk of undergoing sanctions and surcharges fro violation of VAT related administrative requirements: (i) monetary penalties in case of late or incomplete filing; (ii) submission of a supplementary form for VAT refund purposes in case of late filing; (iii) submission of supplementary forms for VAT recording purposes in case of late filing.
Auditing Procedures	Obligation to submit to auditing procedures.	Obligation to submit to auditing procedures.
Tax Invoice pursuant to Revenue Order No Por. 85/2542	No need to prepare tax invoices, but sales receipts must be submitted.	The sales receipt, which must be submitted, can also serve a tax invoice.

b. Less favourable treatment:

It was the opinion of the Panel that additional administrative requirements, imposed only on imported cigarettes can potentially had a negative impact on the competitive position of these cigarettes in the market. The Panel rejected the Thai argument that resellers of imported cigarettes were not treated less favourably because the overall tax burden on the imported cigarettes was not higher because the Panel did not consider the actual tax burden relevant to the examination of the consistency Thai law with Article III: 4. Therefore the Panel concluded that Thailand acted inconsistently with Article III: 4 by subjecting imported cigarettes to less favourable treatment compared to like domestic cigarettes through the VAT related administrative requirements imposed only on resellers of imported cigarettes.

c. Any other justification:

Thailand contended that the differentiated VAT regime is legal because it serves the legitimate purpose of combating tax evasion, fraud, and counterfeiting of foreign cigarettes. The argument was rejected by the Panel because imported products must not be subject to less favourable treatment through a measure that negatively modifies the conditions of competition, regardless of the intent behind the measure.

d. Administrative exception under Article XX (d):

The Panel found that the Thai VAT laws that Thailand purported to secure compliance with through the administrative requirement at issue, were not WTO consistent. Therefore, the Panel concluded that Thailand had not discharged its burden of showing that the administrative requirements and the imposition of penalties for failure to complete VAT filing requirements were necessary to secure compliance with the Thai VAT laws within the meaning of Article XX(d) of the GATT 1994.

V. Claims under Article X of the GATT 1994

The methodology for determining MRSPs

a. Publication of the general methodology used in determining MRSPs:

The Panel had already concluded that the methodology used by Thai Excise

for determining the MRSP, as described and explained by Thailand in this proceeding, constituted rules of general application under Article X: 1. With respect to, whether that methodology had been published in such a manner as to enable importers to become acquainted with it as required by Article X:1, the Panel was of the view that that for importers to become acquainted with the methodology for determining the MRSP, it was important for them to become familiar with, for instance, how the information they provide was processed. Also, they need to be informed on how Thai Excise determined the marketing costs where the information provided by importers was not accepted. Therefore the Panel concluded that Thailand failed to publish the general methodology for determining the MRSP, and to enable governments and traders to become acquainted with it under Article X: 1of GATT, 1994.

b. Publication of Data used in calculating MRSPs:

Since the data necessary for determining the MRSPs for domestic cigarettes were already available, either directly through publication or through simple deductions, the Panel concluded that the data for domestic cigarettes were sufficiently published. The Panel therefore, did not find it necessary to examine whether this data constitutes "laws, regulations, judicial decisions or administrative rulings of general application" within the meaning of Article X: 1of GATT, 1994.

c. Data used in calculating MRSPs-'confidential information':

Since the data used to determine the MRSP did not fall within the scope of administrative rulings of general application, it was not necessary for the Panel to continue with an examination of the question of whether the publication of such data would amount to disclosing "confidential information" within the meaning of Article X: 1of GATT, 1994.

Methodology and data for determining ex factory prices

a. Ex-factory prices- Administrative rulings of general application under Article X: 1:

The ex factory price is only one component in the calculation leading to the MRSP determination. The Philippines had not clarified the consequential link between the ex factory price and its impact on operators active in the Thai domestic market for cigarettes. For the foregoing reasons, the Panel concluded that ex

factory prices were not administrative rulings of general application within the meaning of Article X:1.

Rules relating to the release of guarantees placed for health, excise and television taxes

a. Rules of general application relating to the release of guarantees:

Therefore, in respect of its claim that Thailand failed to publish both a rule concerning "an unambiguous right to the release of guarantees" as well as the specific "procedural rules providing sufficient guidance on how guarantees were released", The Panel concluded that the Philippines did not discharge its burden of proving the existence of the specific procedural rules generally applied to the release of guarantees within the meaning of Article X:1.

b. Rules relating to publication of guarantees:

The Panel felt that despite Thailand's acknowledgment that "in essence, guarantees are to be refunded on the final assessment of the goods", the relevant documents referred to by Thailand in this dispute did not clearly indicate a definite right to the release of guarantees for the internal taxes upon final assessment of the goods. In such circumstances, importers would not be able to become acquainted with the exact nature of the right they have in respect of the release of guarantees for the internal taxes within the meaning of Article X: 1. Therefore, the Panel concluded that the general rules on the right to the release of guarantees as currently published by Thailand in the Customs Act were not sufficient to satisfy the requirements under Article X:1 in relation to the guarantees for the excise, health and television taxes.

VI. Article X: 3(A) of the GATT 1994

Appointment of certain Thai government customs and tax officials as TTM directors

a. 'Administration' under Article X: 3(a):

The Panel observed that "administration" within the meaning of Article X:3(a) may also include in its scope administrative processes. The evidence produced by the Philippines suggested the dual function officials' sufficient involvement in the

process of applying and implementing the Thai customs laws and regulations. Therefore the Panel considered that the appointment of government officials as TTM directors constituted an administrative process leading to the administration of the Thai customs and fiscal laws and regulations and consequently qualifies as "administration" under Article X: 3(a).

b. Partial and unreasonable administration:

The Panel was not convinced that the determinations referenced by the Philippines can necessarily be related to what the dual function officials do and/or what they are permitted to do in administering the Thai customs and tax rules. In other words, unless it could be shown that these determinations were made because of the very presence of the government officials serving also as TTM directors, the Panel thought that it was not in a position to find that the appointment of dual function officials led to a partial administration of customs and tax rules. Therefore, it concluded that the Philippines had not proved that the features relating to the appointment of certain government officials as TTM directors necessarily lead to a lack of impartial administration of the Thai customs and fiscal rules.

Also, the Panel was not presented with evidence indicating that such unauthorized publication of PM Thailand's confidential information can necessarily be related to the concerned government officials' dual role as TTM's directors. Thus, it concluded that the Philippines had not established that the features of Thailand's granting selected customs and tax officials with a dual function as TTM directors necessarily lead to an unreasonable administration of the Thai customs and tax laws and regulations within the meaning of Article X: 3(a).

Delays in the BoA's decision-making concerning PM Thailand's appeals against Thai Customs' determinations

a. Administration of custom laws in an 'unreasonable' manner through delays in BoA process:

The overall length of the administrative process, combined with less-than-prompt actions (for example requesting information from PM Thailand) taken by the BoA, also tends to show prejudice caused to other Member governments and traders under Article X: 3(a). The overall delays shown throughout the course of the review process therefore were "not appropriate or proportionate" considered against the nature of the circumstances concerned. Therefore the Panel concluded

that the concerned delays in the BoA review process resulted in the administration of the Thai customs law in an 'unreasonable' manner and were in violation of Article X:3(a) of the GATT 1994.

Determination of the excise, health and television taxes

The Panel concluded that the alleged administration of the Thai Excise, Health and Television taxes, namely the use of the guarantee value as the tax base and the absence of an automatic refund mechanism, concerned the substantive aspects of such laws and regulations rather than the manner in which they are put into practical effect. Accordingly, the Panel had held that the Philippines' claim under Article X:3(a) in respect of the administration of Thai Excise, Health and Television taxes was improperly brought under Article X:3(a).

VII. Article X: 3(B) of the GATT 1994

Appeals against customs valuation determinations

a. Nature of obligations under Article X: 3(b):

The text of Article X: 3(b), considered in the light of the ordinary meaning of the terms "maintain" and "institute", therefore suggested that Article X: 3(b) mandates Members to keep, or create if not already in place, in their domestic system the existing independent tribunals or procedures designed for the purpose of the prompt review of administrative actions.

b. Nature of Thai Board of appeals (BoA):

The BoA was at least partly staffed with agents from the Customs Department with the possibility that some of those agents might be involved in deciding customs determinations that are subject to the BoA's review. This meant that most of the agents in charge of reviewing customs decisions are those involved in taking the very customs decisions that are the subject of review by the BoA. Therefore, the Panel concluded that the BoA could not be considered as a tribunal independent of the agencies entrusted with administrative enforcement within the meaning of Article X: 3(b).

c. Promptness of the tribunal:

The Panel concluded that in view of the excessive delays that had been caused in the appeals before the BoA were so significant in terms of their duration and frequency that these specific instances could be considered as an indication of the capacity for delays in the system. Therefore, Thailand failed to maintain an independent tribunal for the prompt review of customs value determinations inconsistently with Article X: 3(b).

Appeals against the guarantee decisions

a. Scope of "administrative action relating to customs matters" under Article X: 3(b):

The Panel held that the term "administrative action relating to customs matters" in Article X:3(b) includes a wide range of administrative actions having a rational relationship with customs matters, including the valuation of goods being imported. Therefore, a customs administration's guarantee decision under the circumstances as stipulated in Article 13 of the Customs Valuation Agreement falls within the scope of "administrative action pertaining to customs matters" as a guarantee indeed had a rational relationship with the valuation of imported goods. The fact that the imposition of a guarantee was not the final determination of a customs value of a good did not affect this understanding because, as explained above, a guarantee was a distinct decision by customs that is intended to secure the payment of a final customs duty for which an importer will ultimately be liable.

b. Tribunals for prompt review and correction guarantee decisions:

In challenging a guarantee decision, an importer seeks to have the amount of a guarantee reviewed and, if warranted by the circumstances, revised downwards, for example, to the level in line with the value of the imports and similar import, so as to enable it withdraw the goods from customs. Considered in the light of this, if a system did not make available the review of a guarantee decision until the final determination had made in respect of a customs value, an importer could face a situation where it would not be able to withdraw imported goods due to a guarantee value set at an excessively high level. According to the Panel, this was not compatible with the obligation under Article X: 3(b) to maintain independent tribunals for the prompt review of the concerned administrative action.

Conclusions and Recommendations:

The Panel first summarized their conclusions on the parties' claims on the scope of the terms of reference in this dispute. For the reasons set forth, the Panel concluded that:

a. the Philippines' claim under Article X:3(a) with respect to the Thai VAT system was outside the Panel's terms of reference because the Philippines failed to plainly connect the challenged measure with Article X:3(a) in its panel request;

b. the Philippines' claim under Article X:3(a) with respect to the excise, health and television taxes were within the Panel's terms of reference;

c. Thai Customs' valuation determinations for the imported cigarettes at issue that were cleared between 11 August 2006 and 13 September 2007 were within the Panel's terms of reference and appropriately presented for the Panel's examination; and

d. the December 2005 MRSP Notice, the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice were within the Panel's terms of reference.

With respect to the Philippines' claims under the Customs Valuation Agreement, the Panel concluded that:

a. Thailand did not maintain or apply a general rule requiring the rejection of the transaction value and the use of the deductive valuation method;

b. Thailand's rejection of PM Thailand's declared transaction values for the [[xx.xxx.xx]] entries at issue was inconsistent with Articles 1.1 and 1.2;

c. Thailand acted inconsistently with Article 1.2(a) by failing to communicate within the meaning of Article 1.2(a) the Thai Customs "grounds" for considering that the relationship between PM Thailand and PM Philippines influenced the price;

d. Thailand acted inconsistently with Article 16 by failing to provide an adequate explanation on how Thai Customs determined the customs values for imported cigarettes;

e. Thailand acted inconsistently with Article 7.1 by improperly assessing the deductive value of the imported cigarettes concerned;

f. Thailand acted inconsistently with Article 7.3 by failing to properly inform PM Thailand in writing of the customs value determined under Article 7 and the method used to determine such value; and

g. Thailand acted inconsistently with Article 10 by disclosing confidential customs valuation information provided by PM Thailand to Thai Customs in the Thai media.

With respect to the Philippines' claims under the GATT 1994, the Panel concluded that:

a. regarding the determination of the MRSPs for VAT on imported cigarettes, Thailand acted inconsistently with Article III:2, first sentence by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes with respect to the MRSPs for the December 2005 MRSP Notice, the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice;

b. regarding the VAT exemption for domestic cigarette resellers, Thailand acted inconsistently with Article III:2, first sentence by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes by granting the exemption from the VAT liability only to domestic cigarettes resellers; and

c. regarding the VAT exemption for domestic cigarette resellers, Thailand acted inconsistently with Article III:4 by subjecting imported cigarettes to less favourable treatment compared to like domestic cigarettes by imposing additional administrative requirements, connected to VAT liabilities, on imported cigarette resellers.

With respect to the Philippines' claims under Article X of the GATT 1994, the Panel concluded that:

a. Thailand acted inconsistently with Article X:1 of the GATT 1994 for failing to publish the methodology used to determine the tax base for VAT;

b. Thailand did not act inconsistently with Article X:1 by failing to publish the methodology and data necessary to determine ex factory prices for domestic cigarettes;

c. Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to properly publish the general rule pertaining to the release of guarantees;

d. Thailand did not act inconsistently with Article X:3(a) by appointing certain government officials to the Board of Directors for TTM;

e. Thailand acted inconsistently with Article X:3(a) because of the delays caused in the BoA decision-making process;

f. Thailand acted inconsistently with Article X:3(b) by failing to maintain or institute independent review tribunals or processes for the prompt review of customs valuation determinations; and

g. Thailand acted inconsistently with Article X:3(b) by failing to maintain or institute independent review tribunals or process for the prompt review of guarantee decisions.

Regarding the Philippines' claim under Article 4 of the Customs Valuation Agreement, the Panel concluded that the Philippines' claim cannot form part of the Philippines' request for findings and recommendations because the Philippines' request was not made in a timely manner.

The Panel concluded that the Philippines' sequencing claim under Article 7.1 of the Customs Valuation Agreement cannot form part of the Philippines' request for findings and recommendations because it was not presented in a timely manner. The Panel had held that Article 7.1 of the Customs Valuation Agreement did not constitute the basis for an independent sequencing claim under the Customs Valuation Agreement.

Under Article 3.8 of the DSU, in cases where there was an infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment. The Panel concluded that, to the extent that the measures listed above were inconsistent with the Customs Valuation Agreement and the GATT 1994, they had nullified or impaired benefits accruing to the Philippines under those Agreements.

Accordingly, the Panel recommended that the Dispute Settlement Body request Thailand to bring these inconsistent measures as listed above into conformity with its obligations under the GATT 1994 and the WTO Agreement. Regarding the Panel findings in respect of the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice, it was not entirely clear to the Panel whether and, if so, to what extent, these MRSP Notices would have effects on the subsequent MRSP Notices. Panel's recommendations with respect to these MRSP Notices, therefore, apply only to the extent they continue to have effects. The Panel did not make a recommendation for the December 2005 MRSP Notice as it was not disputed that it had expired and did not continue to exist for purpose of Article 19.1 of the DSU.

7. EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA, WT/DS397/R 3 December 2010

Parties:
People's Republic of China
European Communities (EC)

Third Parties:
Brazil, Canada, Chile, Colombia, India, Japan, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"), Thailand, Turkey, and the United States

Factual Matrix:

On 31 July 2009, the People's Republic of China ("China") requested consultations with the European Communities (the "EC") pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes , Article XXIII:1 of the "GATT 1994" and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 with respect to, but not necessarily limited to, Article 9(5) of Council Regulation (EC) No. 384/96 of 22 December 1995 on Protection against Dumped Imports from Countries not Members of the European Community, as amended, and Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

China's request for the establishment of a panel challenged two measures introduced by the European Union:

1. Article 9(5) of Council Regulation (EC) No. 384/96, as amended on protection against dumped imports from countries not members of the European Community (the "Basic AD Regulation"); and

2. Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (the "Definitive Regulation").

Council Regulation (EC) No. 384/96 was repealed and replaced by Council Regulation (EC) No. 1225/2009 after the establishment of this Panel, and China's submissions address Council Regulation No. 1225/2009.China's claims with regard to Council Regulation 1225/2009 challenge that measure "as such", while its claims with regard to Council Regulation 91/2009 challenge the specifics of that measure, which include aspects of the Basic AD Regulation "as applied".

China challenged Article 9(5) of the Basic AD Regulation, the provision that deals with the individual treatment of producers from non-market economy ("NME") countries, including China, in the context of dumping determinations in anti-dumping investigations, as well as the application of that provision in the fasteners investigation at issue in this dispute.

Parties' Requests for Findings and Recommendations

China

i. Article 9(5) of Council Regulation (EC) No. 384/96

Council Regulation (EC) No. 384/96 (the Basic AD Regulation) was repealed and replaced by Council Regulation (EC) No. 1225/2009 after the establishment of this Panel, and China's submissions address Council Regulation No. 1225/2009. China's claims with regard to Council Regulation 1225/2009 challenge that measure "as such".

China requested the Panel to find that the EC violated Articles 6.10, 9.2, 9.3, and 9.4 of the AD Agreement, Articles I:1 and X:3(a) of the GATT 1994 and Article XVI:4 of the Agreement Establishing the WTO as well as Article 18.4 of the AD Agreement.

ii. Council Regulation (EC) No. 91/2009

Council Regulation (EC) No. 91/2009 of 26 January 2009 imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (the Definitive Regulation). China's claims with regard to Council Regulation 91/2009 challenge the specifics of that measure, which included aspects of the Basic AD Regulation "as applied".

China requested the Panel to find:

i. The EC violated Articles 6.10, 9.2, 9.4 of the AD Agreement since it made the benefit of an individual margin of dumping and the imposition of an individual anti-dumping duty dependent on compliance with the conditions listed in Article 9(5) of Council Regulation (EC) No. 384/96 as amended;

ii. The EC violated Article 5.4 of the AD Agreement because it failed to properly examine before initiating the investigation whether the standing thresholds were met and because the complainants did not meet the standing thresholds;

iii. In its definition of the domestic industry, the EC violated Articles 4.1 and 3.1 of the AD Agreement;

iv. The EC violated Articles 2.1 and 2.6 of the Anti-Dumping Agreement since it erroneously considered fasteners produced and sold by EC's industry, fasteners produced and sold on the domestic market in India and fasteners produced in China and sold to the EC as being "alike";

v. The EC violated Article 2.4 of the AD Agreement since it failed to make a comparison of the normal value and export price on the basis of the full product control number (PCN) and because it failed to make the necessary adjustments for differences that affect the price comparability;

vi. The EC violated Articles 3.1 and 3.2 of the AD Agreement by failing to make a product comparison on the basis of the full PCNs and by comparing standard fasteners without making any adjustments for the differences affecting price comparability when determining the price undercutting margin;

vii. The EC violated Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement in its examination of the volume of dumped imports;

viii. The EC violated Articles 3.1 and 3.4 of the AD Agreement in its examination of the impact of the dumped imports on domestic producers of the like product;

ix. The EC violated Articles 3.1 and 3.5 of the AD Agreement because it failed to properly demonstrate that dumped imports are, through the effects of dumping, causing injury to the domestic industry and because it failed to ensure that injury caused by other factors, in particular the increase in raw material prices and exports by the EC producers, was not attributed to the alleged dumped imports;

x. The EC violated throughout the investigation the various procedural obligations of the Anti Dumping Agreement.

China considered that both measures should be withdrawn. As to the first measure, given the "as such" nature of the violation, it should be withdrawn. As to the second measure, China considered that the nature and scope of the violations of the AD Agreement and of the GATT 1994 were such that it was inherently vitiated and devoid of any legal basis. Thus, China requests the Panel to suggest that the EC implement the recommendations and rulings of the DSB by withdrawing the contested measures.

The European Union

The European Union requested the Panel to reject all of China's claims and arguments, finding instead that, with respect to each of them, the European Union acted consistently with all its obligations under the AD Agreement, the GATT 1994, and the WTO Agreement.

Findings

A. Relevant Principles in the Dispute

i. Standard of Review

Article 11, which imposes the standard of review applicable for WTO Panels in general, imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.[116] Article 17.6 of the AD

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[116] Appellate Body Report, United States-Investigation of the International Trade Commission in Softwood Lumber from Canada-Recourse to Article 21.5 of the DSU by Canada, WT/DS277/AB/RW, adopted 9th May, 2006

Agreement whereas sets forth the special standard of review applicable to disputes under the AD Agreement.

In the assessment of the matter, the Panel would limit its review to the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", in accordance with Article 17.5(ii) of the AD Agreement.

The Panel would not undertake a *de novo* review of the evidence before the investigating authority during the proceeding, and would not substitute its judgement for that of the EU investigating authorities even though it might have made a different determination were it examining the evidence that was before the investigating authorities itself.

ii. Rules of Treaty Interpretation

Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". These customary rules are reflected in Articles 31-32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Interpretation must be based above all on the text of the treaty, but the context of the treaty also plays a role.

Principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[117] Panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[118]

With respect to interpretation of the AD Agreement, the first sentence of Article 17.6(ii) confirms the usual rules of treaty interpretation laid down under the DSU. The second sentence of Article 17.6(ii) provides explicitly that if a Panel finds more than one permissible interpretation of a provision of the AD Agreement, it shall uphold a measure that rests on one of those interpretations.

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117 Appellate Body Report, India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted 16th January 1998.

118 Ibid.

Burden of Proof

The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.[119] China, as the complaining party in this dispute, must therefore make a prima facie case of violation of the relevant provisions of the WTO agreements it cites, which the European Union must refute.

