2008 Supplemental Materials to Chris Wold, Sanford Gaines, & Greg Block, Trade and the Environment: Law and Policy (2005)

Chapter 2

The World Trade Organization, Dispute Settlement, and the Domestic Legal Effect of trade Agreements

Add a new Section 8 at page 98.

8. Repeal of Remedies

Although the DSU expressly contemplates the imposition of sanctions, what action on the part of the losing party requires the prevailing party to repeal those sanctions? The DSU is not clear on this subject. Article 22.8 of the DSU provides that sanctions "shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." Left unanswered is who determines when a measure has been "removed" or when a member has implemented the recommendations or rulings of a panel?

A panel in *Hormones II* recently had the opportunity to explore this issue. The United States refused to repeal its sanctions against European products, even though the European Communities (EC) removed its ban on beef treated with growth hormones, which had been found inconconsistent with risk assessment provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) in *Hormones I*. The EC claimed it had "removed" the offending measure, and that the new functionally equivalent ban on hormone-treated beef was supported by valid risk assessments. Has the EC removed its measure or implemented the rulings of the panel and Appellate Body in *Hormones I*? Must the United States lift its trade sanctions?

Because the United States did not initiate a claim under Article 21.5 of the DSU to justify its continued sanctions against EC products, the EC brought a new action against the United States. The EC claimed that the United States had violated Article 23.1, which requires members to seek redress of a violation under the WTO agreements solely through recourse to the rules of the DSU. The EC claimed that the United States violated this basic tenet in two ways: (1) by unilaterally making a determination of the effect of the new EC measure, as prohibited by Article 23.2(a), and (2) by failing to repeal sanctions after the EC removed its original ban on hormone-treated beef, as required by Article 22.8. United States–Continued Suspension of Obligations in the EC–Hormones Dispute, WT/DS320/R, WT/DS321/R (decided Mar. 31, 2008) (currently on appeal).

The Panel concluded, based on statements made by the United States in the DSB, that the United States had, in effect, made a determination that the new EC measure violated the risk assessment provisions of the SPS Agreement. Because the United States made similar comments over time and was not seeking any new information from the EC, the Panel declared the U.S. statements conveyed "a high degree of firmness and immutability, a more or less final decision." WT/DS320/R, at para. 7.226. As the United States made that determination without recourse to the DSU, the Panel declared the United States in violation of Article 23 of the DSU.

On the second issue, the Panel made clear that the mere replacement of a WTO-inconsistent measure with a different measure was insufficient to conclude that the measure had been "removed." From a technical perspective, the United States had challenged Directive 96/22/EC. The "measure" actually challenged, however, was the import restriction on hormone-treated beef, a measure also found in the replacement directive—Directive 2003/74/EC. As a consequence, the Panel concluded that Article 22.8 required more than simply the removal of the offending regulation; it required compliance with the recommendations of the DSB. In this case, the EC would need to show that the new measure was consistent with the risk assessment provisions of the SPS Agreement. *Id*. at paras. 7.282–7.287. The Panel concluded that the scientific studies presented by the EC did not support the conclusion that these hormones in meat and meat products when used in cattle for growth promotion purposes cause cancer. *See*, *e.g.*, *id.* at para. 7.572 (concerning oestradiol-17β). As a result, the EC's risk assessments were invalid and the EC had not "removed" the measure found to violate the SPS Agreement in *Hormones I*.

Chapter 5

The Environmental Exceptions

II. The Scope of Article XX

A. Who Has the Burden of Proof?

Replace the last paragraph of Section II.A on page 288 with the following:

Although it is clear that the responding party—the party invoking an exception, under Article XX—is required to show that the measure falls within the scope of an enumerated exception, such as paragraph (b) of Article XX, and that the measure is applied in a manner that is consistent with the chapeau of Article XX, the responding party's burden may change with respect to specific elements of an exception. For example, the Appellate Body in *US–Gambling* made the following observations:

> 310. [I]t is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case.
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> 311. "If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available'. If a responding party demonstrates that the alternative is not 'reasonably available', in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary' ..."