B. Terms of Reference of the Panel

The European Union argued that a number of the claims addressed in China's first written submission were not within the Panel's terms of reference either because (1) they were not identified in China's panel request consistently with the requirements of Article 6.2 of the DSU, or (2) they were' not subject to consultations.

China responded that all the claims that the European Union claimed were are outside the Panel's terms of reference.

The Panel considered that a panel request must identify the specific measures at issue and must provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Together, these two elements constitute the "matter referred to the DSB.

As per the Appellate Body's analysis in Korea – Dairy[120], first, the issue is to be resolved on a case-by-case basis. Second, the Panel must examine the Panel request very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. Third, the Panel should take into account the nature of the particular provision at issue – i.e., where the Articles listed establish not one single, distinct obligation, but rather multiple obligations, the mere listing of treaty Articles may not satisfy the standard of Article 6.2.

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119 Appellate Body Report, US-Wool Shirts and Blouses, WT/DS33/AB/R adopted 23rd May 1997.

120 Appellate Body Report, Korea-Dairy para 130.

Compliance with the requirements of Article 6.2 of the DSU must be demonstrated on the basis of the text of the Panel request read as a whole, and defects in the Panel request cannot be cured in the subsequent submissions of the parties.

The Panel found that there were no legal provisions under the AD Agreement supports the proposition that a complaining Member was precluded from identifying in its panel request claims not specifically identified in its request for consultations.

According to the Panel Article 6.2 of the DSU requires that a panel request must indicate whether consultations were held, but neither it nor any other provision of the DSU indicates that the scope of the request for consultations determines the precise scope of the subsequent panel request. Based on several Appellate Body Reports in Canada – Aircraft, Brazil – Aircraft, Mexico – Anti Dumping Measures on Rice and US – Upland Cotton[121] the Panel considered that that there does not have to be precise identity between China's request for consultations and its panel request, either with regard to the specific measures at issue or with regard to the legal basis of the complaint.

As long as the request for consultations and the Panel request concern "the same matter" or, put differently, as long as the legal basis of the Panel request "may reasonably be said to have evolved from the legal basis identified in the request for consultations", a claim not specifically identified in China's request for consultations, but properly identified in the Panel request, will fall within the Panel's terms of reference.

The Parties to the dispute also raised the question of what determines the scope of consultations between the parties to a dispute: the request for consultations or what was actually discussed in such consultations. Taking the Appellate Body's reasoning in US – Upland Cotton into consideration, the Panel found that it would not be appropriate to look into what was actually discussed between China and the European Union in the consultations between the parties, and it would therefore limit the analysis regarding the scope of consultations to the text of China's request for consultations.

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[121] Appellate Body Report, US-Carbon Steel Panel Report Canada-Aircraft, Panel Report Brazil-Aircraft and Appellate Body Report, United States-Subsidies on upland Cotton, WT/DS267/AB/R adopted on 21st March 2005.

C. Claims Regarding Council Regulation No. 1225/2009 (Basic AD Regulation) As Such

i. Whether all claims raised by China in connection with the Basic AD Regulation were within the Panel's Terms of Reference?

Arguments of the Parties

The European Union maintained that under the DSU, it is not enough to summarily identify the legal basis of the complaint; the identification must present the problem clearly. The European Union submitted that, with respect to China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement and under Article X:3(a) of the GATT 1994, China failed to plainly connect the specific measure at issue to the legal provisions claimed to have been infringed

According to China, "Article 6.2 merely requires the complaining party to identify in its Panel Request the specific measure at issue and the claims so as to enable the defending party to know the problem at issue". Specifically, China argued that Article 6.2 does not require that the scope of the specific measure at issue correspond to the scope of the legal provision claimed to have been violated. China argued that from China's panel request, the European Union knew very well the specific measure at issue and the legal provisions identified as having been violated and in the alternative the European Union had failed to demonstrate that China's failure to present the problem clearly prejudiced its ability to defend its interests.

Findings and Consideration of the Panel

Whether Article 9(5) of the Basic AD Regulation was limited to the imposition of dumping duties, or also relates to the calculation of dumping margins or the establishment of the level of anti-dumping duties, was a disputed matter that must be resolved as part of the substance of this case, rather than a matter to be assumed in the context of resolving a preliminary objection.

China's claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement were thus within the Panel's terms of reference. With regard to China's claim under Article X:3(a) of the GATT 1994, the Panel found that what matters for purposes of Article 6.2 of the DSU is whether a claim is described sufficiently clearly in the Panel request so that the respondent is informed of the nature of the claim and can prepare its arguments accordingly.

China's panel request clearly identified a claim under Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation and therefore the Panel considered this claim to be within its terms of reference as well.

ii. Relevant Provisions of Council Regulation No. 1225/2009

Council Regulation No. 1225/2009, the Basic AD Regulation, is the currently-in-force EU legislative instrument that lays down the substantive and procedural requirements pertaining to anti-dumping investigations in the European Union.

Article 9 paragraph 5 of the Basic AD Regulation provides for the modalities of imposing an anti-dumping duty as follows:

"An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except for imports from those sources from which undertakings ... have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned."

Thus, Article 9(5) requires that in principle a duty be specified for each such "supplier". It then introduces two exceptions to this principle: (1) where it is impracticable to specify the duty for each supplier, and (2) in general, where Article 2(7)(a) of the Basic AD Regulation applies – that is, where normal value is determined on the basis of analogue country prices or one of the other methods in that provision. In these cases, the Regulation imposing the duty shall specify a duty rate for the supplying country concerned, that is, a single "country-wide" duty rate will be specified, which will apply to all imports from that country.

Article 9(5) also provides for an exception to the specification of a country-wide duty rate. The criteria which decided eligibility for inclusion within such an exception was referred to as the "individual treatment (IT) test".

iii. Whether Article 9(5) of the Basic AD Regulation was inconsistent with Articles 6.10, 9.2, 9.3 and 9.4 of the AD Agreement?

Arguments of the Parties – China

Article 6.10

China argued that the first sentence of Article 6.10 of the AD Agreement requires investigating authorities, as a rule, to calculate an individual margin of dumping for each exporter/foreign producer of the allegedly dumped imports. Exceptionally, under the second sentence, it allows the use of a sample where the number of exporters, producers, importers or types of products involved is high.

In China's view, sampling is the only exception to the rule set forth in the first sentence of Article 6.10. Therefore, according to China, by providing that exporting producers from NMEs are subject to a country-wide dumping margin unless they are able to demonstrate that they meet the five criteria of Article 9(5) violates Article 6.10.

According to China, even though the text of Article 9(5) of the Basic AD Regulation refers to "an individual duty" rather than "an individual margin of dumping", the application of an individual duty necessitates the calculation of an individual margin of dumping. China asserted that, as a result, Article 9(5) of the Basic AD Regulation violated Article 6.10 of the AD Agreement.

Article 9.2

China argued that just as Article 6.10 requires the calculation of individual dumping margins, Article 9.2 of the AD Agreement requires the authorities to name individual suppliers in the imposition of anti-dumping duties.

Exceptionally, this provision permits the authorities to name the supplying country where naming individual suppliers would be impracticable. China noted Article 9.4 of the AD Agreement, which provides for the imposition of anti-dumping duties in cases where sampling is used, and argues that when Article 9.2 is read in conjunction with Article 9.4, it becomes clear that the only instance in which the authorities would be permitted to assign country-wide duties is when sampling is used in the investigation.

According to China, therefore, by subjecting the assignment of individual duty rates to the fulfilment of certain conditions, Article 9(5) of the Basic AD Regulation violated Article 9.2 of the AD Agreement.

Article 9.3

China noted that the margins of dumping for Chinese producers that do not qualify for IT under Article 9(5) of the Basic AD Regulation are calculated on the basis of a comparison of the normal value calculated for the analogue country with the average export prices of all cooperating non-IT exporting producers which, in most cases, will be further averaged with best information available such as, e.g., import statistics.

China contended that this calculation is inconsistent with the requirements of Article 2 of the AD Agreement because it is not based on the individual export prices of the relevant producers. As a result, those exporting producers which have company-specific export prices which are higher than the average export price used for non-IT exporting producers will be subject to a duty which exceeds their dumping margin established under Article 2 of the AD Agreement.

China claimed that, as a result, the duties imposed on the basis of such margins violate the principle set forth in Article 9.3 of the AD Agreement, that the anti-dumping duty imposed shall not exceed the margin as established under Article 2.

Article 9.4

China asserted that Article 9(5) of the Basic AD Regulation was inconsistent with Article 9.4 of the AD Agreement for two reasons.

First, the dumping margins calculated for non-sampled producers will reflect the weighted average of the margins calculated for the sampled producers which, to the extent sampled producers are not granted IT, will be inconsistent with Article 2 of the AD Agreement because they will be based on the export prices of all cooperating foreign producers, as opposed to those of the individual producers.

Second, Article 9(5) of the Basic AD Regulation runs counter to the obligation contained in the last sentence of Article 9.4 of the AD Agreement in that Article 9(5) subjects the right to request individual margins to conditions that are not found in Article 9.4 of the AD Agreement.

Arguments of the Parties – European Union

Article 6.10

The European Union contended that the obligation set forth in the first sentence of Article 6.10 is purely procedural. It required the authorities to calculate an individual margin for each known exporter or producer but does not address how such calculation should be made. The calculation of margins is addressed elsewhere in the Agreement.

The nature of the obligation contained in Article 6.10 was different from the nature of the issue raised by China, namely the assignment of individual, as opposed to country-wide, duty rates. The imposition of duties was addressed under Article 9 of the Agreement. Accordingly, the European Union maintained that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set out in Article 6.10 of the AD Agreement.

The European Union posits that sampling, allowed under the second sentence of Article 6.10, was not the only exception to the general rule set out in the first sentence of this provision, for example, Article 6.10 permits investigating authorities to treat separate companies as a single entity which was the actual source of dumping.

Therefore, Article 9(5) of the Basic AD Regulation was not inconsistent with Article 6.10 of the AD Agreement.

Article 9.2

The European Union contended that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set forth under Article 9.2 of the AD Agreement because the latter did not require an anti-dumping duty to be company-specific, but merely that the suppliers be "named".

In the alternative, the European Union maintained that, contrary to China's argument, Article 9.4 of the AD Agreement cannot be interpreted to identify the only instance where the investigating authorities can impose anti-dumping duties for the supplying country, for example, the third sentence of Article 9.2 allows authorities to name the supplying country when several suppliers are involved and it is impracticable to name all of them.

According to the European Union, "impracticable" referred to situations where the duty would not address the source of dumping and therefore would be ineffective. The European Union therefore contended that Article 9(5) of the Basic AD Regulation was not inconsistent with Article 9.2 of the Agreement since it served to identify when it would be impracticable to assign individual duties and therefore country-wide duties should be assigned.

Article 9.3

The European Union also asserted that Article 9(5) of the Basic AD Regulation does not fall within the scope of the obligation set forth under Article 9.3 of the AD Agreement, because Article 9(5) of the Basic AD Regulation does not address the calculation of dumping margins or the relationship between anti-dumping duties and dumping margins. In the alternative, the European Union maintained that China's claim under Article 9.3 was dependent on its claims under Articles 6.10 and 9.2. Since, in the European Union's view, Article 9(5) of the Basic AD Regulation does not violate those two provisions, there can be no violation of Article 9.3 either.

Article 9.4

The European Union submitted that Article 9(5) of the Basic AD Regulation does not necessarily require the use of sampling and therefore does not fall within the scope of the obligation set forth under Article 9.4 of the AD Agreement. In the alternative, the European Union maintained that China's claim under Article 9.4 is dependent on its claims under Articles 6.10 and 9.2. Since, in the European Union's view, Article 9(5) of the Basic AD Regulation does not violate those two provisions, there can be no violation of Article 9.3 either.

Findings and Considerations of the Panel

i. The Scope/Operation of Article 9(5) of the Basic AD Regulation

Article 9(5) of the Basic AD Regulation provides that NME producers that fail the IT test will be subject to the imposition of a country-wide anti-dumping duty. NME producers that pass the IT test, on the other hand, will have their own individual duty rates imposed

The Panel agreed that, as China argued, Article 9(5) not only determines whether a particular NME producer will be subjected to an individual or country-wide duty, but necessarily also determines whether the Commission will calculate an individual dumping margin for that producer.

There is a close and necessary link between the calculation of a margin of dumping and the imposition of an anti-dumping duty. According to the Panel, as per Article 9 of the AD Agreement an investigating authority would impose an anti-dumping duty on a producer-specific basis only if the underlying margins were also calculated on a producer-specific basis. Conversely, if the margins have been calculated on a country-wide basis, one would expect the authorities to also impose the duty on a country-wide basis.

It would not make sense for an investigating authority to calculate individual dumping margins for producers with respect to which the national legislation requires the imposition of country-wide anti-dumping duties.

Thus, according to the Panel's understanding of the EU legislation whether or not the Commission will calculate individual dumping margins and assign individual anti-dumping duties with respect to exporters from NMEs is addressed exclusively in Article 9(5) of the Basic AD Regulation.

Based on this consideration, the Panel concluded that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping. More specifically, where this provision requires that a country-wide duty be imposed on NME producers that fail the IT test, it is undisputed that the Commission calculates only a country-wide dumping margin for such producers, and not individual dumping margins. With respect to producers that pass the IT test, an individual margin is calculated and an individual duty is imposed.

The Panel therefore considered that, in operation, the result of the IT test in Article 9(5) of the Basic AD Regulation determines the nature of the margin calculation the EU authorities will undertake, either individual or country-wide.

ii. Substantive Analysis

Under the Basic AD Regulation, in an anti-dumping investigation involving a non-market economy, the NME producers are first subject to the market economy

test, to determine whether the Commission will base the determination of normal value for them on a consideration of the domestic prices of these producers. If a producer passes this test, its normal value will be based on that producer's domestic prices and the export prices that will be compared to that normal value will be based on that exporter's own export prices – it is treated exactly as if it were a producer from a market economy country. If a producer fails the MET, the domestic prices of that producer are not taken into consideration in the determination of its normal value, which is determined on an alternate basis.

That producer is next subject to the IT test, which determines whether an individual margin will be calculated and an individual duty will be imposed with respect to that producer or whether a country-wide margin will be calculated, and the producer will be subject to a country-wide duty. The IT test only applies to producers who fail the MET. Pursuant to Article 9(5) of the Basic AD Regulation, a country-wide duty will be imposed with respect to producers that fail the IT test entails that the Commission will calculate a country-wide margin for such producers.

The determination of the export price used to calculate that country-wide margin will depend on the level of cooperation on the part of the non-IT exporters altogether.

Thus, the Commission calculates one single dumping margin for NME producers that fail the IT test. The Commission then imposes a single "country-wide" duty rate for those producers, which may be less than that margin if the EU authorities determine that a lesser duty would suffice. For NME producers that pass the IT test, the Commission will compare the same normal value, but with these producers' own export prices. Thus, as a technical matter, the Commission calculates individual margins for NME producers that pass the IT test and individual duties are imposed, which may be less than the individual margins calculated if the EU authorities determine that a lesser duty would suffice.

Article 6.10

Article 6.10 clearly concerns individual treatment of producers and exporters subject to anti-dumping investigations, setting out the principle that the investigating authorities shall, "as a rule", "determine", i.e., calculate, an individual dumping margin for "each known producer or exporter ... of the product under investigation".

It also provides for an exception where the number of producers, exporters,

importers or product types is "so large" as to make it impracticable to calculate individual margins, the investigating authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid, or to the largest percentage of the volume of exports from the exporting country in question.

The "limited examination" provided for in this Article is generally referred to as "sampling", even where a statistically valid sample is not used, but the second alternative for limiting examination is used.

The wording of Article 6.10, particularly the fact that the exception is stated immediately after the rule, seems to suggest that sampling is the sole exception to the rule of individual margins. The examples that the European Union gives as potential other exceptions to the rule in the first sentence of Article 6.10 are directly based on other provisions of the AD Agreement and rather than being "exceptions" to the obligation to calculate individual dumping margins they are specific rights and obligations otherwise provided for in the AD Agreement. The first sentence of Article 6.10 only requires the determination, as a rule, of an individual margin of dumping for "known" producers or exporters, so questions about the scope of any "exceptions" to that rule for unknown exporters simply do not arise.

Finally, the use of constructed normal value and/or export price are situations governed by the relevant provisions of Article 2 and there is thus no reason to rely on an exception to the obligation set forth in the first sentence of Article 6.10 to justify their use.

The Panel distinguished between the test applied by the Panel in Korea – Certain Paper and the one applied under Article 9(5) of the Basic AD Regulation with respect to the burden of proof. Although the Panel did not eliminate the possibility of one or more nominally distinct producer(s) or exporter(s) being sufficiently related to the State to justify concluding that they are a single producer or exporter, the criteria in Article 9(5) of the Basic AD Regulation does not serve the purpose of finding this type of relationship between the State and individual exporters.

Article 9(5) of the Basic AD Regulation whereas presumes that NME producers are related to the State and in every such case the burden is on each such producer seeking individual treatment to provide evidence with respect to the Article 9(5)

criteria sufficient to overcome the presumption to the satisfaction of the Commission.

In the Panel's view, applying such a presumption to NME producers would seriously undermine the logic of Article 6.10 which requires that individual margins be calculated for each known producer unless the conditions set forth in its second sentence apply and sampling can be used.

Based on the foregoing, the Panel found that Article 9(5) of the Basic AD Regulation was inconsistent with Article 6.10 of the AD Agreement in that it conditions the calculation of individual margins for producers from NMEs on the fulfilment of the IT test.

Article 9.2

The first sentence of Article 9.2 states that duties should be collected in appropriate amounts and on a non-discriminatory basis from all sources found to be dumping and causing injury except with respect to imports from sources for which a price undertaking has been accepted.

The Panel considered that the word "sources" contained in the first sentence of Article 9.2 refers to producers and exporters of the product subject to the anti-dumping investigation.

The second sentence of Article 9.2 lays down the principle that the authorities should name the individual suppliers with respect to the imposition of the duties. Similar to the Panel's understanding of the word "sources" in the first sentence of this provision, the term "suppliers" referred to in the second and third sentences are the individual foreign producers or exporters of the product subject to the anti-dumping investigation.

The third sentence introduces an exception to this rule, providing that where naming individual suppliers would be impracticable, the authorities may name the supplying country. This sentence suggests that in investigations involving multiple producers, the authorities may find it impracticable to name all the producers individually with respect to the imposition of the duties and, instead, may consider it appropriate to name the supplying country.

The Panel found that although, according to the European Union, Article 9(5) aims to determine the source of the price discrimination on the basis of

whether export prices are freely determined it leads to the conclusion that even if a given NME producer is able to freely determine its export prices, which would suggest that the State is not the source of the price discrimination, it will fail the IT test if it fails to satisfy some of the other criteria, such as the repatriation of capital and profits, the determination of export prices and quantities, and conditions and terms of sale. In such a circumstance, it is difficult to see how it can be concluded that the "source" of the price discrimination is the State.

The third sentence of Article 9.2 consists of two parts. The first part contains two conditions: that there be several suppliers from the same country and that it be impracticable to name all these suppliers in connection with the imposition of the duty.

Seen in light of the first condition in the first part of this sentence "impracticable" refers to it being difficult or impossible to name all producers individually with respect to the imposition of an anti-dumping duty.

Thus, unless the authorities consider that because of the large number of producers involved it would be impracticable to name them individually, we conclude that the rule set forth in the second sentence of Article 9.2 would apply and the authorities would be required to name each producer individually, which in our view entails the imposition of an individual anti-dumping duty.

When the third sentence of Article 9.2 is read in its totality, the European Union's argument that "impracticable" refers to situations where individual treatment would undermine the effectiveness of the measure becomes untenable.

The Panel held that Article 6.10 provides relevant context for interpreting Article 9.2 since although they deal with different aspects, they relate to the same general obligation, namely the obligation to provide individual treatment to producers in the context of anti-dumping proceedings.

Hence, given the similarity in functions of the two provisions, "impracticable" under Article 9.2 should be interpreted consistently with the meaning of this word as used in Article 6.10, namely that impracticability under Article 9.2 refers to situations where, because of the large number of suppliers, that is, producers or exporters, it would be difficult to assign a duty to each of them individually, in which case the authorities are permitted to name the supplying country, that is, assign a country-wide duty

iv. Whether Article 9(5) of the Basic AD Regulation was inconsistent with Article I:1 of the GATT 1994?

Arguments of the Parties – China

China contended that Article 9(5) of the Basic AD Regulation was inconsistent with Article I:1 of the GATT 1994 which requires any advantage, favour, privilege or immunity granted by any contracting party to any product originating in any other country to be accorded immediately and unconditionally to the like product originating in the territories of all other contracting parties

China therefore argued that by not automatically giving the Chinese producers the right to have individual dumping margins calculated and individual duty rates imposed on them, Article 9(5) of the Basic AD Regulation violates the Most Favoured Nation ("MFN") principle embodied in Article I:1 of the GATT 1994

Arguments of the Parties – European Union

The European Union submitted that if the Panel finds that the AD Agreement permits WTO Members to subject the right to an individual margin of dumping to the fulfilment of certain conditions in investigations involving NMEs, by virtue of the lex specialis principle, there can be no violation of Article I:1 of the GATT 1994.

By treating two different situations in two different ways would not necessarily violate the MFN principle in Article I:1 of the GATT 1994. According to the European Union, "imports from market and non-market economy countries may be subject to different treatment in the context of the anti-dumping rules precisely because they are different in nature. Therefore, by definition, no discrimination can arise".

Findings and Considerations of the Panel

Article 9(5) of the Basic AD Regulation only applies to producers from certain NMEs, including China whereas, producers from other WTO Members, ("market economy countries") are entitled to individual treatment without having to fulfil the conditions set forth under Article 9(5) of the Basic AD Regulation

The Most Favoured Nation principle, enshrined in Article I:1 of the GATT 1994, requires that any privilege granted to imports of any country be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other WTO Members and is considered to be "a cornerstone of the GATT and one of the pillars of the WTO trading system".

Based on the text of Article I:1, for there to be a violation of the MFN obligation, the complaining party must show that "there is an advantage, of the type covered by Article I and which is not accorded unconditionally to all "like products" of all WTO Members".

Article 9(5) of the Basic AD Regulation constitutes a rule or formality which affects imports from certain countries, since it sets out criteria for determining whether the export prices of producers subject to anti-dumping investigations will be taken into consideration, individual margins of dumping calculated, and individual anti-dumping duties imposed upon importation of the relevant product to the European Union.

Determining and imposing individual duties for producers subject to an anti-dumping investigation that is basing the duties for such producers on individual margins established on the basis of their own export prices rather than the average export price of a group of producers from the same country, is an advantage within the meaning of Article I.1 of the GATT 1994. This is because such individual treatment ensures that an exporter is not subjected to a duty higher than its own dumping margin, as would be the case for some exporters with a country-wide duty imposed on the basis of a margin calculated on average export prices.

The application of Article 9(5) will, in certain situations, result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union. Thus, the Panel that Article 9(5) violates the MFN obligation of Article I:1 of the GATT 1994.

In the absence of an explicit authorization to do so, or a sufficient factual basis showing that a difference in the nature of the imports concerned, any differential treatment on the basis of the origin of goods, including on the basis of the nature of the economy in the exporting country, would violate the MFN principle.

v. Whether Article 9(5) of the Basic AD Regulation was inconsistent with Article X:3(a) of the GATT 1994?

Arguments of the Parties – China

China contended that Article 9(5) of the Basic AD Regulation falls within the scope of Article X:3(a) of the GATT 1994 which refers to "laws, regulations, decisions and administrative rulings of general application".

China observed that the methodology for the calculation of the country-wide margin of dumping varies, depending on the degree of cooperation on the part of the foreign producers subject to an investigation results in Article 9(5) of the Basic AD Regulation not being administered in a uniform manner in all anti-dumping investigations

China also maintained that Article 9(5) of the Basic AD Regulation was not administered in a reasonable manner in anti-dumping investigations against Chinese exporters since the dumping determinations against such exporters were usually made by the Commission on the basis of facts available even where the conditions set out under Article 6.8 of the AD Agreement were not met.

In China's view, such non-uniform and unreasonable application of Article 9(5) of the Basic AD Regulation was inconsistent with the obligation contained in Article X:3(a) of the GATT 1994.

Arguments of the Parties – European Union

The European Union assertted that Article 9(5) of the Basic AD Regulation provides for a methodology for determining anti-dumping duties in investigations against NMEs and do not contain any rules on how such methodology should be administered. Since the specific measure at issue does not fall within the scope of the obligation contained in Article X:3(a) of the GATT 1994, the European Union contended that the Panel should reject China's claim

In the alternative, the European Union submitted that a methodology that varies depending on the level of cooperation on the part of foreign exporters cannot per se be considered as non-uniform. According to the European Union, the application of Article 9(5) of the Basic AD Regulation led to the same result where the circumstances are the same, and therefore was applied in a consistent manner in all investigations

Findings and Considerations of the Panel

Article X:3(a) lays down the principle that WTO Members should administer their laws, regulations, decisions and rulings that affect trade in a uniform, impartial and reasonable manner.

In the Panel's view, this obligation aims at ensuring that laws, regulations, decisions and rulings that are substantively consistent with a Member's WTO obligations are also implemented in an appropriate manner so that exporters from other Members can predict the treatment their exports will be accorded under the regime to which their trade will be subjected in the territory of that Member.

Having found Article 9(5) of the Basic Regulation to be "as such" inconsistent with the European Union's obligations under Articles 6.10 and 9.2 of the AD Agreement, the Panel saw no reason to consider whether this WTO-inconsistent measure was administered in a uniform and reasonable manner by the European Union.

vi. Whether Article 9(5) of the Basic AD Regulation was inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement?

Arguments of the Parties

China asserted that since Article 9(5) of the Basic AD Regulation was inconsistent with the provisions of the AD Agreement and the GATT 1994 discussed above, it follows that it was also inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement, which require WTO Members to ensure the conformity of their laws, regulations and administrative procedures with their WTO obligations.

The European Union counters the argument on the same grounds.

The Panel found that Article XVI:4 of the WTO Agreement requires WTO Members to ensure that their laws, regulations and administrative provisions are consistent with the provisions of the agreements annexed to the WTO Agreement, and Article 18.4 of the AD Agreement imposes the same obligation with respect to laws, regulations and administrative procedures pertaining to the conduct of anti-dumping investigations.

Since Article 9(5) of the Basic AD Regulation was inconsistent with Articles 6.10 and 9.2 of the AD Agreement it was also inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement and the European Union had failed to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the relevant Agreements.

D. Claims Regarding Council Regulation 91/2009 ("the Definitive Regulation")

i. Background of the Investigation at Issue

Council Regulation (EC) No. 91/2009 of 26 January 2009, the Definitive Regulation, imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

On 26 September 2007, the Commission received a complaint from the European Industrial Fasteners Institute, the complainant, for the initiation of an anti-dumping investigation on imports of steel fasteners originating in China. Evidence submitted in connection with the application was deemed sufficient and an investigation was initiated on 9 November 2007.

On 18 September 2008, a public meeting was organized in which all interested parties participated. The Commission used sampling in making its dumping determination. A total of 110 Chinese producers made themselves known by the relevant deadline, 15 days from initiation, and were considered as cooperating parties. The Commission undertook to individually examine eight Chinese producers in total in making its dumping determination, out of which five companies had been sampled and three had not been selected for the sampling process. Since none of the individually-examined Chinese producer was granted MET, the Commission determined the normal value on the basis of information concerning an analogue third country, India.

Apart from two companies, for whom resort was made to constructed export price, the export price for the rest six was made on the basis of the price actually paid pr payable for the product when sold for export from the exporting country (China) to the European Union. Individual dumping margins were calculated for these, based on a comparison of the normal value for the analogue country with each company's weighted average export price. A weighted average of those margins

was calculated and applied to the non-sampled Chinese producers, except for the three non-sampled producers that were granted IT. Based on its analysis of the information before it, the Commission determined that dumped imports from China caused material injury to the domestic industry.

ii. Whether Article 9(5) of the Basic AD Regulation, as applied in the fasteners investigation, was inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement?

Arguments of the Parties – China

Despite acknowledging that the Commission granted the IT requests of the eights Chinese producers examined in the fasteners investigation, China contended that subjecting such treatment to the conditions set forth under Article 9(5) of the Basic AD Regulation was inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement. China submitted that for the same reasons that Article 9(5) of the Basic AD Regulation is "as such" inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement, its application in the fasteners investigation was inconsistent with these provisions.

Arguments of the Parties – European Union

The European Union argued that China's claim under Article 9.4 of the AD Agreement is outside the Panel's terms of reference because it was not included in China's panel request. The European Union noted that China's "as applied" claims repeat its "as such" claims regarding Article 9(5) of the Basic AD Regulation, and asserts that since the "as such" claims are unfounded, the Panel should also reject China's "as applied" claims regarding the Definitive Regulation.

The European Union submitted that, even if the Panel finds that Article 9(5) of the Basic AD Regulation is inconsistent with the AD Agreement or the GATT 1994 cited by China "as such", since all the Chinese producers that requested IT in the investigation at issue were granted such treatment, China is challenging a non-existent measure.

The European Union therefore requested the Panel to reject China's "as applied" claims regarding Article 9(5) of the Basic AD Regulation.

Findings and Considerations of the Panel

The fact that all the IT requests were granted in the underlying investigation does not preclude the Panel from considering whether the application of Article 9(5) of the Basic AD Regulation in the investigation was inconsistent with the AD Agreement.

Having found Article 9(5) of the Basic AD Regulation to be inconsistent with Articles 6.10 and 9.2 of the AD Agreement, and for the same reasons, its application in the fasteners investigation was also inconsistent with these two provisions.

iii. Whether the European Union violated Article 5.4 of the AD Agreement in its standing determination?

Arguments of the Parties – China

China claimed that the Commission's determination on standing was inconsistent with the requirements of Article 5.4 of the AD Agreement, and puts forward three main arguments in support of its claim.

First, China submitted that the Commission failed to examine whether the figure for total EC production provided by the complainant was reliable and correct. By not checking the adequacy and accuracy of this figure the Commission failed to conduct an "examination" on the issue of standing as required under Article 5.4.

Second, China argued that the Commission failed to examine, prior to initiation, whether the application had been made by or on behalf of the domestic industry. In China's view, the Commission made its standing determination after the initiation of the investigation.

Third, China maintained that the Commission's decision on standing was wrong since the EU producers supporting the application accounted for less than 25 per cent of total production. In this regard, China asserted that the 27 per cent share cited in the Definitive Regulation includes the production accounted for by producers that made themselves known within the 15 day period following initiation provided for domestic producers to come forward and indicate their willingness to cooperate in the investigation.

China further contended that a 15 per cent margin of error in the calculation of the production accounted for by the producers supporting the application also undermined the accuracy of this calculation.

Arguments of the Parties – European Union

The European Union submitted that China's claim under Article 5.4 is not within the Panel's terms of reference because: a) it was not subject to consultations; b) China's panel request does not identify it consistently with the requirements of Article 6.2 of the DSU; and c) the Notice of Initiation of the investigation at issue, which sets out the Commission's determination on the issue of standing, is not a measure identified in China's panel request.

With regard to substantives, the European Union argued that the Commission did examine standing prior to the initiation of the investigation, and that the complainants represented 37 per cent of the total EU production of the like product.

The European Union argued that China's claim that the figures used for the calculation of the total EU production were not reliable should be rejected because China has failed to make a prima facie case in this regard. The European Union contended that, contrary what China asserts, the total EU production figure submitted in the complaint was examined by checking the figures in Eurostat.

Findings and Considerations of the Panel

a. Terms of Reference

The obligation set forth in Article 5.4 pertains to determining whether the complaint (the "application" in Article 5.4) had been lodged "by or on behalf of" a domestic industry, and establishes numerical criteria for that determination, based on the proportion of domestic production of the like product attributable to the producers supporting and opposing the complaint. The first sentence of this provision sets out the general rule that no investigation can be initiated unless the authorities determine that the application has been made by or on behalf of the domestic industry producing the like product in the importing country. The following two sentences introduce the specific numerical criteria for this determination, both of which must be satisfied.

The request for consultations suggested that China considers that 27 per cent of domestic production support the complaint is not enough to support the conclusion that the complaint has been made by or on behalf of the domestic industry, whereas, the Panel request questions the conclusion that producers accounting for 27 per cent of domestic production actually supported the complaint. Thus, although there was a difference between the two requests, despite it, the claim in the Panel request can reasonably be found to have evolved from the legal basis identified in the request for consultations - a violation of Article 5.4 of the AD Agreement with respect to the determination of standing.

Although Article 5.4 contains a general obligation to ensure that the complaint is made by or on behalf of the domestic industry producing the like product in the importing country, in the Panel's view that obligation has several aspects, each of which may be the focus of a claim of violation of this provision. China developed its claim on standing along the lines of the legal basis for that claim outlined in its panel request and therefore the "brief summary" of the legal basis for China's claim of violation of Article 5.4 of the AD Agreement in its panel request was sufficient to comply with the requirements of Article 6.2 of the DSU

Article 17.4 would not allow a Member to bring a case citing a notice of initiation as the measure at issue, or at least not without also citing one of the three measures specified in Article 17.4. However, this does not limit a complaining Member's right to bring claims about any aspect of the anti-dumping investigation in question. In a dispute concerning a final anti-dumping measure a complaining Member may raise any alleged violations of the WTO Agreement arising out of the initiation or conduct of, as well as the determinations made and actions taken in the course of, the underlying anti-dumping investigation.

Based on the foregoing, the Panel concluded that China's claim with respect to the Commission's standing determination is within its terms of reference and proceeded to consider that claim.

b. Substantive Analysis

With respect to the timing of the Commission's determination, after examination of the Notice of Initiation the Panel came to the conclusion that it clearly shows that the Commission did make a determination with regard to standing prior to initiation

Although the issue of standing was revisited in response to the allegations made by some importers and exporters that the investigation had been initiated without ensuring that there was standing, the European Union did not, in fact, in this post-initiation inquiry substantively change its conclusion that there was standing.

With respect to the quality of the Commission's determination, the Panel noted China has not submitted any evidence demonstrating that the Commission failed to check the accuracy and adequacy of the information in the application which was used for standing purposes.

The Panel also noted that China did not assert that there was reason to doubt the reliability of that information in this investigation which the Commission disregarded and hence, China's argument that the Commission did not examine whether the producers supporting the application accounted for at least 25 per cent of the total EU production cannot stand.

China's assertion that the Commission, in its standing determination took into consideration the production of EU producers that made themselves known after the initiation, was unfounded as a matter of fact.

Based on the foregoing, the Panel rejected China's claim that the Commission's standing determination was inconsistent with Article 5.4 of the AD Agreement.

iv. Whether the European Union violated Articles 4.1 and 3.1 of the AD Agreement in defining the domestic industry?

Arguments of the Parties – China

China raised five allegations of error with regard to the domestic industry definition in the investigation at issue

First, China asserted that the Commission violated Articles 4.1 and 3.1 of the AD Agreement by excluding from the domestic industry definition producers that made themselves known after the 15-day deadline following the publication of the Notice of Initiation, and those that did not support the complaint.

Second, China argued that the domestic industry as defined by the Commission did not include domestic producers of the like product accounting

for a "major proportion" of total EU production as required under Article 4.1 of the AD Agreement. China argued that it was obvious that 27 per cent cannot be regarded as significant, which it claimed was what "major" meant. In any event, China argued that, even granting that 27 per cent of total domestic production may constitute a "major proportion" within the meaning of Article 4.1, this can only be the case if the overall circumstances of the case indicate that the proportion of domestic production at issue is sufficient to be deemed "major"

Third, China contended that the Commission violated Article 3.1 of the AD Agreement by not defining the domestic industry in relation to the Investigation Period, 1 October 2006-30 September 2007. China contends that the domestic industry must be defined in relation to the same period that is used for assessing the injury factors.

Fourth, China argued that the European Union violated Articles 3.1 and 4.1 of the AD Agreement by basing its injury determination on a sample of domestic producers that was not representative. China further contends that the European Union acted inconsistently with Article 3.1 by selecting the sample based on volume of production as the sole criterion.

Fifth, China considered that the European Union acted inconsistently with Article 4.1 of the AD Agreement by not excluding from the domestic industry definition producers that were related to the exporters or importers or were themselves importers of the product under consideration.

Arguments of the Parties – European Union

The European Union argued that China's first allegation of error is not within the Panel's terms of reference because it was not subject to consultations.

With respect to the substantives, the European Union contended that, contrary to China's argument, Articles 4.1 and 3.1 of the AD Agreement do not require an investigating authority to define the domestic industry so as to include all producers, or even the largest possible group of producers. The European Union considered that Article 3.1 of the AD Agreement does not impose any obligations with respect to the definition of the domestic industry, but merely requires an objective examination based on positive evidence of the impact of the dumped imports on the domestic industry, and thus the European Union contended that the Article

3.1 aspect of China's claim was entirely dependent on its claim with respect to the definition of the domestic industry.

With regard to China's second allegation of error, the European Union asserted that the Eurostat data provided a reasonable estimate of total EU production of the like product, referring to its arguments in this regard with respect to the standing determination. Moreover, the European Union submitted that in the circumstances of this investigation, 27 per cent did represent a major proportion of total production within the meaning of Article 4.1 of the AD Agreement.

With regard to China's third allegation of error, the European Union asserted that China errs in its description of the facts. The EU maintained that the period for the assessment of the injury factors was from January 2003 to October 2007.

In response to China's fourth allegation of error, the European Union argued that China fails to make a prima facie case of a violation, since Article 4.1 of the AD Agreement does not require that the sample used for injury determinations represent a major proportion of total production.

With regard to China's fifth allegation of error, the European Union argued that Article 4.1 of the AD Agreement does not require the exclusion of related producers from the definition of domestic industry, but simply allows such exclusion if circumstances justify this. In addition, the European Union argued that Article 3.1 imposes no obligation with respect to an investigating authority's decision whether to exclude related domestic producers from the domestic industry, and asks the Panel to reject this aspect of China's claim as well.

Findings and Considerations of the Panel

Unlike Article 6.2 of the DSU, which requires that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, Article 4.4 of the DSU requires only that a request for consultations contain "an indication of the legal basis for the complaint".

In the Panel's opinion, this was a lesser requirement than that of Article 6.2, and may well be satisfied in a particular case by listing the Articles allegedly violated.

The Panel concluded that China's request for consultations does contain a sufficient "indication of the legal basis" for the first allegation of error with respect

to its claim of violation of Articles 3.1 and 4.1 of the AD Agreement, which was therefore within our terms of reference

On its face, it was clear that Article 4.1 of the AD Agreement does not establish any particular procedure or methodology for investigating authorities in defining the domestic industry. There is nothing in Article 4.1 which would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry.

The Panel concluded that the Commission, the EU investigating authority, did not act to exclude the "category" of producers asserted by China, that is, "producers that did not support the complaint", from the definition of the domestic industry. The Panel saw no basis for concluding that the 15-day period was necessarily insufficient.

The mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers expressing different views with respect to the complaint, or producers who did not come forward within the 15-day period, does not demonstrate that the European Union acted inconsistently with Article 4.1 of the AD Agreement in defining the domestic industry. Thus, China failed to demonstrate that the European Union excluded producers that did not support the complaint, and has failed to demonstrate that the definition of the domestic industry was inconsistent with Article 4.1 of the AD Agreement in this regard.

China had not, in the view of the Panel, made a prima facie case of violation of Article 3.1 of the AD Agreement. Reliance on a set of data gathered and maintained on an objective basis for reasons not linked to the anti-dumping investigation was a reasonable basis for an investigating authority to make decisions concerning the definition of the domestic industry, including whether a group of producers accounts for a sufficient proportion of total domestic production to be considered a "major proportion" of that production. There was nothing in the facts that would support the view that the Commission should have approached the Eurostat data with suspicion

Thus, the Panel concluded that the European Union did not violate Article 4.1 by relying on Eurostat data in estimating total EU production for purposes of defining the domestic industry.

In the Panel's view, China's assertion that the Commission relied on a presumption was not alone sufficient to demonstrate, prima facie, that the definition of domestic industry in this case was inconsistent with Article 4.1 of the AD Agreement. Therefore, the Panel did not consider it necessary to address China's argument that the European Union erred by presuming that producers accounting for 25 per cent of total domestic production will constitute a major proportion, and thus satisfy the requirements of Article 4.1 in this regard.

As per the parties and pursuant with the views of the Panel in Argentina – Poultry a "major" proportion was one that is "important, serious, or significant" and may in certain circumstances even be less than 50 percent

The only requirement clearly set out in Article 4.1 was that the domestic industry consists of "domestic producers of the like product", either as a whole, or those of them accounting for a major proportion of total domestic production. There was no basis in the text of the AD Agreement to impose on investigating authorities an affirmative obligation to examine non-quantitative factors in defining a domestic industry on the basis of producers accounting for a major proportion of domestic production of the like product

There is nothing in Article 4.1 that would require an investigating authority, in defining the domestic industry, to examine and determine whether producers accounting for a major proportion, are, in addition, somehow "representative" of the whole of domestic production. Nor do we see anything in the text of Article 4.1 that would require an investigating authority to include as many producers as is "practically feasible", so long as the producers that are included account for a sufficient quantity of domestic production to be considered a "major proportion". Similarly, the Panel considered irrelevant whether the number of producers included in the domestic industry is a small or a large portion of the total number of producers.

Article 4.1 refers to the volume of production accounted for by producers, a consideration which is, in our view, not addressed by taking account of the number of producers. The Panel therefore concluded that the European Union did not act inconsistently with Article 4.1 of the AD Agreement in defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners.

The Panel disagreed with and rejected China's contention that a definition of domestic industry based on a major proportion calculated for data relating to a period other than the period for which data is collected for the dumping determination necessarily is inconsistent with Article 3.1 of the AD Agreement.

In the absence of any methodological guidance for the selection of a sample in the context of an injury determination, the Panel laid down that it cannot conclude that a selection based on volume of production is necessarily unsatisfactory.

v. Whether the European Union violated Articles 2.1 and 2.6 of the AD Agreement in defining the product under consideration and/or the like product?

Arguments of the Parties – China

China challenged the definition of "product concerned" as defined by the Definitive Regulation the European Union acted inconsistently with Articles 2.1 and 2.6 of the AD Agreement by including in the scope of the product under consideration both standard and special fasteners as "like" products, despite readily apparent differences in characteristics and uses. By concluding that fasteners produced and sold by the Community industry, fasteners produced and sold on the domestic market in India and fasteners produced in the PRC and sold to the Community were alike, the European Union violated Articles 2.1 and 2.6 of the AD Agreement.

Articles 2.1 of the AD Agreement, in combination with Article 2.6, sets forth an obligation concerning the definition of the product concerned, such that the product concerned can only include products that are "like, in order to ensure that the dumping determination is based on a comparison between products which are "like".