United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body, WT/DS285/AB/R (published April 7, 2005)(adopted April 20, 2005). Panels have cited this case approvingly in the Article XX(b) context, including in *Brazil–Retreaded Tyres*. Brazil–Measures Affecting Imports of Retreaded Tyres, Report of the Panel, paras. 7.155-7.156, WT/DS332/R (published June 12, 2007) (adopted Dec. 17, 2007).

III. The Application of Article XX(b)

Delete Section III(C), pages 305–310, and replace with the following:

2. Brazil–Retreaded Tyres

In the aftermath of *EC-Asbestos* and *Korea–Beef* (page 298 at discussion note 5), panels and the Appellate Body have elaborated a more detailed interpretation of "necessary" under at least three different exceptions using the term "necessary":

- Article XX(b) of the GATT for measures necessary to protect human, animal, or plant life or health;

- Article XX(d) of the GATT for measures necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of the GATT; and

- Article XIV(a) of the General Agreement on Trade in Services for measures necessary to protect public morals or to maintain public order.

These separate strands were synthesized very concisely in a recent environmental dispute between the European Communities (EC) and Brazil concerning Brazilian restrictions on retreaded tires. Brazil–Measures Affecting Imports of Retreaded Tyres, Report of the Panel, WT/DS332/R published June 12, 2007, adopted Dec. 17, 2007).

Retreaded tires are produced by reconditioning used tires. The worn tread is stripped from a used tire's skeleton (casing) and replaced with a new tread and, sometimes, new material covering parts or all of the sidewalls. Retreaded tires can be produced through a number of different methods all encompassed by the generic term "retreading." There are different types of retreaded tires which correspond to the different types of casings used to produce them: passenger car retreaded tires, commercial vehicle retreaded tires, aircraft retreaded tires, and others. Under international standards, passenger car tires may be retreaded only once. By contrast, commercial vehicle and aircraft tires may be retreaded more than once. In addition, for international trade purposes, retreaded tires differ from both used tires and new tires.

Brazil claimed that it imposed a number of restrictions, most notably a ban on the issuance of import licenses for retreaded tires, to protect human, animal, and plant life from the effects of dengue, yellow fever, malaria, and other diseases spread by mosquitoes that breed in pools of water that collect in discarded tires. It also claimed that the accumulation of waste tires creates a risk of tire fires and toxic leaching and that this risk has substantial adverse effects on human health and the environment. The EC, however, believed that Brazil's restrictions were designed to protect domestic retreading industries from foreign competition. It noted that since the Brazilian restrictions were imposed in 2000, Brazilian imports of *retreaded* tires dropped to zero whereas imports of *used* tires increased from 5,000 metric tons to 70,000 tons in 2005. Imports of used tires increased presumably because Brazilian companies imported them to manufacture retreaded tires.

In particular, the EC claimed that Brazil's ban on the issuance of import licenses for retreaded tires constituted an import ban on retreaded tires within the meaning of Article XI:1 of the GATT. The panel agreed that the law, known as Portaria SECEX 14/2004, operated so as to

prohibit the importation of retreaded tires and, thus, constituted a prohibition on importation in violation of Article XI:1. Indeed, Brazil did not contest the allegation. The EC also claimed, and the Panel agreed, that a Brazilian law known as DECEX 8, which banned the importation of used consumer goods, including used tires, also violated Article XI:1. The Panel similarly concluded that Law 12.114 of 5 July 2004 of the Brazilian State of Rio Grande do Sul, which prohibits the sale of used tires that have been manufactured outside of Brazil from the casings of used tires and imported into Brazil, violated Article XI:1.

The Panel further agreed with the EC that Brazil's imposition of a fine of 400 Brazilian Reis per unit on the importation, as well as the marketing, transportation, storage, or keeping in deposit or warehouses of imported, but not of domestic retreaded tires, violated Article III of the GATT. Moreover, because the fine greatly exceeded the value of a used tire, the Panel declared the fine a restriction on the importation of used tires in violation of Article XI:1 of the GATT.

a. Is There a Risk?