China argued that fasteners produced in China for export to the European Union and those produced by the Community industry are not "like" due to differences in physical and technical characteristics, lack of interchangeability and different end-uses and prices. The Commission, in China's view, acted inconsistently with Articles 2.1 and 2.6 of the AD Agreement by including special fasteners in the like product.

Arguments of the Parties – European Union

The European Union contended that the product under consideration for purposes of the investigation at issue was defined in the Notice of Initiation, which, since it was not identified in China's request for establishment, is not a measure within the Panel's terms of reference. With respect to the substance of China's claim, the European Union distinguished the determination of the "product concerned" and the determination of the "like product".

With regard to the determination of the like product, the European Union asserted that this claim was not within the Panel's terms of reference because China's panel request only refered to the selection of the product concerned, on the assumption that the like product standard applies.

In the alternative, the European Union argued that, if the Panel concludes that this claim was within its terms of reference, the like product definition in the investigation at issue was that "fasteners (standard and special) [were] like fasteners (standard and special)", which definition the European Union asserts was consistent with Article 2.6 of the AD Agreement.

Findings and Considerations of the Panel

a. Product under Consideration

There is certainly nothing in the text of Article 2.1 that can be understood to require any consideration of "likeness" in the scope of the exported product investigated, contrary to China's argument. If the meaning of "a product" in Article 2.1 were limited as China argues, there would be no possibility that more than one "type of product" would be at issue in any investigation.

The Panel concluded that while Article 2.1 establishes that a dumping determination is to be made for a single "product under consideration", there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article.

The subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all but to define the term "like product" for purposes of the AD Agreement. It is self-evident that an investigating authority must, at the time it initiates an anti-dumping investigation, make a decision as to

the scope of that investigation, and give notice of the "product involved", neither Article 2.1 nor Article 2.6 of the AD Agreement establishes a requirement for making an elaborated determination in that regard. It would be absurd to impose the definition of like product from Article 2.6 onto the undefined term product under consideration. The Panel also took note of the interpretation of "product under consideration" deliberated upon by previous Panels in cases like EC – Salmon (Norway), US – Softwood Lumber V and Korea – Certain Paper.

Thus, the Panel concluded that Articles 2.1 and 2.6 of the AD Agreement do not establish an obligation on investigating authorities to ensure that the product under consideration include only "like" products. The Panel thus found it unnecessary to determine whether standard and special fasteners are or are not "like" each other within the meaning of Article 2.6.

b. Like Product

The passage on which China relied as providing "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" made clear that China was making a claim with respect to the selection of the product under consideration. Although China raised the concept of "likeness" as an element of its claim regarding the product under consideration, this alone was not sufficient to set out a claim with respect to the definition of the like product per se.

If a claim cannot reasonably be discerned as allegedly set out in the request for establishment, it was not necessary to consider whether the defending party has been prejudiced in its ability to defend itself. Thus, the Panel request in this case did not set forth a claim with respect to the definition of the like product in the underlying investigation.

The like product defined by the European Union was coextensive with the product under consideration. Thus, even if the question were within the terms of reference, China failed to establish a violation of Article 2.6 of the AD Agreement with respect to the definition of like product in this case.

vi. Whether the European Union violated Article 2.4 of the AD Agreement in its Dumping Determination?

Arguments of the Parties – China

China argued that the Commission violated Article 2.4 of the AD Agreement in its dumping determination for two reasons: first, because it did not make the comparison between the normal value and the export price on the basis of product categories based on "Product Control Numbers" ("PCNs") which the Commission itself had defined in requesting information; and second, because it failed to make adjustments for quality differences and for certain differences in physical characteristics which were included in the PCNs, but not reflected in the factors on which product categories for the comparison were ultimately based and which affected price comparability.

China argued further that all the product characteristics reflected in the PCNs represent physical differences that affect price comparability within the meaning of Article 2.4, and which, therefore, had to be taken into account when making the comparison between normal value and export price in order to carry out a "fair comparison".

China also contended that the Commission violated Article 2.4 by failing to make certain adjustments. In this regard, China maintained that the Commission should have considered whether the PCN characteristics that were not reflected in the product types actually compared nonetheless required adjustments.

China asserted that the Commission should have made an adjustment for differences in the quality of Chinese fasteners and fasteners produced by the Indian producer. China asserted that the Commission made only one adjustment, for differences in quality control costs of the Chinese producers and the Indian producer.

Arguments of the Parties – European Union

According to the European Union, by not linking its arguments to the relevant parts of the Definitive Regulation, China failed to make a prima facie case of violation. The European Union disagreed with China's assertion that the fair comparison obligation in Article 2.4 required in this investigation that adjustments be made for each PCN element. The European Union also maintained that no

interested party made a substantiated request during the fasteners investigation for adjustments to be made with respect to other product characteristics reflected in the PCNs.

The European Union contended that the Commission found that the Chinese and Indian fasteners had the same basic physical and technical characteristics. The Commission made adjustments for differences in quality control costs between Indian and Chinese fasteners, as well as for other factors such as transport, insurance, packing handling costs etc. The European Union argued that in the absence of substantiation that differences demonstrated to affect price comparability were ignored, this aspect of China's claim, therefore, should also be rejected.

Findings and Consideration of the Parties

a. Failure to Use Full PCNs

The following elements make up the PCNs identified by the Commission: type of fasteners (by CN code); strength/hardness; coating; presence of chrome on coating, diameter; and length/thickness. But because the Indian producer did not provide information as categorized in the PCN the Commission in its price comparison used only strength class and the distinction between standard and special fasteners in its comparison and rejected the other factors.

Article 2.4 of the AD Agreement requires that a fair comparison be carried out between the normal value and the export price, and that the comparison should be made at the same level of trade and with respect to sales made at as nearly as possible the same time. Although the obligation to make a fair comparison lies with the investigating authorities if it is not demonstrated to the authorities that there was a difference affecting price comparability, there was no obligation to make an adjustment.

It follows that, in order to make a prima facie case of violation of Article 2.4 in this dispute, China had to demonstrate to the Panel that an adjustment should have been made with respect to (1) a difference (2) that was demonstrated to affect price comparability between the normal value and the export price, and that the Commission failed to make the adjustment.

In the Panel's view, the fact that the Commission sought information on the basis of PCNs certainly suggests that the EU authorities considered, at least in the

early stages of the investigative process, that these elements might affect price comparability, and that they therefore envisioned comparisons based on the PCNs in order to avoid possible problems of non-comparability. The obligation to make a fair comparison under Article 2.4 does not vary depending on the form in which information is requested or received. The price comparison must be judged against the requirements of Article 2.4, and not on the basis of the information-gathering procedures of the investigating authority.

The Panel therefore rejected China's argument that the Commission acted inconsistently with the obligation set forth under Article 2.4 of the Agreement by not taking into consideration all the PCN characteristics in making price comparisons in its dumping determination.

b. Alleged Failure to make necessary adjustments

Having concluded that the European Union was not required to carry out its comparison on the basis of the PCNs, partly because the PCN elements do not necessarily reflect differences affecting price comparability and there is no evidence to demonstrate that they do in this case, the Panel considered that the argument that the Commission should have considered whether the elements excluded from the comparison nonetheless required adjustments does not amount to a prima facie case of violation of Article 2.4.

The Panel disagreed with and rejected China's claim that the statement in recital 52 demonstrates that the Commission recognized any quality differences between Indian and Chinese fasteners, much less any such differences that affected price comparability and therefore required an adjustment.

The Panel thus rejected China's claim that the Commission violated Article 2.4 of the AD Agreement by not making the necessary adjustments in its dumping determinations in the investigation at issue.

vii. Whether the European Union violated Articles 3.1 and 3.2 of the AD Agreement in its price undercutting determination?

Arguments of the Parties – China

China submitted that the Commission violated the obligations set forth in Articles 3.1 and 3.2 of the AD Agreement in its price undercutting determination.

The Commission did not base its price undercutting determination on a comparison of product categories defined by full PCNs, which rendered the results of the Commission's price undercutting determination unreliable. By failing to take into account the full PCNs or to make adjustments, the European Union ignored certain important differences in physical characteristics which affect price comparability and consumer perception and made a finding of injury more likely, thereby violating Articles 3.1 and 3.2 of the AD Agreement.

China asserted that the error caused by use of simplified PCNs was "compounded by the methodology applied by the EC to differentiate between special and standard fasteners". China concluded that not taking into consideration the quality differences between Chinese and EU-made fasteners, which China contended were obviously important from a consumer's point of view and which affect prices, rendered the Commission's price undercutting determinations non-objective

Arguments of the Parties – European Union

The European Union asserted that this claim was outside the Panel's terms of reference because it was not subject to consultations. The European Union also submitted that China's claim on price undercutting had different legal and factual bases compared with the other injury-related claims raised in China's request for consultations. Therefore, argued the European Union, this claim was outside the Panel's terms of reference.

The European Union argued that Article 3.2 of the AD Agreement does not impose a particular methodology with respect to price undercutting determinations. The European Union contended that merely because different product types included in the same product group had different prices does not make the Commission's price undercutting analysis non-objective.

Findings and considerations of the Panel

i. Terms of Reference of the Panel

Article 3.2 addresses the details of two of the three main elements of an injury determination, namely the consideration of the volume of dumped imports and of the impact of the prices of such imports on the prices of the domestic industry producing the like product in the country of imports.

Unlike Article 6.2 of the DSU, which contains the requirement that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, Article 4.4 of the DSU requires only that a request for consultations contain "an indication of the legal basis for the complaint". In our view, this is a lesser requirement than that of Article 6.2, and may well be satisfied in a particular case by listing the Articles allegedly violated.

On this basis, the Panel concluded that China's request for consultations does contain a sufficient "indication of the legal basis", Article 3.2 of the AD Agreement, with respect to its complaint concerning the Commission's price undercutting analysis and that this claim is therefore within the Panel's terms of reference. The alleged violation of Article 3.1 is dependent on a finding of violation of the obligations in one or more of other Articles of the AD Agreement. Since the request for consultations covers China's price undercutting claim, the alleged dependent violation of Article 3.1 is also within the scope of the request.

ii. Substantive Analysis

Article 3.2 does not prescribe a particular methodology for the consideration of price undercutting, nor does it require that a determination of price undercutting be made. In order to establish a prima facie case of violation, China had to establish that the Commission's price undercutting analysis did not constitute an objective examination based on positive evidence as required under Article 3.1 of the AD Agreement.

The text of Article 3.2 provides no methodological guidance as to how an investigating authority is to "consider" whether there has been significant price undercutting. In our view, price undercutting may be demonstrated by comparing the prices of the like product of the domestic industry with the prices of the dumped imports, as the European Union did in this case. The general requirements of objective examination and positive evidence of Article 3.1 limit an investigating authority's discretion in the conduct of a price undercutting analysis, but this does not mean that the requirements of Article 2.4 with respect to due allowance for differences affecting price comparability are applicable.

The Panel found that there was no basis for any different conclusion with respect to China's claim concerning price undercutting, where there is even less guidance on methodology. The Panel said that it was not clear what the "standard-plus" and "basic standard" categories posited by China consist of and there was

no indication in the Definitive Regulation suggesting that the Commission accepted that these categories existed.

The Commission concluded, in the context of its discussion of like product, that alleged differences between the quality of the raw materials used in the production of Chinese and EU-made fasteners did not affect the comparability of the two. China had failed to make out a prima facie case that there were differences in quality between Chinese and EU produced fasteners, and therefore has failed to demonstrate that the Commission did not undertake an objective examination of price undercutting in this respect.

viii. Whether the European Union violated Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement in its consideration of the volume of dumped imports?

Arguments of the Parties – China

China argued that the Commission violated Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement by treating all imports from China as being dumped. China considered that the inclusion of non-dumped imports in the volume of "dumped imports" examined necessarily constitutes a violation of Articles 3.1 and 3.2 of the AD Agreement.

China argued that taking into consideration the fact that these two individually-examined Chinese producers were found not to be dumping; the Commission could not legitimately treat all imports from Chinese producers for which an individual dumping margin was not calculated as dumped. China submitted that the European Union violated Articles 3.1 and 3.2 of the AD Agreement by treating the imports of all Chinese producers who were not sampled or not subject to individual examination as being dumped.

China asserted that the European Union was not entitled to extrapolate from the sample, without taking into account the evidence that two producers for which individual dumping margins were calculated were found not to be dumping. China asserted further that, by failing to properly determine the "dumped imports", the European Union also violated Articles 3.4 of the AD Agreement, which requires investigating authorities to examine the impact of "dumped imports" on the domestic industry, and Article 3.5, which requires investigating authorities to demonstrate that the "dumped imports" are causing injury to the domestic industry.

Arguments of the Parties – European Union

The European Union asserted that imports from these two producers were very small, that these two producers were not included in the sample of Chinese producers, and that all of the sampled producers were found to be dumping at a significant margin.

The European Union argued that it was obvious that, given the small volume of non-dumped imports in question, their inclusion in the volume of dumped imports could not affect the outcome, and thus could not affect the objectivity of the injury determination within the meaning of Article 3.1 of the AD Agreement.

The European Union disagreed with China's contention that the Commission was wrong to treat imports from all non-sampled Chinese producers as dumped in examining the volume of dumped imports. The European Union maintained that it was entitled to consider all of these imports for which more than de minimis margins were established as dumped imports for the purposes of the volume and injury analysis.

The European Union noted that China's claims under Articles 3.4 and 3.5 of the AD Agreement are dependent on a finding of violation of Articles 3.1 and/or 3.2, and should be rejected, and that in any event, China had failed to set out a prima facie case of violation of those provisions.

Findings and Considerations of the Panel

The text of the AD Agreement is perfectly clear and the consideration of "dumped imports" for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than de minimis is established in the course of the investigation. The Panel cited the Appellate Body in EC – Bed Linen which stated that if a producer or exporter is not found to be dumping; all imports from that producer or exporter must be excluded from the volume of dumped imports.

In the Panel's view data concerning imports that includes imports that the investigating authority itself has determined are not dumped cannot simply be substituted for evidence of the actual volume of imports that are properly treated as dumped, regardless of the volume of non-dumped imports involved. Articles

3.1 and 3.2 are perfectly clear that the relevant consideration is of the volume of "dumped imports" without equivocation. The Panel distinguished the case of Japan – DRAMs (Korea) and held that the consideration of the volume of dumped imports is a necessary element of the determination of injury under Article 3.

The Panel thus concluded that the European Union erred in treating imports attributable to two companies which it found not to be dumping as dumped in the context of its injury determination. As a result, the European Union acted inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports. The Panel also thought it unnecessary to address China's consequential claims of violation of Articles 3.4 and 3.5, which are based on the same considerations.

With respect to the second aspect of China's claim the Panel maintained that it is clear that the conclusion of the investigating authority with respect to the sampled producers, that they were dumping, is not undermined by the fact that two producers not included in the sample were found not to be dumping upon being individually examined.

Article 9.4 of the AD Agreement makes clear that, if the sample for the dumping determination is selected consistently with the AD Agreement then the investigating authority may treat the findings of dumping made with respect to that sample of companies as establishing the existence of dumping by all non-sampled/unexamined companies for purposes of the imposition of anti-dumping duties. A similar result should follow with respect to the treatment of imports as dumped for purposes of the injury determination.

It seems inconsistent and illogical to accept that conclusions about dumping for sampled producers can be the basis for the imposition of anti-dumping duties on non-sampled/unexamined producers, but not to accept that those same conclusions about dumping may serve as evidence that imports attributable to non-sampled/unexamined producers are dumped in the same investigation.

In this case, where all sampled producers were found to be dumping, that evidence supports the European Union's treatment of all imports from non-sampled/unexamined producers as dumped for purposes of the injury determination.

That two producers not included in the sample but individually examined were found not to be dumping does not affect the relevance or probative value of the evidence drawn from the sample when all sampled producers were found to be dumping. Thus, that two exporters not included in the sample were found not to be dumping does not preclude the investigating authority from treating all imports from non-sampled/unexamined producers as dumped in this case, based on the evidence of the sample itself.

The Panel therefore concluded that the European Union did not err in treating all imports from non-sampled producers and exporters as dumped, in the context of its injury determination, and thus did not act inconsistently with Articles 3.1 and 3.2 in considering the volume of dumped imports. China's consequential claim of violation of Articles 3.4 and 3.5, which are based on the same considerations we have rejected above were also dismissed for the same reasons.

ix. Whether the European Union violated Articles 3.1 and 3.4 of the AD Agreement in its consideration of the consequent impact of dumped imports?

Arguments of the Parties – China

China argued that the European Union violated Articles 3.1 and 3.4 of the AD Agreement, because the Commission failed to objectively examine the impact of the dumped imports on the domestic industry on the basis of positive evidence.

First, China argued that the Commission did not examine all injury factors in relation to a domestic industry defined in a consistent manner. It maintained that the Commission should have consistently used the same set of companies with respect to its consideration of all injury factors China argued that the fact that the analysis of data for certain injury factors with respect to the sampled EU producers, or with respect to the EU industry, leads to different results constitutes evidence that the examination was not carried out objectively and was fundamentally biased.

Second, China alleged that the European Union did not objectively examine the profitability of the domestic industry. China asserted that the statement that the level of profitability was "low" and the conclusion that the dumped imports had a negative impact on profitability are inconsistent with this evidence, thus demonstrating that the conclusions were not objective.

Third, China asserted that the Commission's overall assessment of the impact of dumped imports on the EU industry was not objective. China contended that having found that all factors showed a positive trend, the Commission should have concluded that the EU industry had not suffered material injury. China considered that an objective examination of the Article 3.4 factors could only have led to a conclusion that the EU industry had suffered no injury

Finally, China contended that the Commission improperly considered the displacement of EU-manufactured fasteners by Chinese imports from certain market segments in making its determination. China asserted that the entire injury analysis was premised on the distinction between two market segments, and that the European Union's conclusions were based on the industry moving from production of standard fasteners to more production of special fasteners, allegedly because of pressure from dumped imports.

Arguments of the Parties – European Union

In the view of the European Union, information concerning the domestic industry as defined and the sample may both be considered, and for different factors, in making an injury determination, because the data for the sampled producers was reflective of the state of the entire domestic industry as defined.

With regard to China's second argument, the European Union contended that the Commission did take into consideration the slight increase in profitability registered during the period considered, but reasonably found that profitability was low compared to the reasonable target profit margin of 5 per cent.

In response to China's third argument, the European Union asserted that the Definitive Regulation shows that while only market share showed significant declines, evaluation of a number of other factors, including production, productivity and capacity utilization and profitability also revealed a negative assessment. The European Union maintained that the AD Agreement does not require that there be negative trends with regard to every injury factor in order to determine that the domestic industry suffers injury.

With respect to China's fourth argument, the European Union submitted that the Commission did not find that injury was caused only to one segment of the market. The European Union maintained that the Commission's conclusion clearly related that assessment to the finding of injury to the industry as a whole.

Findings and Considerations of the Panel

According to the Panel "once an investigating authority has identified the framework for its analysis ... it must use this identified framework consistently and coherently throughout an investigation" as per the Panel in Mexico – Steel Pipes and Tubes.

The fact that some information was only collected and analysed for the sample, while other information was collected and analysed for all producers in the industry cannot per se render the examination not objective. The Commission's practice of collecting and examining information on such factors as stocks, profitability and cash flow, investment, return on investments, ability to raise capital, and wages only from the sampled producers was not unreasonable on its face.

The Panel, noting that pursuant to Article 3.4, a determination of injury must be reached for the domestic industry that is the subject of the investigation as per EC – Bed Linen. The Panel thus rejected China's allegation that the fact that the Commission considered some injury factors on the basis of information for the domestic industry as defined, and for the remaining factors on the basis of information for the sample of that industry, demonstrates that the determination was not an objective examination based on positive evidence

It was clear that the parties receiving the Information Document were made aware that the analysis in that document was preliminary, that the investigation of certain elements to be analyzed would continue, and that the analysis in the Definitive Regulation might well be undertaken on the basis of different information. In the Panel's view, this alone sufficed as a basis to reject China's argument that the Commission's examination of information in the Definitive Regulation was "selective". China had not demonstrated that the consideration of data for the sample of the EU industry for some factors, and for the entire EU industry for others resulted in this case in bias in the analysis and outcome.

There is nothing in the AD Agreement that prescribes a threshold level of profitability that might be considered sufficiently "low" to support a conclusion of injury. In this case, the Commission found that a profit margin of 5 per cent was a level the industry could be expected to achieve in the absence of injurious dumping. In these circumstances, there was absolutely no basis to conclude that the Commission's conclusion that the level of profitability was "low" in the circumstances of this industry demonstrates a failure to examine the facts objectively.

The mere fact that a different conclusion can be reached, which China had requested the Panel to find, even if that different conclusion were one the Panel might have reached itself is insufficient to warrant overturning the evaluation of the investigating authority. The Panel therefore rejected China's allegation that the European Union failed to objectively examine the profitability of the EU industry.

Not only is there any methodological guidance under Article 3.4 for the required consideration of relevant economic factors there is also nothing in the text of Article 3.4 which requires that any particular factor or group of factors demonstrate "negative trends", which can be understand to mean declines, in order for a determination of injury to be made.

Based on the Panel's review of the Definitive Regulation, and of when a factor may be viewed as "negative" for purposes of evaluating injury factors, it rejected China's assertion that it is incorrect, as a matter of fact, to allege that a "significant number of injury factors" were negative.

The Panel thus concluded that the Commission's overall evaluation of the relevant injury factors reflects an objective examination of positive evidence, and its conclusions were such as could reasonably be reached by an objective decision-maker, on the basis of the facts and arguments before it, and we therefore reject China's allegation in this regard. It is clear that the Commission did not find injury to only the standard fasteners segment of the market, and thus did not conclude that injury resulted from a displacement of sales from one segment of the market to another.

Therefore, the Panel concluded that, as a matter of fact, the Commission did not "segment" its analysis of injury, and did not focus only on the standard fastener segment of the market.

x. Whether the European Union violated Articles 3.1 and 3.5 of the AD Agreement in its consideration of causation?

Arguments of the Parties – China

China contended that the European Union violated Articles 3.1 and 3.5 of the AD Agreement in concluding that dumped imports from China caused material injury to the EU Industry. China based its claim on two assertions of error: first,

that the Commission failed to demonstrate that the dumped imports, through the effects of dumping, are causing injury; and second, that the Commission failed to ensure that injury caused by factors other than dumped imports was not attributed to dumped imports.

China maintained that a mere "coincidence", that was, simultaneity of an increase in the volume of dumped imports and the existence of injury, was insufficient to establish the causal relationship required by the AD Agreement.

China submitted that the conclusion that there was a causal relationship between dumped imports and injury must be based on positive evidence, and argued that the Commission failed to adduce such evidence in its examination of the reasons why the EU industry produced more special and fewer standard fasteners.

With respect to the second assertion, China contended that the Commission failed to properly assess the injurious effects of increased raw material prices, and the effects of exports to third countries, and failed to ensure that injury caused by these factors was not attributed to dumped imports.

China maintained that the European Union failed to separate and distinguish the injurious effects of the increase in raw material prices from the injurious effects of dumped imports. China maintained further that the Commission based its assessment of export performance on data which do not relate to the domestic industry as defined in the investigation.

Arguments of the Parties – European Union

The European Union contended that China failed to establish a prima facie case with respect to both aspects of its causation claim. According to European Union the Commission's findings reflected that the commission's findings were reasonable and well analysed.

With respect to the second aspect of China's claim, the European Union contended that, contrary to China's arguments, the Commission did not consider the loss of market share by the EU industry as a cause of injury, but as an indicator of injury caused by the effects of dumped imports, finding a clear and direct link between the increase in dumped imports, their increase in market share, and the consequent loss of market share of the EU industry.

European Union noted that there was no specified methodology for conducting a non-attribution analysis, and that what was important was that injuries caused by other factors were not lumped together with injury caused by the dumped imports.

The European Union considered that the alternative information relied on by China in its arguments was not part of the record, and was not raised during the investigation. Thus, the European Union argued that it would be an unwarranted *de novo* review for the Panel to consider this information, which the European Union contended was incorrect.

Findings and Considerations of the Panel

An 'objective examination' [under Article 3.1] requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.

Unless a complaining party in dispute settlement demonstrate that the evidence and arguments before the investigating authority were such that an unbiased and objective investigating authority could not reach a particular conclusion, the Panel was obliged to sustain the investigating authority's judgment, even if it would not have reached that conclusion itself.

A review of the Definitive Regulation made it clear that while the coincidence in time of the increase in dumped imports and the decline in the EU industry's market share was certainly an element in the Commission's reasoning, it was not the entire basis for the conclusion that dumped imports caused injury to the domestic industry.

The Commission did not find that the EU industry was injured solely because market share declined, and did not consider the declining market share to be a cause of injury, but rather a factor demonstrating that injury existed which is a reasonable interpretation of the facts, and one which could be reached by an unbiased and objective investigating authority on the basis of the information before it.

With respect to the second aspect of China's claim, previous panel and Appellate Body reports made it clear that while an investigating authority was required to consider the effects of other factors known to the investigating authority

which may be causing injury to the domestic industry, there was no required method of analysis in undertaking that examination. It was clear that the Commission did consider the effect of increased raw material costs.

It appeared that the Commission did not, in fact, find that export performance was an "other factor which was injuring the domestic industry at the same time as dumped imports" within the meaning of Article 3.5 of the AD Agreement. However, it was also clear that this conclusion was based on information for all EU producers of fasteners, and not on information related to either the domestic industry as defined by the Commission, or the sampled producers examined in the investigation.

This ignored the fundamental principle reflected in the statement of the Panel in EC – Bed Linen, which according to the Panel was that the analysis of injury to the domestic industry should rest on information related to that industry, and not some other group of producers.

The Panel therefore concluded that, by relying on information concerning producers not part of the domestic industry in considering whether exports of the EU industry may have contributed to the injury suffered by the industry, the European Union failed to undertake an objective examination of the relevant facts in concluding that the export performance of the domestic industry was not a source of material injury to the EU industry. Thus, its conclusion concerning the effect of other factors were, in this respect, inconsistent with Articles 3.1 and 3.5 of the AD Agreement.

xi. Claims regarding procedural violations

a. Whether the European Union violated Articles 6.5, 6.2 and 6.4 of the AD Agreement by failing to disclose the identity of domestic producers?

Arguments of the Parties – China

China contended that the Commission did not disclose the identity of the complainants and the supporters of the complaint, treating this information as confidential on the grounds that its disclosure could lead to retaliation from complainants' and supporters' customers who import the subject product from China. China maintained that a claim of "potential commercial retaliation" does

not amount to "good cause" being shown for confidential treatment within the meaning of Article 6.5 of the AD Agreement.

Failure to disclose that information therefore also violated Article 6.4 of the AD Agreement, which requires that interested parties be given timely opportunities to see all non-confidential information which is used by the authorities and which is relevant to the preparation of their cases. China was of the view that a violation of the obligation set forth in Article 6.4 necessarily leads to a violation of Article 6.2, and that therefore, by not disclosing the identity of the complainants and the supporters, the European Union also acted inconsistently with Article 6.2 of the AD Agreement.

Arguments of the Parties – European Union

With respect to the claim under Article 6.5, the European Union noted that China seems to accept that in principle the identity of complainants can be treated as confidential information within the meaning of Article 6.5, but asserted that in this case no good cause was shown for such treatment.

The EU disagreed with China's contention that there had to be compelling evidence to show the existence of commercial retaliation from the customers of the complainants and the supporters of the complaint in the fasteners investigation. The European Union posits that potential commercial retaliation constitutes "good cause" within the meaning of Article 6.5.

As regards China's claims under Articles 6.4 and 6.2, the European Union submitted that these claims fall outside the Panel's terms of reference because China's panel request makes no reference to the identity of the complainants in connection with these two provisions.

In the alternative, the European Union argued that, with the exception of the independent claim under Article 6.2, these two claims are purely consequential to China's claim under Article 6.5 and since there is no violation of Article 6.5, there should be no violation of Articles 6.4 or 6.2.

Findings and Considerations of the Panel

To find a violation of Articles 6.4 and 6.2, the Panel necessarily have to find a violation of Article 6.5, which would mean that the identity of the

complainants and the supporters should not have been treated as confidential information. It is only if that information was wrongly treated as confidential that the Panel can engage in a substantive analysis of China's claims under Articles 6.4 and 6.2.

Article 6.5 addresses the treatment of information submitted to the investigating authorities in an anti-dumping investigation by interested parties for which confidential treatment is sought. It states that information which is by nature confidential or which is submitted on a confidential basis must be treated as confidential by the investigating authorities provided good cause is shown. Potential commercial retaliation" from the complainants' customers, who, in addition to buying the subject product from the complainants, also purchase imports from the country subject to the complaint, might have a "significantly adverse effect" upon the complainants. The purpose of granting confidential treatment as provided for in Article 6.5 is precisely to make sure that a feared adverse effect, in this case "potential commercial retaliation", remains hypothetical, and does not actually materialize

The Panel thus concluded that the Commission did not err in granting the request of the complainants and the supporters of the complaint to treat their identities as confidential, and therefore reject China's claim under Article 6.5.

Specific explanations provided in a panel request cannot be interpreted as limiting the scope of the claims under Articles 6.4 and 6.2 of the AD Agreement. The nature of the rights and obligations set forth in Articles 6.4 and 6.2 is such that a reference to these provisions, without further explanation, could suffice to put the responding Member on notice of the nature of the claim that the complainant might bring. China's claims were thus under Articles 6.4 and 6.2 of the AD Agreement with respect to the non-disclosure of the identity of the complainants and the supporters of the complaint are properly before the Panel.

The obligations in Articles 6.4 and 6.2 of the AD Agreement do not apply to information which is confidential within the meaning of Article 6.5 of the AD Agreement. Having concluded that the Commission did not err in treating the information as confidential, it was clear that there can be no violation under Articles 6.4 and 6.2 in the non-disclosure of that information.

b. Whether the European Union violated Articles 6.2, 6.4, 6.5 and 6.9 of the AD Agreement by failing to disclose aspects of the normal value determination?

Arguments of the Parties – China

China argued that the Commission acted inconsistently with the requirements of Articles 6.4 and 6.2 of the AD Agreement by failing to disclose information concerning the product types used in the determination of normal value. China also submitted that by refusing to provide this information the Commission also violated the more general due process obligation set out in Article 6.2 of the AD Agreement.

Second, China submitted that the Commission violated Article 6.4, and therefore also Article 6.2, of the AD Agreement by failing to disclose information on normal value calculations. China asserted that the Commission failed to disclose information on normal values calculated for each product type, and the calculations as to whether each product type was sold in representative quantities in the Indian market.

Third, China argued that the Commission violated Articles 6.4 and 6.2 of the AD Agreement by failing to disclose information regarding the comparison between the normal value and export price. Specifically, China argued that the Commission did not provide any information on how the distinction between standard and special fasteners was made and how the adjustment for quality control costs was made.

Finally, China argued that these three pieces of information constitute "facts" that established the basis of the European Union's decision as to whether or not definitive anti-dumping measures should be applied, and should therefore have been disclosed to the Chinese producers pursuant to Article 6.9.

Arguments of the Parties – European Union

The European Union contended, however, that these disclosure documents were susceptible to scrutiny under Article 6.9 of the AD Agreement, not Articles 6.4 or 6.2. The European Union argued that this claim was not within the Panel's terms of reference because China's panel request referred to "data concerning normal value determination", not to "product types for the normal value calculation".

As to the disclosure documents and the correspondence between the Chinese producers and the Commission, the European Union argued that those could in theory only be evidence of an alleged violation of Article 6.9 of the AD Agreement, but not of alleged violations of Articles 6.4 or 6.2.

With regard to China's second claim, the European Union posits that given the amount of information provided in the Definitive Regulation, China's claims under Articles 6.4 and 6.2 of the AD Agreement should be rejected. According to the European Union, since the information on the normal values of the Indian producer was treated as confidential under Article 6.5 of the AD Agreement, a decision China had not challenged, China's claim under Article 6.2 fails, because the obligation under this provision does not apply to confidential information.

With respect to China's third and fourth claims as well, the EU raised similar objections.

Findings and Considerations of the Panel

i. Alleged Violations of Articles 6.4 and 6.2 of the AD Agreement in connection with the Commission's dumping determinations

A reference to the data concerning normal value determination may reasonably be understood as also referring to the relevant product types on the basis of which data may be collected and analysed. The Panel therefore considered that China's claim that the Commission acted inconsistently with Articles 6.4 and 6.2 of the AD Agreement by failing to disclose information concerning the product types used in the determination of the normal value, and then proceeded to a substantive assessment of this claim.

As explained by the Panel in -EC – Salmon Article 6.4 generally stipulates that the authorities shall give interested parties "opportunities" to see all information used by the investigating authorities in an anti-dumping investigation. This right, however, was not unlimited. First, it applied to information which was used by the authorities. Second, the information must be relevant to the presentation of the interested parties' cases. Third, this right did not apply to confidential information. Fourth, the investigating authorities had to provide these opportunities "whenever practicable", and on a "timely" basis.

A violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential.

It was clear to the Panel that the rights of interested parties under Article 6.2 do not include any right to see information treated as confidential consistently with the provisions of Article 6.5 of the AD Agreement. The Panel also noted that, like Article 6.4, Article 6.2 does not require the investigating authorities to actively disclose information to interested parties.

China's claim under Articles 6.4 and 6.2 alleged that the Commission failed to "provide" three categories of information, that is, information on: 1) product types used in the determination of the normal value; 2) normal value determinations; and 3) the comparison between the normal value and the export price

Product Types

The General Disclosure Document made it clear that the Commission based its normal value determination on "product types", as opposed to PCNs, but did not provide any information as to the relevant characteristics of those groups, or how they were determined. Chinese producers were informed very late in the proceedings of the product types that formed the basis of the comparisons underlying the Commission's dumping determinations. Two of them requested information pertaining to those product types, but were not given a timely opportunity to see the relevant information by the Commission.

The European Union failed to provide a timely opportunity for the Chinese exporters to see information relevant to the presentation of their cases, in violation of Article 6.4 of the AD Agreement.

The European Union had failed to demonstrate that the information in question was confidential, or was withheld from access on the basis of confidentiality, and therefore do not consider that China's arguments had been rebutted.

The Panel thus concluded that the European Union violated Article 6.4 of the AD Agreement by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established, information relevant to the presentation of their case.

Normal Value Determinations

Articles 6.4 and 6.2 of the AD Agreement do not impose any affirmative disclosure obligations on the investigating authorities. The Panel therefore concluded that China had failed to make a prima facie case of violation under these two provisions with respect to the alleged non-disclosure of information on the normal value determinations in the General and Individual Disclosure Documents, and therefore rejected China's claim.

Comparison between the Normal Value and the Export Price

China's allegations in this regard were not sufficient to constitute a prima facie case of violation of Article 6.4 of the Agreement. China failed to show that a request to see information used by the Commission which was relevant to the presentation of Chinese producers' cases was rejected by the Commission. However, there is nothing in the text of either Article 6.4 or Article 6.2 that requires an investigating authority to give any explanation at all with respect to the information it makes available to the parties.

Thus, China had not made a prima facie case of violation of Article 6.4 in this regard, and therefore the Panel rejected China's claim. In the absence of any additional arguments with respect to the alleged violation of Article 6.2 of the AD Agreement, this claim was also rejected.

ii. Alleged Violation of Article 6.9 of the AD Agreement in connection with the Commission's dumping determinations

While there does not have to be precise identity between China's request for consultations and its panel request, the request for consultations and the Panel request must concern "the same matter" and the Panel must be able to conclude that the legal basis of the Panel request "may reasonably be said to have evolved from the legal basis identified in the request for consultations", in order for a claim not specifically identified in China's request for consultations, but properly identified in the Panel request, to fall within our terms of reference. The Panel concluded this standard is not satisfied with respect to China's claim under Article 6.9. There is no reference to Article 6.9 in China's request for consultations, nor any narrative description indicating that China might intend to raise a claim under Article 6.9 in the context of the Commission's dumping determinations.

Thus, even though China's claim under Article 6.9 is premised on the same factual basis, given that there was no reference whatsoever to Article 6.9 in the request for consultations, nor any explanation that might suggest that this information was not disclosed as required by Article 6.9, the Panel concluded that consultations were not held with respect to China's claim under Article 6.9, and that therefore, pursuant to Article 6.2 of the DSU, this claim was not within its terms of reference, as defined in Article 7.1 of the DSU.

c. Whether the European Union violated Articles 6.5, 6.2 and 6.4 of the AD Agreement in connection with the non-confidential version of certain questionnaire responses?

Arguments of the Parties – China

China argued that the non-confidential versions of the questionnaire responses by EU producers, and that of the producer in India, were deficient compared with the requirements of Article 6.5 of the AD Agreement. China argued further that the Commission violated Article 6.5.1 of the AD Agreement by not requiring non-confidential summaries of the confidential information submitted by two producers which were sufficiently detailed to permit a reasonable understanding of the confidential information.

China also asserted that by failing to make sure that these three questionnaire responses included all relevant information, whether in confidential or non-confidential format, the Commission also violated the Chinese producers' procedural rights under Articles 6.4 and 6.2 of the AD Agreement.

Arguments of the Parties – European Union

The European Union argued that China has not developed its claim under Articles 6.4 and 6.2 of the AD Agreement. With respect to the claim under Article 6.5, the European Union argued that China had not developed this claim in connection with the questionnaire response of the Indian producer.

The European Union asserted that the non-confidential versions of the questionnaires demonstrate that "it has clearly been possible for the interested parties to defend themselves in respect of injury factors". The European Union concluded that China had failed to make a prima facie case under Article 6.5.

Findings and Considerations of the Panel

The chapeau of Article 6.5 sets forth the general principle that provided good cause is shown, information that is by nature confidential and information submitted on a confidential basis must be treated as confidential, and the investigating authorities may not disclose such information without specific permission from the party submitting it.

Article 6.5.1, in turn, stipulates that investigating authorities shall require interested parties submitting confidential information to submit a non-confidential summary thereof, which must be prepared in such a way as to allow other interested parties to have a reasonable understanding of the substance of the confidential information.

The investigating authority must ensure that an appropriate non-confidential summary was provided, or in exceptional circumstances, if that was not possible, that an appropriate statement of reasons why summarization was not possible was given.

One of the EU producer Agrati's statements simply reflected that its disclosure would have a significantly adverse effect on the person supplying it and asserts that the confidential information cannot be summarized without disclosure. The statement did not, however, relate to any of the specific information for which no non-confidential summary is provided, or to anything having to do with Agrati itself, the party supplying it. These categories of information are in fact susceptible of summary. There was certainly nothing in Agrati's stated reason which would demonstrate otherwise. The Panel therefore considered that the Commission failed to ensure Agrati's compliance with the requirements of Article 6.5.1, and thus acted inconsistently with that provision with respect to Agrati.

The second EU producer Fontana Luigi's statement does not even assert that the confidential information cannot be summarized, but simply asserts that the information is "by nature confidential". Fontana Luigi's statement is not related to the specific information for which no non-confidential summary is provided, or to anything having to do with Fontana Luigi itself, the party supplying it. The Panel therefore considered that the Commission failed to ensure Fontana Luigi's compliance with the requirements of Article 6.5.1, and thus acted inconsistently with that provision with respect to Fontana Luigi.

There was no evidence to suggest that a showing of good cause was made for treating this information as confidential as required by Article 6.5, whether such treatment is requested for information which is by nature confidential, or information submitted on a confidential basis.

The Commission acted inconsistently with its obligations under Article 6.5 of the AD Agreement with respect to the treatment of the confidential information in Pooja Forge's questionnaire response.

Having found violations of Article 6.5.1 in connection with the non-confidential versions of the questionnaire responses of Agrati and Fontana Luigi, and of Article 6.5 in connection with the questionnaire response of Pooja Forge, the Panel exercised judicial economy and decided that additional findings on China's claims under Articles 6.4 and 6.2 would not contribute to the resolution of this dispute or be potentially useful in implementation.

d. Whether the European Union violated Articles 6.5, 6.2 and 6.4 of the AD Agreement by failing to disclose the Eurostat data on total EU production of fasteners?

Arguments of the Parties – China

China contended that although the complaint provided the source data for total exports and imports, data for total production were not provided on the grounds that this was confidential information and this violated Article 6.5 of the AD Agreement.

According to China, the Commission violated Article 6.5 of the AD Agreement by treating as confidential the Eurostat data and information as to how the estimation of total EU production was made, and particularly as to whether adjustments had been made to the Eurostat data.

China argued that the Eurostat data and the information as to how the estimation of total EU production had been made, was information used by the Commission and was relevant to the presentation of the Chinese producers' cases and by failing to provide access to such information EU also violated Articles 6.2 and 6.4 of the AD Agreement.

Arguments of the Parties – European Union

The European Union contended that Article 6.5 refers to information, not documents or original sources, and asserted that what matters under this provision was the content of the information, not the original document. The European Union asserted that the Chinese producers were "given access to the relevant Eurostat information, including the fact that source of the information was Eurostat". Therefore, the European Union contended, there was no violation of Article 6.5, and consequently no violation of Article 6.2 and 6.4.

Findings and Considerations of the Panel

The obligation set forth in Article 6.5 applies to the confidential treatment of information, not the methodology used and determinations made by the investigating authorities and the question whether or not these matters can be kept confidential or must be disclosed does not fall within the scope of Article 6.5.

Information that was publicly available was not confidential within the meaning of Article 6.5 of the AD Agreement. However, the Commission treated this information as confidential information, despite that good cause had not been shown which is inconsistent with the letter of Article 6.5 of the AD Agreement. The fact that this information was available in the public domain was not, an excuse for disregarding the requirements of Article 6.5.

Article 6.4 requires the authorities "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential ... and that is used by the authorities". Chinese producers had adequate opportunities to see that information and the Panel therefore reject China's claim that the Commission violated the obligation set out under Article 6.4 of the AD Agreement with respect to this information as also the claim under Article 6.4.

e. Whether the European Union violated Articles 6.9, 6.2 and 6.4 of the AD Agreement in procedural aspects of the domestic industry definition?

Arguments of the Parties – China

China submitted that the Commission's determination regarding the number

of producers included in the domestic industry definition was unclear, and specifically, that the Commission indicated in the Information Document that the number of producers in the industry was 114, and in the General Disclosure Document (and in the Definitive Regulation) indicated that the number of producers in the domestic industry was 46.

China contended that by failing to give access to relevant information concerning the definition of the domestic industry, and in particular, how many producers were actually included in the domestic industry definition and their identity as well as the identity of the producers that were excluded from the scope of the domestic industry, the Commission violated Articles 6.2 and 6.4 of the AD Agreement.