Consistent with *EC–Asbestos*, the Panel began its analysis of Article XX(b) by examining whether a risk exists to human, animal, or plant life or health. The European Communities did not dispute the existence of health risks to humans from mosquito-borne diseases, but argued that Brazil had not demonstrated a specific link between the spread of mosquito-borne diseases or the harmful effects of tire fires and the accumulation of waste tires. The European Communities also argued that only incorrectly managed waste tires cause health risks.

The Panel first cited with approval the Appellate Body's observation, in the context of the SPS Agreement in *EC–Hormones*, that the risk being addressed encompasses "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world, where people live and work and die." Consequently, it dispensed with the EC's argument by noting that that there is indeed a correlation between the spread of mosquito borne diseases and the accumulation of waste tires and that:

> 7.67 * * * [I]t may be that health risks associated with waste tyres can be significantly reduced with proper management of waste tyres. However, that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil.
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> 7.68 Moreover, the evidence before the Panel does not suggest that only illegally dumped or mismanaged waste tyres can cause mosquito-borne diseases. The risk of mosquito-borne diseases, albeit to different extents, seems to exist in relation to all types of accumulated waste tyres. Indeed, this situation does not appear to be limited to Brazil, as some of the evidence presented to the Panel makes clear. * * *
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> 7.71 Therefore, the **Panel** finds that Brazil has demonstrated that risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transportation of waste tyres.

Concerning toxic emissions from tire fires, the Panel concluded that Brazil had demonstrated that highly toxic and mutagenic emissions produced by tire fires result in a number of health problems, including, inter alia, the loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, and that a noxious plume comprising dioxins emitted by tire fires produces significant short- and long-term health hazards, including inter alia, cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.

Nonetheless, the European Communities' argued that Brazil had not met its burden of proof because it had not demonstrated the existence of any risks posed by tire fires *within* Brazil. The Panel disagreed with the EC's statement as a factual matter—Brazil had submitted such information—but also rejected the EC's legal argument concerning Brazil's burden:

> 7.77 The question before us therefore is whether Brazil was required to present more detailed information on tyre fires in Brazil such as their location, causes, dimension and duration as suggested by the European Communities as well as specific evidence of the actual negative health effects of tyre fires within Brazil. There may be situations in which such specific evidence would be required to demonstrate the existence of a risk. In this case, however, accepting the European Communities' argument would imply that a WTO Member can never prove the existence of health risks from a tyre fire until a tyre fire does in fact take place and the government of that country conducts its own assessment of the consequences of such a fire. The Panel does not consider that detailed proof of actual tyre fires and associated negative impact on health within the territory of Brazil is required in this case. This is because potential harmful effects caused by tyre fires on human health can be assessed on the basis of incidents that have occurred in other countries. The Panel is thus of the view that the incidence of such fires in Brazil, when considered in combination with evidence of the harmful impact of tyre fires on human health and the evidence of specific incidents of such fires in other countries, is sufficient in this case to prove the existence of potential health risks relating to tyre fires in Brazil.

The Panel also rejected the EC's argument that the low probability of a tire fire negated any risk, stating that "the low probability of tire fires occurring negates neither the fact that tyre fires do actually occur, as shown by the evidence presented in relation to tyre fires that have occurred in other countries, nor the fact that health risks exist in relation to tyre fires and that once they occur, tire fires are very difficult to extinguish." para. 7.78. As with mosquito-borne diseases, the Panel rejected the EC's argument that the risk from tire fires did not fall within the risk contemplated by Article XX(b), because the risk arose only from improperly managed waste tires. In addition, it found that the risk for tire fires is not necessarily limited to improper management.