China added that by not disclosing in the Disclosure Document (i) the number of companies constituting the domestic industry, (ii) whether or not such companies supported the complaint, (iii) their identity and (iv) the reason for the reduction from 86 to 46 companies, the Commission also violated Article 6.9 of the AD Agreement.

Arguments of the Parties – European Union

The European Union asserted that the "evidence" China relied on to support its claims under Articles 6.2 and 6.4 is certain recitals in the Definitive Regulation, and contends that these recitals cannot constitute evidence of a violation of these two provisions. The European Union considered that China had failed to make a prima facie case in connection with its claims under Articles 6.2 and 6.4.

The European Union contended that China's claim under Article 6.9 was outside the Panel's terms of reference, because the parties did not consult on this claim and in the alternative, the European Union considered that China had failed to present any evidence or argument in support of this claim, and therefore had failed to make a prima facie case with regard to this claim.

Findings and Considerations of the Panel

Articles 6.2 and 6.4 do not impose any affirmative obligation on investigating authorities to actively disclose information to interested parties. China's claim focuses on the definition of the domestic industry, specifically the number and identity of producers in that industry which does not constitute information per

se. China had failed to establish a prima facie case of violation of Article 6.4 of the AD Agreement because the facts and argument it presents are not relevant to the obligation set out in Article 6.4.

Similarly, the fact that the Commission made, and notified parties concerning, conclusions with respect to the definition of the domestic industry at various stages of the proceeding establishes, even prima facie, does not constitute a violation of the Article 6.2 requirement to provide interested parties a full opportunity for the defence of their interests.

With respect to China's claim under Article 6.9 relating to the normal value calculations the Panel concluded that they were not the subject of consultations, given that the request for consultations contains no reference to Article 6.9, and therefore found these claims not to be within its terms of reference.

f. Whether the European Union violated Article 12.2.2 of the AD Agreement in procedural aspects of individual treatment determinations?

Arguments of the Parties – China

China argued that determinations concerning individual treatment constitute "matters of fact and law" within the meaning of Article 12.2.2, and that therefore, the Commission was required to explain the reasons for its determination with respect to each request. China asserted that the requirement to explain was not limited to situations where requests for IT were rejected.

Therefore, China asserts, by not explaining the basis for its decisions granting the requests for IT, the Commission acted inconsistently with the obligation set forth under Article 12.2.2 of the AD Agreement.

Arguments of the Parties – European Union

The European Union first asserted that this claim was not within the Panel's terms of reference because China failed to consult with the European Union with regard to Article 12.2.2.

In the alternative, the EU argued that the Definitive Regulation states that all Chinese producers that requested individual treatment were granted such treatment

because each of them satisfied the criteria set out in Article 9(5) of the Basic AD Regulation, which being a positive decision, there can be no need to explain such a decision in the Definitive Regulation in any more detail beyond explaining that the relevant conditions have been fulfilled.

Findings and Considerations of the Panel

China's request for consultations encompassed its complaint under Article 12.2.2 with respect to the Definitive Regulation. Where there was a substantive inconsistency with the provisions of the AD Agreement, it was not necessary to consider whether there was a violation of Article 12, as the question of whether the notice was "sufficient" under Articles 12.2 and 12.2.2 was immaterial.

The obligations with respect to explanation of determinations were not limited only to determinations that are unfavourable to a particular interested party or group of interested parties. On the other hand, however, it was also clear that the nature and content of the explanation given may well differ depending on the nature of the determination or decision in question.

The Panel ruled that since it had found the provisions of Article 9(5) of the Basic AD Regulation at issue in connection with this claim to be inconsistent with the European Union's obligations, both as such and as applied, it would not be appropriate to rule on whether the Definitive Regulation in this case was consistent with the requirements of Article 12.2.2.

g. Whether the European Union violated Article 6.5 of the AD Agreement by disclosing confidential information?

Arguments of the Parties – China

China stated that the document submitted as evidence along with their MET requests contained confidential information for each of the nine Chinese producers, concerning ownership of the company, sales, costs, profits, subsidies, accounting systems, assets, etc, which is sensitive and was submitted on a confidential basis, as indicated by the label "LIMITED" on the MET/IT Claim Forms.

China asserted that by failing to treat the information as confidential and disclosing it to interested parties other than the producers whose information it was, the European Union violated Article 6.5 of the AD Agreement.

Arguments of the Parties – European Union

The European Union contended that China's claim was based on general assertions and that China had failed to make a prima facie case of violation. The European Union also asserted that the information in the document was very general and did not disclose any specific information submitted on a confidential basis. Moreover, the European Union contended that none of the companies concerned have complained about confidential information having been disclosed.

Findings and Considerations of the Panel

It became evident to the Panel on examining the evidence that the Chinese exporting producers provided the information in the MET forms to the Commission on a confidential basis. They were entitled to expect that the information would be treated as confidential by the Commission in the course of the investigation, as required by EU law and Article 6.5. It was thus clear that the European Union treated the MET Disclosure Document as one containing confidential information, to be treated as such as required by EU law and Article 6.5

It was within the power of the Commission to disclose internal documents to whomever it may choose, provided that it does not, by so doing, violate some other relevant obligation. Merely because a document was labelled as such did not demonstrate that the information it contains was confidential within the meaning of Article 6.5. It was clear that an investigating authority may conclude that information submitted as confidential does not merit such treatment. Even assuming that the MET Disclosure Document did not contain any data on the volume, value, or unit price of sales, actual costs of the companies concerned, percentage or value of profits, value of any subsidy received, or the value of the assets of the companies examined this does not demonstrate that the document contains only non-confidential information. Information which may properly be treated as confidential under Article 6.5 was not necessarily limited to data of the types referred to by the European Union, but may include any type of information submitted on a confidential basis.

Based on the foregoing, the Panel concluded that the European Union violated Article 6.5 of the AD Agreement by disclosing confidential information.

h. Whether the European Union violated Article 6.1.1 of the AD Agreement by failing to provide sufficient time to respond to requests for information?

Arguments of the Parties – China

China asserted that, in this case, the Commission gave Chinese producers only 15 days from the date of the Notice of Initiation to submit "questionnaires" for companies claiming market economy status and/or individual treatment. In China's view, the Commission should have given Chinese producers 30 days to submit their claims for market economy treatment and/or for individual treatment, and should have started to count that period from the date of receipt as per Article 6.1.1 of the AD Agreement.

Arguments of the Parties – European Union

The European Union asserted that China's premise, that the document in question was a "questionnaire" within the meaning of Article 6.1.1, was fundamentally flawed, asserting that the provision applies to the initial overall questionnaire, citing in this regard the Panel report in Egypt – Steel Rebar.

Moreover, the European Union contended that the decision whether to grant MET and/or IT must be made early in the investigation, as it has important consequences for the investigation, and thus consideration of claims in this regard must not become an obstacle to the conduct of the investigation. Finally, the European Union asserted that the 15-day period was reasonable, noting that the same period was given to other parties for submission of basic information.

Findings and Considerations of the Panel

The term "questionnaires" in Article 6.1.1 referred to one kind of document in an investigation and the consideration of various contexts suggest that it refers to the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which questionnaire seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation).

Merely because the first request for information sent to Chinese exporters did not, ipso facto, demonstrate that it was a questionnaire within the meaning of Article 6.1.1. According to the Panel the substance of the document was critical to determining whether it was such a questionnaire. The "MET claim form" cannot be considered a "questionnaire" within the meaning of Article 6.1.1

The resolution of the MET and IT tests was important for the Chinese exporting producers, but the Panel did not consider that this changes the nature of the questionnaire, or brings it within the scope of Article 6.1.1 and hence the European Union did not violate Article 6.1.1 of the AD Agreement by not providing Chinese exporters with 30 days to submit their responses.

Conclusion and Recommendations

Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that to the extent the European Union had acted inconsistently with the provisions of the AD Agreement and GATT 1994, it had nullified or impaired benefits accruing to China under those Agreements. The Panel therefore recommended that the Dispute Settlement Body request the European Union to bring its measure into conformity with its obligations under the AD Agreement and GATT 1994.

On the issue of China's requests suggesting ways in which the European Union could implement the recommendations and rulings of the DSB the Panel held that a panel must ("shall") recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity", but has discretion to ("may") suggest ways in which a Member could implement that recommendation. Clearly, however, a panel was not required to make a suggestion should it not deem it appropriate to do so.

In this case, although the Panel found the contested measures inconsistent with the AD Agreement, the GATT 1994 and the WTO Agreement in a number of respects, it did not found appropriate to make a suggestion with respect to implementation, and therefore deny China's request.

8. UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA, WT/DS399/R, 13 December, 2010

Parties:
People's Republic of China
United States of America

Third Parties:
The European Union, Japan, Chinese Taipei, Turkey, and Viet Nam

Factual Matrix:

On 14 September 2009, the People's Republic of China requested consultations with the United States pursuant to Article XXIII: 1 of the GATT 1994, Articles 1 and 4 of the DSU and Article 14 of the Safeguards Agreement, with regard to certain measures taken by the United States allegedly affecting the import of certain passenger vehicle and light truck tyres from China. China and the United States held consultations but failed to resolve the dispute. At the DSB meeting on 19 January 2010, China requested the establishment of a Panel pursuant to Article XXIII: 2 of the GATT 1994, Articles 4.7 and 6 of the DSU and Article 14 of the Safeguards Agreement. At that meeting, the DSB established a panel pursuant to the request of China.

This dispute was about a transitional product-specific safeguard measure under Paragraph 16 of the Protocol that had been applied on imports of certain passenger vehicle and light truck tyres from China by the US pursuant to Section 421 of the Trade Act of 1974. The United States International Trade Commission ("USITC") determined that there was market disruption as a result of rapidly increasing imports of subject tyres from China that were a significant cause of material injury to the domestic industry. Following a Presidential decision additional duties have been imposed on imports of subject tyres for a three-year period, in the amount of 35 per cent ad valorem in the first year, 30 per cent ad valorem in the second year, and 25 per cent ad valorem in the third year. The Tyres measure took effect on 26 September 2009.

China made seven specific claims in this dispute and requested the Panel to find that:

i. the United States failed to evaluate properly whether imports from China were in "such increased quantities" and "increasing rapidly" as required by Paragraphs 16.1 and 16.4 of the Protocol;

ii. the U.S. statute implementing the causation standard of Paragraph 16 into U.S. law was inconsistent "as such" with Paragraphs 16.1 and 16.4 of the Protocol;

iii. the United States failed to evaluate properly whether imports from China were a "significant cause" as required by Paragraphs 16.1 and 16.4 of the Protocol;

iv. the United States had imposed a transitional safeguard measure that goes beyond the "extent necessary", and thus it was inconsistent with Paragraph 16.3 of the Protocol;

v. the United States had imposed a transitional safeguard measure for a three-year period that is beyond "such period of time" that was "necessary", and thus it was inconsistent with Paragraph 16.6 of the Protocol.

vi. the transitional safeguard measure was inconsistent with Article I:1 of the GATT 1994 as the United States did not accord the same treatment that it grants to passenger vehicle and light truck tyres originating in other countries to like products originating in China;

vii. the transitional safeguard measure was inconsistent with Article II:1(b) of GATT 1994 as the tariffs consist of unjustified modifications of U.S. concessions on passenger vehicle and light truck tyres under the GATT 1994.

Arguments of the parties

Arguments on behalf of China:

Was the USITC entitled to find that imports were "increasing rapidly" in accordance with paragraph 16 of the protocol?

China claimed that the United States did not properly evaluate whether imports from China were "increasing rapidly" in accordance with Paragraph 16.4 of the Protocol. China further claimed that Paragraph 16.1 and Paragraph 16.4 both use the present continuous tense in detailing the increased imports standard under the Protocol. Thus, the term "increasing" means imports must be increasing in the most recent past. In its view, this was the year 2008 which had witnessed a decline in the rate of increase (at 10.8 %) leading to the conclusion that imports were no longer "increasing rapidly". China placed its reliance on the Panel finding in US – Steel Safeguards[122] which held an increase of 11.9 % during the most recent full year of data not to be sufficient to constitute "increased imports".

China also claimed that the blurring of the last two years of the investigation obscures the fact that 39 per cent of the growth in market share occurred from 2006 to 2007. Between 2007 and 2008 the growth of market share was only 22 per cent.

In summation, China argued that the USITC improperly relied on an end-point-to-end-point analysis of imports; on increases in value rather than increases in volume; did not take account of the fact that subject imports began from a low base; and should have collected data for the first quarter of 2009.

Was the U.S. implementing statute's causation standard inconsistent as such with paragraph 16.1 and paragraph 16.4 of the protocol?

In US – Customs Bond Directive[123] it was held that "the Appellate Body has explained that Panels are not obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory". Moreover, the United States had not argued, and indeed cannot argue, that the USITC was free to disregard the statutory definition at its discretion.

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122 Appellate Body Report, US-Steel Safeguards, para 367

123 Panel Report, US Customs Bond Directive, para 7.209

China claimed that Section 421 was "as such" inconsistent with Paragraph 16 of the Protocol (irrespective of the way in which the USITC applied that standard in the Tyres investigation), because it failed to fully implement the "significant cause" standard set forth in Paragraph 16.4 of the Protocol. First, the statute lowers the Paragraph 16.4 causation standard by redefining "significant cause" as "contributes significantly". A cause "produces" or "brings about" the consequence, and does not merely "contribute to" or "play a part" in its occurrence. Moreover, a factor can make an "important contribution" at a far lower level of casual relationship than when it rises to the level of an "important cause".

Second, the statute further lowered the causation standard by allowing imports to be a less important factor than any other single cause, no matter how minor that other cause might be. In circumstances where there were also other causes of injury to the domestic industry, the "significance" of the increased imports as a causal factor should be assessed relative to those other causes, rather than in a vacuum; the Section 421 "contributes significantly" standard requires no more than a "mere" contribution.

Whether the USITC properly found that rapidly increasing imports were a significant cause of material injury?

The nature of the analysis required by Paragraph 16 of the Protocol

China claimed that the USITC was required to analyse the conditions of competition and correlation. WTO case law has established that the conditions of competition must always be analysed under Article 2.1 of the Safeguards Agreement which refers to a product being imported in increased quantities and "under such conditions" as to cause serious injury. Paragraph 16.1 of the Protocol contained the same language ("under such conditions"). Moreover, WTO case law highlights the central role played by correlation in the context of establishing causation under the Safeguards Agreement.

China attributed the injury suffered by the U.S. domestic industry to a number of alternative factors, including changes in demand and the domestic industry's business strategy. China contended that the USITC ignored or failed to assess fully these other causes of injury, or to establish that the injury caused by such other factors was not improperly attributed to the subject imports.

The conditions of competition between subject imports and domestic tyres

USITC's causation analysis was based on a misinterpretation and distortion of the conditions of competition, such that the USITC failed to understand the attenuated nature of competition between subject imports from China and domestic tyres. It improperly dismissed the fact (a) that subject imports and domestic tyres focus on different market segments in the replacement tyre market, and (b) that U.S. producers have a greater involvement in the OEM sector, and, (c) improperly concluded from questionnaire responses that subject imports and domestic tyres were substitutable.

The replacement market was based on the existence of three distinct tiers, or market segments. China claimed that domestic tyres were confined principally to tier 1, whereas subject imports were confined principally to tiers 2 and 3. China asserted that the limited presence of domestic tyres in tiers 2 and 3 meant that there was only "vestigial" competition between subject imports and domestic tyres in those segments.

Furthermore, the USITC failed to accord significance to the U.S. producers' greater involvement in the OEM market. It incorrectly found that there was competition between domestic tyres and subject imports in the OEM market, even though between 17.7 and 23.3 per cent of U.S. producers' shipments were in the OEM market, whereas only 0.8 to 7.3 per cent of subject imports went to the OEM market. Subject imports only accounted for 0.2 to 4.9 per cent of all OEM shipments, such that any competition between subject imports and domestic tyres in the domestic OEM market was negligible.

It improperly found that subject imports and domestic tyres were on the basis of "vague" responses to a questionnaire that simply asked producers, importers and purchasers "if subject tires produced in the United States and in other countries are used interchangeably", giving the option of "always", "frequently", "sometimes", and "never"; exactly this type of subjective and overbroad questionnaire data had been warned against by the Panel in Argentina – Footwear (EC).[124]

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[124] Panel Report, Argentina-Footwear (EC) para 8.238, Appellate Body Report, Argentina Footwear (EC) paras 144-145

Correlation between the increase in imports and the decline in injury factors

On the question of the type of correlation that might be sufficient to establish causation under Paragraph 16 of the Protocol, China contended that mere temporal coincidence would not suffice. More is required to be proved in the sense that the degree of the increases in imports should correspond with the degree of the declines in injury factors. A simple assessment of whether an upward movement in imports over the period coincides with a downward movement in injury factors amounts to no more than an end-point-to-end-point analysis, of the sort condemned by the Appellate Body in Argentina – Footwear (EC).[125]

It further claimed that there was no correlation between the increase in subject imports and the increase in the COGS (Costs of goods sold)/sales ratio.

The non-attribution of injury caused by other factors to increasing imports

The domestic industry's business strategy

China claimed that the domestic industry's business strategy was an "other cause" of material injury to the domestic industry, in the sense that declines in certain injury indicators (such as the volume-metrics, including production, shipments and net sales quantities) should be attributed to the domestic industry's withdrawal from the low-value segments of the replacement market (i.e., tiers 2 and 3), rather than subject imports. Thus, subject imports merely filled a "supply gap" left by the retreating domestic industry. Subject imports were to some extent presented as an "own goal", since they result from the industry's own business strategy.

At the same time, though, China argued that the U.S. producers were "global companies with global sourcing strategies", and that their "[o]perations in China have enhanced the[ir] profitability". Moreover, "the imports from China (and other low-cost jurisdictions) are a positive factor" for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires". In this sense, it also presented the subject imports resulting from the domestic industry's strategy of off-shoring the production of low-value tyres as being non-injurious.

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125 Ibid

USITC improperly attributed plant closings to imports from China, when the record in fact demonstrated that domestic producers were engaged in a long-term strategy that led them to voluntarily close high-cost U.S. plants and plants that focused on small-sized or low-value tyres, and shift production in the United States towards the higher-end segments of the market. It alleged that the domestic industry voluntarily ceded the low end of the market because it was profitable to do so. In particular, "the imports from China (and other low-cost jurisdictions) were a positive factor" for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires". The mere fact that Chinese companies purchased western tyre manufacturing equipment says nothing about whether the U.S. producers voluntarily adopted their business strategy, or were "forced" to curtail lower-end manufacture in the United States by imports from China arriving in the U.S. market.

Moreover, the fact that U.S. producers were not the largest importers of Chinese tyres is a non sequitur, and had no bearing on whether imports from China were a significant cause of the business strategy that these global producers adopted.

Changes in demand

Any injury suffered by the domestic industry was caused by changes in demand, rather than subject imports. There was a prolonged contraction in demand over the period of investigation, with apparent consumption falling by 10.3 per cent during the 2004-2008 periods. The contraction in demand was particularly pronounced in the OEM market, with total shipments in that market falling by 28 per cent; the U.S. producers devoted approximately 20 per cent of their domestic production to the OEM market. The recession of 2008, and the near-collapse of the U.S. auto industry, greatly accelerated this contraction in demand and consumer demand shifted in favour of larger tyres, even for smaller, fuel-efficient vehicles. This required producers to shift production, and in some cases reduce capacity or close factories that produced smaller tyres.

Non-subject imports

The USITC also failed to properly analyse the injury caused to the domestic industry by imports from countries other than China; resulting in injury caused by non-subject imports being improperly attributed to subject imports. The non-subject imports were also cheaper than U.S.-made tyres.

Whether the transitional safeguard measure went beyond the "Extent Necessary", Contrary to paragraph 16.3 of the protocol?

First, China claimed that no remedy is appropriate in this case as the USITC failed to establish that 'increasing rapidly' imports from China were a 'significant cause' of market disruption.

Second, China claims that even if the United States had complied with the other requirements of Paragraph 16, the specific remedy applied by the United States in this case was inconsistent with Paragraph 16.3 because the remedy was not limited to the market disruption caused by rapidly increasing imports from China. China claimed that the United States instead imposed a remedy that addressed all of the alleged market disruption, including that caused by factors other than rapidly increasing imports.

Whether the duration of the remedy exceeded the period of the time necessary to prevent or remedy market disruption?

China claimed that the three-year duration of the remedy exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of the Protocol.

Whether the U.S. tyres measures were inconsistent with articles I:1 and II:1(B) of the GATT 1994?

China claimed that the imposition of additional (transitional safeguard) duties on imports of subject tyres from China is inconsistent with Article I.1 of the GATT 1994. China also claimed that the imposition of the additional (transitional safeguard) duties on imports of subject tyres from China is inconsistent with Article II.1 (b) of the GATT 1994

Arguments on behalf of the United States:

A. Was the USITC entitled to find that imports were "increasing rapidly" in accordance with paragraph 16 of the protocol?

The United States argued that China sought to have the Panel impose an overly restrictive view of how recent increases in imports should be in order to comply with the Protocol. There was no meaningful distinction between the

language in the Protocol and the language in the Safeguards Agreement to indicate an investigating authority must focus its analysis on a more recent period of time under the Protocol compared to the Safeguards Agreement.

China's view that imports must be "steep" or "surging", imposes a higher standard to find that imports were "increasing rapidly" than is warranted by the text. Nor does the Protocol "suggest that imports must be growing at their most rapid pace at the end of the period examined by a competent authority". It only required that the competent authority find that there was a rapid increase in imports on an absolute or relative basis, during the period. US had placed reliance on Appellate Body ruling in Argentina – Footwear (EC) and US – Lamb where it held that "competent authorities should not consider such data [from the most recent past] in isolation from the data pertaining to the entire period of investigation".

B. Was the U.S. implementing statute's causation standard inconsistent as such with paragraph 16.1 and paragraph 16.4 of the protocol?

Consistent with a long-standing distinction in GATT and WTO case law between mandatory and discretionary legislation, China must demonstrate that Section 421 mandates, or requires, the USITC to apply a causation standard that is inconsistent with the Protocol. There was nothing in the U.S. statute that mandates action that is inconsistent with the United States' obligations under the Protocol.

Paragraph 16.4 refers to "a significant cause", indicating that increased imports might be one of several "significant causes" of injury to the domestic industry. This provision did not, either require the weighing of causal factors, or preclude a finding that increased imports were a "significant cause" of material injury simply because the causal effect of such increased imports may be less than some other factor(s).

C. Whether the USITC properly found that rapidly increasing imports were a significant cause of material injury?

The nature of the analysis required by Paragraph 16 of the Protocol

The United States denied, as a legal matter, that an investigating authority was required to analyse the conditions of competition under Paragraph 16 of the Protocol. This was because unlike the language of the Safeguards Agreement which specifically requires an analysis of increased quantities and the conditions under

which imports were causing serious injury, the Protocol indicated that increased quantities alone or conditions alone might cause market disruption.

Unlike the Safeguards Agreement and the Anti Dumping Agreement, the Protocol did not contain "non-attribution" language. Thus applying the principle of inclusio unius est exclusio alterius, it was clear that the drafters did not want intend to include the non-attribution requirement in the Protocol, i.e. the need to consider other causes, and ensure that their injurious effects were not attributed to rapidly increasing imports.

The conditions of competition between subject imports and domestic tyres

Although the U.S. replacement market could generally be segmented into three categories, market participants did not agree on which tyres fell into which categories. The results of the supplemental questionnaire evidenced the fact that there was no bright line or industry-wide accepted dividing line between the three categories. The USITC found that subject imports and the domestic product were both present in category one, and that both had a significant presence in categories two and three. Thus, there was no merit in China's argument that there was little competition between subject tyres and U.S. tyres.

Furthermore, data gathered by the USITC revealed that in every year of the period, there were considerable amounts of U.S. tyres and an increasingly significant amount of subject imports in the OEM market, thereby demonstrating that there was competition between imports from China and domestically produced tyres in the OEM market.

The United States maintained that, according to the evidence collected by the questionnaire, the large majority of responding market participants, whether they are producers, importers, or purchasers, indicated that market segmentation was not a bar to, or limit on the inter-changeability of the subject and U.S. tyres.

Correlation between the increase in imports and the decline in injury factors

The United States considered that there need only be an overall coincidence between imports and injury factors, in the sense that the upward movements in imports should occur at the same time as the downward movements in injury

factors. Moreover, the fact that the ratio of cost of goods sold to sales declined in 2007, when subject imports increased at the greatest rate, was not enough to show that overall coincidence was not present, as in every other year of the period the ratio of cost of goods sold to sales increased, thus corresponding with increases in the volumes of subject imports in every year.

The non-attribution of injury caused by other factors to increasing imports

The domestic industry's business strategy

The United States contended that the record showed that imports were already increasing before the announced plant closings, and that U.S. producers issued contemporaneous statements at the time of these plant closings confirming that low-priced competition from imports, including subject imports from China, was an important part of their decisions.

The USITC relied on the articles in trade publications to demonstrate that market participants were well aware of the extraordinary growth in the size and export capacity of the Chinese industry before and during the period of investigation. According to the United States, the USITC reasonably relied on this article as evidence that U.S. producers had closed certain production facilities as a strategy to deal with the rapid growth in the size and aggressiveness of the Chinese industry, and the rapid increase in its exports to the United States.

The United States argued that 84.2% of the growth in subject imports over the period of investigation was imported by companies other than U.S. producers. From this the USITC could reasonably conclude that this indicated that the industry's alleged "voluntary business strategy" was not itself responsible for the tremendous growth in the subject imports during the period.

Changes in demand

The United States denied that there was a "prolonged" contraction in demand "apparent across the entire period of investigation". Moreover, during recession, "subject imports increased by 4.5 million tyres in 2008, while U.S. consumption declined by 20.4 million tyres" and this was taken into account by the USITC.

There was no need for the USITC to separately address the demand trend in the OEM market, as "there were similar demand and import volume trends in the

OEM market and overall market, that is, that demand declined overall and that imports obtained an increasing share of the overall and OEM market" and this market was less important than the domestic industry.

The record evidence did not indicate that there was a "shift in demand in favor of larger tires" during the period of investigation as none of the responding U.S. producers or importers reported in the questionnaire that a "shift in demand in favor of larger tires" had affected demand trends during the period of investigation.

Non-subject imports

The average unit values for non-subject imports were well above the average unit values for subject imports throughout the period but the absolute volumes and market share for non-subject imports remained relatively steady over the period, in contrast to the significant increases in both volume and market share by subject imports.

D. Whether the transitional safeguard measure went beyond the "Extent necessary", contrary to paragraph 16.3 of the protocol?

The United States disagreed that the statements quoted from the USITC Report support China's claims. The United States argued that nowhere does the USITC suggest that the proposed tariffs would address all of the injury to the domestic industry.

E. Whether the duration of the remedy exceeded the period of time necessary to prevent or remedy market disruption?

The United States rejected China's argument that the duration requirements in the Safeguards Agreement, the Anti Dumping Agreement, and the SCM Agreement demonstrate that "any remedy imposed must be narrowly tailored in terms of duration". The United States noted in this regard that the Anti-Dumping Agreement and the SCM Agreement allow the imposition of relief as long as the injurious dumping or subsidization continues.

F. Whether the U.S. tyres measure was inconsistent with Articles I:1 and II:1(B) of the GATT 1994?

China's GATT 1994 claims were entirely dependent on its claims under Paragraph 16 of the Protocol. Since the Panel did not accept China's claims under Paragraph 16 of the Protocol, therefore, China's claims under Articles I: 1 and II: 1 of the GATT 1994 was also not accepted.

Panel Findings

Was the USITC entitled to find that imports were "increasing rapidly" in accordance with paragraph 16 of the protocol?

Review of Import Data

The Panel applied the Appellate Body ruling in Argentina – Footwear (EC) and the Panel in US – Line Pipe.[126] These findings suggest that there was nothing in the use of the present continuous tense in Paragraphs 16.1 and 16.4 of the Protocol that would require an investigating authority to focus on the movements in imports during the most recent past, or during the period immediately preceding the authority's decision.

The meaning of the phrase "increasing rapidly"

Moreover, for imports to be "increasing rapidly", they need only be increasing "with great speed", or "swiftly". There was no need for any swift progression in the rate of increase in those imports. The rapid increase need only be on an absolute or relative basis.

Relative increase in imports

USITC gave a reasonable and adequate explanation for concluding that the absolute data indicates that imports were "increasing rapidly", which was sufficient under the Protocol and it was not necessary to consider the situation in relation to relative data. Nevertheless, that analysis too revealed that given rapidly increasing subject imports from China relative to domestic production and relative to market share, imports are "increasing rapidly" in relative terms.

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[126] Appellate Body Report, US-Line Pipe, para 233

End-point-to-end-point analysis

The Panel rejected China's arguments against an end-point-to-end-point analysis because it "can obscure the more relevant analysis of what is happening over the more recent period". China had misconstrued the Appellate Body ruling in Argentina – Footwear (EC) to conclude that such analysis was prohibited in all circumstances. Furthermore, there was not even a predominant reliance on an end-point-to-end-point analysis, as the USITC relied on the fact that there was an absolute and relative increase in subject imports in every year of the investigation.

Value / volume

The Panel noted that even though the text of the Protocol referred to quantities, it did not prohibit an analysis that looks at the value of imports. Moreover, the USITC had assessed both the quantity and value of imports. Also, China has not presented any arguments to suggest that the increase in value in this case could be explained by factors other than an increase in subject imports.

Low base

The Panel outright rejected China's contention that there was a "low" base at the beginning of the investigation period and this was never put into context by the USITC in light of the fact that it had 5% of the market at a value of 450 million dollars, and was the fourth largest import source in the world.

Interim data for the first quarter of 2009

Given that there were no precise guidelines in the Protocol, the selection of a five year period of investigation that ended less than four months before the beginning of the investigation provided recent data and satisfies the standard under the Protocol and the USITC was not obliged to collect and incorporate absolute and relative data for the first quarter of 2009 into its period of investigation.

Was the U.S. implementing statute's causation standard inconsistent as such with paragraph 16.1 and paragraph 16.4 of the protocol?

The Appellate Body upheld the application of the mandatory/discretionary

distinction in US – Zeroing (EC)[127] and US – Carbon Steel[128]. The Panel concluded that in that respect, Section 421 did not appear inconsistent on its face. The onus being on China to establish that the Section 421 definition of "significant cause" as "contributes significantly" was inconsistent with the causation standard set forth in Paragraph 16.4 of the Protocol.

The term "cause" should be interpreted in a way that allows for the possibility that the causal factor was one of several causal factors that together produce or bring market disruption.

The Panel placed reliance on the Appellate Body ruling in US – Wheat Gluten[129] to hold that a finding that rapidly increasing imports are a (significant) cause of material injury was equivalent to a finding that there is a (significant) causal link between the imports and the injury. The existence of a causal link might be established on the basis of a (sufficiently clear) contribution. Since in the context of the Protocol the terms "cause" and "causal link" might properly be used synonymously, the guidance from the Appellate Body provided support – in the context of a provision that envisages a multiplicity of causal factors – for interpreting "cause" as "contribute to bring about".

On the question of whether the Statute further lowers the causation standard of Paragraph 16.4 by allowing imports to be a less important factor than any other single cause, no matter how minor, the Panel held that "increasing imports might properly constitute a significant cause of market disruption even though their causal role is not as significant as other factors."

Whether the USITC properly found that rapidly increasing imports were a significant cause of material injury?

The nature of the analysis required by Paragraph 16 of the Protocol

On an analysis of the 1st sentence of Paragraph 16.4, the Panel found that the

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127 Appellate Body Report, *US-Laws Regulations and Methodology for Calculating Dumping Margins (Zeroing) – Recourse to Article 21.5 of the DSU by the EC*, WT/DS294/AB/RW, adopted 11th June 2009.

128 Appellate Body Report, US- Countervailing Duties on certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R, adopted 19th December 2002.

129 Appellate Body Report, US-Definitive Safeguard Measures on Imports of Wheat Gluten from the EC, WT/DS166/AB/R, adopted on 19th January, 2001

importing Member was not required to apply any particular methodology for establishing market disruption, including causation. The second sentence shows investigating authority was free to choose any methodology to establish causation, provided it addresses the objective factors set forth in Paragraph 16.4, and was sufficient to establish that rapidly increasing imports are a "significant cause" of material injury. The Panel held that the USITC did rely on analyses of the conditions of competition and correlation in determining that rapidly increasing subject imports were a "significant cause" of material injury.

The Panel held that the causal link between rapidly increasing imports and material injury must be assessed "within the context of other possible causal factors". In particular, a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors.

The conditions of competition between subject imports and domestic tyres

The Panel concluded that while there was a general understanding that the tyre replacement market was divided into 3 tiers, it found no fault with the USITC's conclusion that there was no distinct dividing line between these tiers. Although there was some variation in levels of competition between subject imports and domestic products as between tier 1 and tiers 2 and 3, there was no fault with the USITC's conclusion that subject imports and domestic products were not focused in different tiers and it was unacceptable that the USITC should have found that there was only "vestigial" competition between them in tiers 2 and 3.

In the absence of any industry consensus on the distinction between tiers 1, 2 and 3, the Panel held that the USITC was not required to have included, in its original questionnaire, more specific questions regarding inter-changeability on the basis of distinctions between tiers 1, 2 and 3 of the replacement market.

Correlation between the increase in imports and the decline in injury factors

Correlation between the varying degrees of increase in imports and decrease in injury indicators suggested a certain degree of precision but it would be unrealistic to expect, or require, a somewhat precise correlation between the two. Thus, a finding of "significant cause" was not excluded simply because an investigating authority relies on an overall coincidence between the upward movement in imports

and the downward movement in injury factors, especially if that finding of overall coincidence is combined – as it was in the present case - with other analyses indicative of causation. The Panel concluded that the data submitted by the United States was sufficient for the USITC to properly find that there was an overall coincidence.

The Panel further upheld the United States' claim of overall coincidence between rapidly increasing imports and the deterioration in the condition of the domestic industry. The fact that annual movements in every single injury factor did not precisely track annual movements in subject imports did not invalidate the USITC's finding of overall coincidence.

The non-attribution of injury caused by other factors to increasing imports

The domestic industry's business strategy

The Panel made 5 general observations regarding China's contentions on this point. First, the argument that subject imports were non-injurious was belied by the (increasing) margin of underselling established by the USITC. Second, if the domestic industry' withdrawal had really left a void in parts of the market; one would have expected that both subject and non-subject imports would have benefited from the domestic industry's withdrawal. Third, when the rate of increase in subject imports was greatest, there were still three (out of ten) domestic producers who recorded operating losses that year. The Panel was thus, not persuaded that there was necessarily any positive connection between the volume of subject imports and the profitability of the domestic industry. Fourth, as claimed by China, if subject imports really were being imported by U.S. producers consistent with their own business strategy of off-shoring production of tier 2 and 3 tyres, and if subject imports really were beneficial to domestic producers, it would be would expected that domestic producers would account for a far greater proportion of subject imports than the 23.5% it did in 2008. Fifth, regarding China's claim that the domestic industry's "[o] perations in China have enhanced the [ir] profitability", it found no obvious nexus between any increase in the domestic industry's profitability and the volume of subject tyres imported by domestic producers.

In light of the above, the Panel concluded that the plant closures could well be attributed to the imports.

Changes in demand

The Panel held that although the USITC did not include in its report a discrete section on demand, it was satisfied that the USITC ultimately did properly address the issue of demand, and did properly find that subject imports had injurious effects independent of any injury caused by changes in demand. A pertinent finding was that as demand fell by 6.9% in 2008, the volume of subject imports continued to increase by an additional 10.8%, resulting in a 2.7 % increase in market share, compared with a fall in the domestic industry's market share of 2.9 percentage points.

The Panel found compelling the USITC's finding that injury should be attributed to subject imports rather than demand.

The Panel agreed with the USITC that the decline in demand was not more pronounced in the OEM market than the replacement market, and that the OEM market was less important for the domestic industry and subject imports than the replacement market; thereby dispensing with the need to analyse demand in the OEM market separately from demand in the replacement market.

Also, the USITC properly established that the injury to the domestic industry could not be attributed in whole to the fall in demand resulting from the 2008 recession.

Lastly, given that none of the respondent producers or importers reported any shift in demand in favour of larger tyres, the Panel was not persuaded that the USITC should have considered any such shift in demand in its determination.

Non-subject imports

Although the volume of non-subject imports was greater than the volume of subject imports from China, and although non-subject imports remained cheaper than domestically-produced tyres, the dominant feature of the U.S. market was the rise of subject imports from China at the expense of both non-subject imports and the U.S. industry. Thus, USITC did not fail to properly analyse injury caused by non-subject imports or improperly attribute injury caused by non-subject imports to subject imports.

Whether the transitional safeguard measure went beyond the "extent necessary", contrary to paragraph 16.3 of the protocol?

The Panel was not convinced that this demonstrates that the measure was excessive. Firstly, a measure was not necessarily excessive simply because it seeks to improve the condition of the industry. Secondly, since the USITC found that the domestic industry suffered market disruption as a result of rapidly increasing subject imports that were underselling domestic production, a measure that was aimed at "reducing the quantity of subject imports and raising their price in the U.S. market" can be justified. The Panel however noted that it did allow for the possibility of the expansion of non-subject imports rather than the improvement of the condition of the domestic industry, and observed that was a consequence of a country-specific safeguard and not a defect of the remedy in this case.

Whether the duration of the remedy exceeded the period of time necessary to prevent or remedy market disruption?

There was no obligation on the United States to explain why a three-year measure was needed to prevent or remedy the market disruption caused by subject imports. Instead, the onus was on China to establish prima facie that a three-year measure was excessive. Therefore, China has failed to meet this burden. China has failed to establish prima facie that the tyres measure exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of the Protocol.

Whether the U.S. tyres measure was inconsistent with Article I:1 and II:1(B) of the GATT 1994?

China's GATT 1994 claims were entirely dependent on its claims under Paragraph 16 of the Protocol. Since the Panel did not accept China's claims under Paragraph 16 of the Protocol, therefore, China's claims under Articles I: 1 and II: 1 of the GATT 1994 was also not accepted.

Conclusion

It was concluded by the Panel that in imposing the transitional safeguards measure on 26 September 2009 in respect of imports of subject tyres from China, the United States did not fail to comply with its obligations under Paragraph 16 of the Protocol and Articles I:1 and II:1 of the GATT 1994.

III. Adopted Appellate Body Reports

9. AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF APPLES FROM NEW ZEALAND, WT/DS 367/AB/R, 29th November, 2010

Parties:
Australia: Appellant/Appellee
New Zealand: Other Appellant/Appellee

Third Parties:
Chile, European Union, Japan, Pakistan, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, United States

Factual Matrix.

Introduction

Australia and New Zealand both appealed certain issues of law and legal interpretations developed in the Panel Report, Australia – Measures Affecting the Importation of Apples from New Zealand. The Panel was established on 21 January 2008 to consider a complaint by New Zealand concerning several Australian measures on the importation of apples from New Zealand. For understanding the background of the dispute refer to PP. 46 of the Dispute Watch 2010.

Issues Raised

The following issues were raised in this appeal:

a. Whether the Panel erred in finding that the 16 measures at issue, both as a whole and individually, constituted SPS measures within the meaning of Annex A(1) to the SPS Agreement;

b. Whether, in finding that the measures regarding fire blight and apple leaf curling midge ("ALCM"), as well as the "general" measures relating to these pests, were inconsistent with Articles 5.1, 5.2, and, consequently, 2.2 of the SPS Agreement, the Panel misinterpreted and misapplied these provisions, and more specifically:

   i. Whether, in evaluating Australia's risk assessment and the consistency of Australia's SPS measures with these provisions, the Panel applied an improper standard of review;

   ii. Whether, in reviewing Australia's risk assessment and its use of expert judgement at several intermediate steps, the Panel required too high a standard of transparency and documentation and, thereby, erred in its assessment of the objectivity and coherence of the reasoning of the risk assessor; and

   iii. Whether the Panel erred in failing to assess the materiality of the faults it found with Australia's risk assessment, and in failing to determine whether any alleged flaws were so serious as to call into question the risk assessment as a whole;

c. Whether the Panel failed to conduct an objective assessment of the matter before it within the meaning of Article 11 of the DSU, and in particular:

   i. Whether the Panel failed to engage with or disregarded testimony of its appointed experts that was favourable to Australia; and

   ii. Whether the Panel misunderstood the methodology employed in Australia's risk assessment;

d. Whether the Panel erred in finding that the measures regarding fire blight and ALCM are inconsistent with Article 5.6 of the SPS Agreement, and more specifically:

   i. Whether the Panel inappropriately relied on its findings under Articles 5.1, 5.2, and 2.2 of the SPS Agreement in concluding that New Zealand's proposed alternative measures would achieve Australia's appropriate level of protection;

ii. Whether the Panel failed to require New Zealand to establish affirmatively the inconsistency of the measures at issue with Article 5.6 of the SPS Agreement because it determined only that the alternative measures "might" or "may" achieve Australia's appropriate level of protection; and

iii. Whether the Panel erred in interpreting the term "appropriate level of sanitary or phytosanitary protection", defined in Annex A(5) to the SPS Agreement, by focusing solely on the likelihood of entry, establishment and spread of the relevant pests without also considering the associated potential biological and economic consequences; and

e. Whether the Panel erred in finding that New Zealand's claims under Annex C(1)(a) and Article 8 of the SPS Agreement are outside the Panel's terms of reference, and, if so, whether the Appellate Body can complete the legal analysis and find that Australia's measures at issue are inconsistent with the "without undue delay" obligation in Annex C(1)(a) and Article 8 of the SPS Agreement.

Arguments of the Participants

Claims of Error by Australia – Appellant

I. Annex A(1) to the SPS Agreement: "SPS Measure"

Australia accepted that all of the measures at issue constitute SPS measures when taken as a whole or "grouped appropriately". However, Australia contended that the Panel erred in finding that the 16 measures at issue constitute SPS measures not only as a whole, but also individually, and that the Panel failed to assess whether the 16 measures individually meet the requirements of Annex A(1) to the SPS Agreement. According to Australia, the Panel failed to ask whether each "measure" identified by New Zealand individually met the essential characteristics of the definition of an SPS measure in Annex A(1)(a).

II. Articles 5.1, 5.2, and 2.2 of the SPS Agreement

Australia requested the Appellate Body to reverse the Panel's findings that its

measures for fire blight and ALCM, as well as the general measures, were inconsistent with Articles 5.1, 5.2, and 2.2 of the SPS Agreement. Australia argued that, in so finding, the Panel erred because it applied an incorrect legal interpretation of "risk assessment" and misapplied the criteria identified in the Appellate Body reports in US/Canada – Continued Suspension[130] for a panel's analysis of whether a risk assessment complies with Articles 5.1 and 5.2.