The Panel also concluded that Brazil had demonstrated a risk to animal or plant life or health from tire fires and mosquito-borne diseases. The Panel particularly noted that "[a]lthough the evidence is less explicit in explaining the risk to animal and plant life or health than that to

human health or life, the evidence before us suggests that contamination of water and soil leads to an inevitable negative impact on animal and plant life and health." The Panel also responded to the EC's claim that as for mosquito-borne illnesses, in particular yellow fever, monkeys seem to get infected with it in their natural environment, independently of the presence of waste tires.

> 7.91 However, as for "yellow fever", which is also one of the mosquito-borne diseases, the evidence shows that the mosquitoes acting as a vector of yellow fever to monkeys are wild mosquitoes rather than urban mosquitoes that breed in, *inter alia*, waste tyres as argued by the European Communities. We also note the argument contained in the brief by the Humane Society International, attached by Brazil to its second submission, that the mosquito-borne diseases that can put at risk the health of both humans and animals include malaria, filarosis, canine heartworm, dengue, yellow fever and West Nile virus. However, no specific element is provided in support of this assertion, showing how each of these diseases affects animals, in particular in relation to the accumulation of waste tyres.

In light of the above, the Panel concluded that Brazil had demonstrated the existence of risks to animal life or health in relation to dengue and risks to animal and plant life or health in relation to toxic emissions caused by tire fires. The Panel also concluded that Brazil's measures fell within the range of policies covered by Article XX(b), because Brazil's policy objective was to reduce exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tires: "Measures specifically designed to avoid the generation of further risk, thereby contributing to the reduction of exposure to the risk, fall, in our view, within [Article XX(b)]." para. 7.98.

b. Is the Measure "Necessary" within the Meaning of Article XX(b)?

While the Panel's discussion of risk did not differ from the analysis in *EC–Asbestos*, the Panel's analysis of "necessary" differed markedly. The Panel began by drawing together various analyses of "necessary" under several WTO agreements.

Brazil–Measures Affecting Imports of Retreaded Tyres,
Report of the Appellate Body, WT/DS332/AB/R (decided Dec. 3, 2007, Dec. 17, 2007)

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of the Objective * * *

> 141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In *Korea–Various Measures on Beef*, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable'". The Appellate Body added:

> Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". (footnote omitted)

142. In *Korea–Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

> ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

143. *US–Gambling*, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure", and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres", and noted that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important." The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible." Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."

145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective. In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified. To the contrary, in *EC–Asbestos*, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health". In other words, "[a] risk may be evaluated either in quantitative or qualitative terms." Although the reference by the Appellate Body to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban. In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

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150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be". We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in *Korea–Various Measures on Beef*, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'". Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us

that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

152. We have now to assess whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres.

153. … In the light of the evidence adduced by the parties, the Panel was of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings, or with new tyres that are retreadable. As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres" and that, accordingly, the Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan." As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres and that "at least some domestic used tyres are being retreaded in

Brazil." The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres, and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded. The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide for the safe disposal of waste tyres in specified proportions. For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil. Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material. Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil. Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a *key element* of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel's Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken. As the Appellate Body indicated in *US–Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives." We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued". If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available". As the Appellate Body indicated in *US–Gambling,* "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties." If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of

waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil. The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

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174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection, that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres" to the maximum extent possible. In this respect, we believe, like the Panel, that non-generation measures are more apt to achieve this objective because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated. Furthermore, we note that, in comparing a proposed alternative to the Import Ban, the Panel took into account specific risks attached to the proposed alternative, such as the risk of leaching of toxic substances that might be associated to landfilling, or the risk of toxic emissions that might arise from the incineration of waste tyres. In our view, the Panel did not err in so doing. Indeed, we do not see how a panel could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative.[308] In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban. Because these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres. We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

[308] This was recognized by the Appellate Body in *EC–Asbestos*, where it stated that the risks attached to a proposed measure should be included in the exercise of comparison aiming to determine whether it is a reasonably available alternative to the measure at issue. (Appellate Body Report, *EC–Asbestos*, para. 174)

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it". According to the European Communities, although the Appellate Body has not defined the term "weighing and balancing", "this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued." The European Communities reasons that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and balancing' this contribution against any of the other relevant factors." In addition, the European Communities contends that "the Panel base[d] ... its 'weighing and balancing' exercise on the wrong analysis it ... made of the alternatives". In sum, the European Communities argues that the Panel conducted a "superficial analysis" that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued."