Australia alleged that the Panel erroneously failed to ask, whether any alleged flaws in the IRA's reasoning were "so serious" as to undermine "reasonable confidence" in the risk assessment as a whole. Accordingly these interpretational errors affected the Panel's analysis of the IRA's assessment of the risk of fire blight and ALCM.

III. Article 11 of the DSU

Australia claimed that the Panel failed to make an objective assessment of the facts before it, as required by Article 11 of the DSU, because it failed to engage with all of the important evidence before it and failed to understand the methodology employed in the IRA.

a. Treatment of Expert Testimony:

Australia argued that the Panel disregarded critical aspects of the appointed experts' testimony that were favourable to Australia. The Panel, in several instances, overlooked entirely testimony that was favourable to Australia's case. In fact, it has been alleged by Australia that the Panel either merely reproduced the testimony without discussing it, or disregarded it completely. This evidently constitutes a failure to make an objective assessment of the facts.

b. Alleged Misunderstanding of the IRA:

Australia further argued that the Panel acted inconsistently with Article 11 of the DSU because it failed to understand the risk assessment methodology employed in the IRA and, in particular, the choice of a probability interval. Australia contended that, if the Panel misunderstood in a material respect what the risk assessor had done, it necessarily failed to perform its duties under Article 11 of the DSU.

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130 Appellate Body Report, US – Continued Suspensions of the Obligations in the EC-Hormones Dispute WT/DS320/AB/R, adopted 14th November, 2008.

IV. Article 5.6 of the SPS Agreement

Australia alleged that the Panel misinterpreted the requirements of Article 5.6 and misapplied the rules governing the burden of proof. Although the Panel correctly stated the burden of proof at the outset and at the conclusion of its analysis, the Panel in fact applied a significantly lower standard. Australia further contended that the Panel misinterpreted the words "appropriate level of sanitary or phytosanitary protection" in Article 5.6. The Panel failed to satisfy itself that the evidence and arguments adduced by New Zealand demonstrate that the alternative measures "would achieve" Australia's appropriate level of protection, and instead wrongly relied on its findings under Article 5.1 regarding the inadequacy of the IRA as also establishing inconsistency with Article 5.6.

Arguments of New Zealand – Appellee

I. Annex A(1) to the SPS Agreement: "SPS Measure"

New Zealand characterized Australia's conception of an SPS measure, in particular, the alleged distinction between "principal" and "ancillary" measure as a "mere assertion" with "no basis in the SPS Agreement or the jurisprudence". According to New Zealand not to distinguish between principal and ancillary measures would "potentially open up every detail of an administrative regime to separate evaluation for compliance" with Articles 2.2, 5.1, 5.2, and 5.6 of the SPS Agreement.

II. Articles 5.1, 5.2, and 2.2 of the SPS Agreement

New Zealand argued that two of Australia's main assertions, that the standard of objectivity and coherence set out in paragraph 591 of the Appellate Body reports in US/Canada – Continued Suspension should apply only to conclusions ultimately reached and that a panel should only review whether expert judgments fall within a range considered legitimate by the standards of the scientific community, were "designed to shelter the IRA from effective review". New Zealand also asserted that, contrary to Australia's claims, the Panel did not discount the IRA's use of expert judgment because it was not documented and transparent. Rather, the Panel rejected the concept that the mere recourse to expert judgment requires a panel to uphold the conclusions reached through that expert judgment.

III. Article 11 of the DSU

New Zealand claimed that the Panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning, and is not required to discuss, in its report, each and every piece of evidence.

a. Treatment of Expert Testimony:

New Zealand highlighted the differences in circumstances between this case and US/Canada – Continued Suspension. It pointed out that, in US/Canada – Continued Suspension[131], there were justifiable doubts as to the independence or impartiality of the two experts on whom the Panel relied extensively, whereas the experts relied upon by the Panel in this dispute are clearly independent and impartial. New Zealand further argued that the Panel properly engaged with the totality of the evidence and did not, as Australia claims, dismiss without explanation any expert's testimony.

b. Alleged Misunderstanding of the IRA:

New Zealand contested that, the Panel was correct to consider the definitional correspondence between the term "negligible" and the interval and distribution. Further New Zealand claimed that the Panel was correct in concluding that the methodological flaws were serious enough to constitute an independent basis for the IRA's invalidity. New Zealand pointed out that the interval at issue was assigned to over one third of all the intervals used in the IRA.

IV. Article 5.6 of the SPS Agreement

New Zealand submitted that the Panel was correct in finding that New Zealand had raised a presumption that restricting imports of New Zealand apples to mature, symptomless apples was an alternative measure with respect to fire blight that would meet Australia's appropriate level of protection, and that New Zealand had made a prima facie case that the inspection of a 600-fruit sample of each import lot would be an alternative measure with respect to ALCM that would meet Australia's appropriate level of protection.

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131 Ibid

Claims of Error by New Zealand

New Zealand requested the Appellate Body to reverse the Panel's finding that its claim under Annex C (1) (a), and its consequential claim under Article 8 of the SPS Agreement, fell outside the Panel's terms of reference. New Zealand alleged that the Panel erred in finding that New Zealand had not properly identified the measure at issue in the context of its claims under Annex C(1)(a) and Article 8, and that New Zealand had to challenge the completed "IRA process" as a measure separate from the measures specified in the IRA. New Zealand had contended that the Panel erred in finding that the measure at issue must necessarily be the "procedure" referred to in the chapeau of Annex C(1) to the SPS Agreement. In doing so, the Panel improperly limited the measures at issue by reference to the specific obligation being challenged, thereby blurring the distinction between claims and measures under Article 6.2 of the DSU.

New Zealand further requested the Appellate Body to complete the analysis of its claim of undue delay. New Zealand asserted that in the present dispute the key factual matters establishing that the time taken to complete the IRA exceeded that which was reasonably needed are uncontested.

Arguments of Australia – Appellee

According to Australia, the Panel correctly required New Zealand to identify in its panel request the "procedure" alleged to be inconsistent with the obligation under Annex C(1)(a). Australia asserted that New Zealand sought to contrive a distinction between the object of a claimed violation and a measure at issue, when they were the same thing.

Australia submitted that the Appellate Body should not complete the legal analysis of New Zealand's claims under Annex C (1)(a) and Article 8 because at least two of the "key factual matters" relied upon by New Zealand, namely, the absence of justification for the delay and the statements in the domestic review of Australia's quarantine system, had been contested by Australia in the course of the Panel proceedings.

Appellate Body Analysis

Annex A (1) to the SPS Agreement: "SPS Measure"

Interpretation of Annex A(1) to the SPS Agreement

A fundamental element of the definition of "SPS measure" set out in Annex A(1) was that such a measure must be one "applied to protect" at least one of the listed interests or "to prevent or limit" specified damage. In addition, that the word "applied" pointed to the application of the measure and, thus, suggests that the relationship of the measure and one of the objectives listed in Annex A(1) must be manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure. This suggests that the purpose of a measure was to be ascertained on the basis of objective considerations.

The last sentence of Annex A (1) follows, and relates to, all of the first sentence, including all of the purposes enumerated in subparagraphs (a) through (d). The list served to illustrate, through a set of concrete examples, the different types of measures that, when they exhibit the appropriate nexus to one of the specified purposes, would constitute SPS measures and, accordingly, be subject to the disciplines set out in the SPS Agreement.

Application of Annex A(1) to the Measures at Issue

The Appellate Body noted that there was no merit in Australia's allegation that the Panel failed to assess whether the 16 measures at issue individually meet the requirements of Annex A(1). The Appellate Body had interpreted the word "measure" in a broad sense, and rejected the notion that only certain types of measures could be challenged in dispute settlement proceedings. Nothing in the text of Annex A(1) suggested a more restrictive interpretation of the word "measure" in the context of the SPS Agreement.

Therefore, the Appellate Body concluded that there was no error in the Panel's finding that the 16 measures at issue, both as a whole and individually, constitute SPS measures within the meaning of Annex A(1) and were covered by the SPS Agreement.

Articles 5.1, 5.2, and 2.2 of the SPS Agreement

I. IRA Structure and Panel Findings

The Panel found that the Australia's SPS measures regarding fire blight and ALCM, as well as the "general" measures linked to these pests, were inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, and, by implication, with Article 2.2 of the SPS Agreement.

In assessing New Zealand's claims under Articles 5.1 and 5.2 of the SPS Agreement with respect to fire blight, the Panel reviewed the IRA's analysis of: (i) the eight importation steps; (ii) proximity ; (iii) exposure ; (iv) establishment; (v) spread; and (vi) associated potential biological and economic consequences; and also examined (vii) certain alleged methodological flaws in the IRA. The Panel observed that the IRA calculated the overall probability of importation as a sum of the probabilities associated with ten individual importation scenarios and did not provide any separate justification or evidence regarding the estimated overall likelihood of importation.

II. The Panel's Assessment of the IRA

a. Articles 5.1, 5.2, and 2.2 of the SPS Agreement:

Science plays a central role in risk assessment and, therefore, a risk assessment is "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions". Thus, Article 5.2 requires a risk assessor to take into account the available scientific evidence, together with other factors. A panel should not determine whether the risk assessment is correct, but rather "determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable".

b. The Standard of Review used by the Panel in Its Review of the IRA under Article 5.1 of the SPS Agreement:

It was the view of the Appellate Body that by arguing that the Panel's task in reviewing the IRA's intermediate conclusions should be limited to ensuring that these "fall within a range that could be considered legitimate by the scientific community", Australia was suggesting that a panel should assess the reasoning

and conclusions reached by a risk assessor and the scientific evidence relied upon in the same way. However, the AB observed that a distinction should be drawn between, on the one hand, the scientific evidence relied upon by the risk assessor and, on the other hand, the reasoning employed and the conclusions reached by the risk assessor on the basis of that scientific evidence. The Appellate Body opined that if the Panel had been prevented from assessing the objectivity and coherence of the intermediate conclusions and reasoning of the IRA, it would have been left with virtually no basis upon which to assess the consistency of the IRA with Article 5.1 of the SPS Agreement.

c. The Panel's Assessment of the Use of IRA Expert Judgment:

The Appellate Body did not consider that the phrase "as appropriate to the circumstances" prevents a panel from assessing the coherence and objectivity of a risk assessment under Article 5.1 of the SPS Agreement in situations that present some degree of scientific uncertainty and where a risk assessor has reached conclusions on the basis of expert judgment. Furthermore, the Panel said that it is clear from a complete reading of ISPM No. 2 and ISPM No. 11 that, in addition to the sections on "uncertainty" that call for the transparency and documentation of the nature and degree of uncertainty, the general sections on "documentation" specify that the entire pest risk analysis process should be sufficiently documented.

d. The Materiality of the Faults the Panel Found with the Reasoning of the IRA:

The Panel's analysis revealed that it considered that the faults it found with the IRA's reasoning on the importation steps and the factors relating to entry, establishment and spread were numerous and serious enough to render the IRA inconsistent with Article 5.1 of the SPS Agreement. The Appellate Body did not consider that a panel is required to establish whether each fault it finds with a risk assessment is, in itself, serious enough to undermine the entire risk assessment.

III. Conclusion

In the light of the above, the Appellate Body concluded that the Panel did not err in finding that the IRA is not a proper risk assessment within the meaning of Article 5.1 and Annex A(4) to the SPS Agreement and that the flaws that the Panel

found in the IRA also constituted a failure, under Article 5.2 of the SPS Agreement, to take sufficiently into account factors such as the available scientific evidence, the relevant processes and production methods in New Zealand and Australia, and the actual prevalence of fire blight and viable ALCM.

Article 11 of the DSU

I. The Panel's Treatment of Testimony by its Appointed Experts

In its appeal against the Panel's treatment of expert testimony, Australia challenged the Panel's treatment of certain statements by the appointed experts, which were allegedly favourable to its case, in six different areas.

a. Overall probability of importation:

The Appellate Body considered that both the oral and written replies of Dr. Decker opine that importation steps 2, 3 and 5 were overestimated and the overall probability of importation could be overestimated. Australia was not able to establish that the Panel disregarded any apparent contradictions in the testimony of Dr. Deckers on the IRA's estimations of the probability of importation of fire blight.

b. Exposure:

The Panel in its report concluded that transfer by browsing insects, while not totally unreasonable, seems to correspond to a highly unlikely scenario. In this respect, the Appellate Body observed that Dr. Deckers' reply that the value assigned by the IRA to exposure was "very low" was given due consideration by the Panel.

c. Potential biological and economic consequences of fire blight:

The Appellate Body observed that Australia has focused on the parts of Dr. Deckers' and Dr. Paulin's testimony that it considers favourable to its case, while leaving aside aspects of the same testimony that appear to confirm the Panel's finding that the IRA's conclusions on the potential biological and economic consequences of fire blight were not objective and coherent. Regarding the fact that the Panel did not explicitly review specific instances of fire blight outbreaks, the Appellate Body upheld the Panel's discretion to assess whether a given peice of evidence is more relevant for its reasoning than another.

d. Limitation of exports to mature, symptomless apples:

The Panel in its report had clearly explained that, in spite of Dr. Deckers' statement expressing scepticism about New Zealand's alternative measure, it reached a different conclusion based on other testimony of Dr. Deckers and Dr. Paulin showing "that they consider the overall risk of fire blight entry, establishment and spread through mature, symptomless apples imported from New Zealand to be very low – both overall and in regard to specific key points in the import scenario assessed by the IRA."

e. Use of uniform distribution:

The Appellate Body considered that the Panel was not required to discuss Dr. Schrader's testimony about the usefulness of uniform distribution in a situation where it had concluded that the conditions for the use of this type of distribution were not present.

f. Potential biological and economic consequences:

The Appellate body concluded that according to the applicable standard of review, the Panel was required to verify that the IRA's conclusion son the potential consequences were objective and coherent, not that they were correct. It concluded that Australia was not able to establish that the Panel disregarded or failed to engage with evidence by not discussing Dr. Cross' statement that he would not change the overall qualification of "low" assigned by the IRA to the potential consequences of ALCM.

II. The Panel's Characterization of the Methodology Employed in the IRA

The IRA adopted a semi-quantitative methodology and used a correspondence ("nomenclature") to convert quantitative probability intervals into qualitative ratings and descriptors. Like the Panel, the Appellate Body was also of the opinion that, in a semi-quantitative risk assessment such as the IRA, the objectivity of the correspondence was fundamental to the objectivity and coherence of the results of the risk assessment. If, as the Panel found , the quantitative value that was assigned to the qualitative likelihood "negligible" is too high, this would have repercussions on the overall probability of entry, establishment and spread and ultimately on the assessment of unrestricted risk. This, therefore, demonstrated that the Panel

correctly found that they constituted an independent basis for the inconsistency of Australia's SPS measures with Articles 5.1, 5.2 and 2.2 of the SPS Agreement.

III. Conclusion

For the above stated reasons the Appellate Body concluded that Australia has not established that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU in its treatment of the experts' testimony or of the IRA's risk assessment methodology.

Article 5.6 of the SPS Agreement

I. Article 5.6 and Footnote 3

Under Article 5.6of the SPS Agreement, in order to assess whether a significantly less trade-restrictive alternative measure that would meet the appropriate level of protection is available, the Appellate Body considered that a panel must identify both the level of protection that the importing Member had set as its appropriate level, and the level of protection that would be achieved by the alternative measure put forth by the complainant. Thereupon the Panel would be able to make the requisite comparison between the level of protection that would be achieved by the alternative measure and the importing Member's appropriate level of protection.

II. Australia's appeal

a. Whether the Panel's Finding under Article 5.6 was Consequential upon Its Findings under Articles 5.1, 5.2, and 2.2 of the SPS Agreement?

The Appellate Body had upheld the Panel's findings under Article 5.1 and 5.2. Therefore, there was no consequential reversal of the Panel's findings under Article 5.6.

b. The Alleged Errors in the Panel's Analysis of New Zealand's Article 5.6 Claim :

Australia alleged that the analytical approach adopted by the Panel in assessing New Zealand's claim under Article 5.6 was faulty. Concurring with Australia, the

Appellate Body said that the Panel was required to undertake its own analysis of the question of whether the alternative measures proposed by New Zealand would achieve Australia's appropriate level of protection. Moreover, in making its own assessment of the case presented by New Zealand, the Panel was free, within the limits of its duty to make an objective assessment, to structure its analysis as it deemed appropriate. Thus, it was not obliged, in considering the risk associated with the alternative measure, to adopt the same methodology or structure as that employed by the IRA in its pest risk analysis. The Appellate Body went on to say that the Panel seemed to have assumed that, because it could not conduct its own risk assessment, the only way that it could evaluate New Zealand's Article 5.6 claim was by relying upon its review of the IRA. This was an incorrect understanding of its task.

Overall, the totality of the evidence identified and/or adduced by the complainant would have to be sufficient to establish a presumption that the alternative measure would meet the appropriate level of protection.

The Appellate Body then went on to determine whether with the correct approach it can complete the analysis of New Zealand's claim that Australia's measures concerning the risk of fire blight are inconsistent with Article 5.6 of the SPS Agreement. It was observed by the Appellate Body that the Panel reviewed a fair amount of evidence relevant to this issue. However, it did not consider any of the suggestions by experts as affirmative findings. Also, there was no indication as to what the Panel considered to be the overall risk associated with the alternative measure for fire blight proposed by New Zealand, that is, the risk of entry, establishment and spread, as well as potential biological and economic consequences. Therefore, The Appellate Body was unable to identify sufficient uncontested facts or factual findings by the Panel to enable them to make a finding on the level of risk associated with New Zealand's alternative measure for fire blight. Hence, the necessary comparison between the level of protection offered by New Zealand's alternative measure and Australia's appropriate level of protection could not be made.

Lastly, the Appellate Body had to determine whether it can complete the analysis respect to New Zealand's alternative measure for ALCM. However, the Panel seemed to have considered that, under the alternative measure of requiring inspection of a 600-fruit sample from each import lot, transmission of ALCM to a susceptible host plant would "probably almost never occur". In addition there was no indication as to what the Panel considered to be overall risk associated with the alternative measure relating to ALCM.

I. Conclusion

The Appellate Body reversed the Panel's findings that Australia's measures at issue regarding fire blight and ALCM were inconsistent with Article 5.6 of the SPS Agreement. The Appellate Body, however, unable to complete the legal analysis of New Zealand's claim under Article 5.6 of the SPS Agreement.

New Zealand's Other Appeal – Annex C(1)(a) and Article 8 of the SPS Agreement

I. Whether the Panel Erred in Finding that New Zealand's Claims under Annex C(1)(a) and Article 8 of the SPS Agreement were Outside Its Terms of Reference?

It appeared to the Appellate body that the Panel had conflated the requirement to identify the measure at issue with the requirement to identify the legal basis of the complaint. The Panel failed to take proper account of this key distinction between measures and claims by, on the one hand, undertaking analysis as to whether New Zealand had identified the specific measure at issue in its panel and, on the other hand, finding that it was New Zealand's claims, not the measure, that were outside the Panel's terms of reference. Furthermore, the Appellate Body disagreed with the approach of the Panel that seemed to have understood the question of whether 17 measures identified in the Panel request can violate, or cause the violation of the obligation in Annex C(1)(a) and Article 8 is a jurisdictional question.

Therefore, the Appellate Body concluded that the Panel erred in finding that New Zealand's claim under Annex C(1)(a) and its consequential claim under Article 8 of the SPS Agreement are outside the Panel's terms of reference in this dispute. Accordingly, the finding of the Panel was reversed.

II. Completion of Legal Analysis

According to the Appellate Body, the measures that may violate the obligation in Annex C(1)(a) and Article 8 include relevant "approval, control and inspection procedures", governmental actions that impede or prevent the undertaking or completion of such procedures, as well as failures to undertake or complete such procedures with appropriate dispatch. New Zealand had not argued that the 16 measures at issue are any such type of measure and has not provided any other arguments in support of its assertion that these 16 measures, individually or as a

whole, "directly" or "indirectly" violate the "without undue delay" obligation in Annex C(1)(a) and Article 8.

III. Conclusion

The Appellate Body therefore, reversed New Zealand's claim under Annex C(1)(a) and its consequential claim under Article 8 of the SPS Agreement fall outside of the Panel's terms of reference. The Appellate Body held that New Zealand had not established that the 16 measures at issue are inconsistent with Annex C(1)(a) and Article 8 of the SPS Agreement.

The Appellate Body upheld the Panel's finding, in paragraphs 7.172 and 8.1(b) of the Panel Report, that the 16 measures at issue, both as a whole and individually, constitute SPS measures within the meaning of Annex A(1) to the SPS Agreement. It further upheld the Panel's finding, in paragraphs 7.906 and 8.1(c) of the Panel Report, that Australia's measures regarding fire blight and ALCM, as well as the general measures relating to these pests, were inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, and that, by implication, these measures were also inconsistent with Article 2.2 of the SPS Agreement. The Appellate Body further found that Australia had not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter before it, within the meaning of Article 11 of the DSU. It reversed the Panel's finding, in paragraphs 7.1403 and 8.1(e) of the Panel Report that Australia's measures at issue regarding fire blight and ALCM are inconsistent with Article 5.6 of the SPS Agreement; but is unable to complete the legal analysis of New Zealand's claim under that provision.

The Appellate Body reversed the Panel's finding, in paragraphs 7.1477 and 8.1(f) of the Panel Report, that New Zealand's claim under Annex C(1)(a) and its consequential claim under Article 8 of the SPS Agreement fall outside the Panel's terms of reference; but found that New Zealand had not established that the 16 measures at issue are inconsistent with Annex C(1)(a) and Article 8 of the SPS Agreement.

Recommendations

The Appellate Body recommended that the DSB request Australia to bring its measures, found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

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