* * *

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree". The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important. Then, the Panel analyzed the

trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.

180. The Panel then proceeded to examine the alternatives to the Import Ban proposed by the European Communities. The Panel explained that some of them could not be viewed as alternatives to the Import Ban because they were complementary to it and were already included in Brazil's comprehensive policy.[324] Next, the Panel compared the other alternatives proposed by the European Communities—landfilling, stockpiling, incineration, and material recycling—with the Import Ban, taking into consideration the specific risks associated with these proposed alternatives. The Panel concluded from this comparative assessment that none of the proposed options was a reasonably available alternative to the Import Ban.

181. The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that "none of these, either individually *or collectively*, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban." Secondly, as noted by the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy. Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives.

182. In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body. The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not "actually" weigh and balance the relevant factors, or

[324] For example, measures to encourage domestic retreading and improve the retreadability of domestic used tyres, a better implementation of the import ban on used tyres, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.

that the Panel made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban.

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Questions and Discussion

1. In *Brazil–Retreaded Tyres*, Brazil justified its ban on *retreaded* tires even though *waste* tires (as opposed to properly used retreaded tires) caused the risks that Brazil sought to reduce. In other words, the product posing the health risk differed from the product subject to trade restrictions. Similarly, in *US–Gasoline*, the United States imposed trade restrictions on gasoline even through, strictly speaking, the health risks did not directly relate to gasoline itself but rather to air pollution caused by the combustion of gasoline. In *Shrimp/Turtle*, the Appellate Body also found that restrictions on the importation of shrimp to protect sea turtles fell within the scope of measures allowable under Article XX(g). In our discussion of Article XX(g), we will return to the question of just how tight the link must be between the regulated product and the resource to be protected or the risk to be avoided.

2. Also with respect to risk, the Appellate Body repeated the clarification made in *US–Shrimp* that the legitimacy of the measure's declared policy objective must be examined in light of the measure itself and its general design and structure. In addition, it restated the Appellate Body's declaration in *EC-Asbestos* that the Panel's task was *not* to examine the desirability of the declared policy goal, because Article XX(b) embodies "the fundamental principle" that WTO Members have "the right … to determine the level of protection that they consider appropriate in a given context." *Brazil–Retreaded Tyres*, Appellate Body Report, at para. 210. In light of this fundamental principle, do you think WTO members will have difficulty defending a measure under the new balancing test of Article XX(b)?

3. The EC argued that Brazil did not show specific health risks from tire fires in Brazil and that, in any event, the probability of adverse health effects is small. The EC also argued that Brazil needed to quantify the contribution of the import ban to a reduction in waste tires. With these arguments, the EC appeared to bring the risk assessment provisions of the SPS Agreement into the analysis of Article XX(b). As will be seen in *EC–Hormones*, the Appellate Body has interpreted the SPS Agreement as requiring WTO members to provide substantial evidence of risk and a very close connection between the level of risk demonstrated and the measure adopted. For example, if the probably of harm is low, then a ban would likely not be considered consistent with the SPS provisions. While the Panel and Appellate Body in *Retreaded Tyres* clearly required Brazil to establish the existence of risk, it made equally clear that the information needed to establish that risk was substantially less under Article XX(b) than under the SPS Agreement. How much evidence and what kind of evidence should the responding Party need to demonstrate risk?

4. The new "necessary" test allows panels to balance many different factors. Some of the effects of the balancing test are obvious. For example, whereas the *Tuna/Dolphin* panels considered very little factual information as to whether the U.S. restrictions on tuna where necessary, the *Asbestos* and *Retreaded Tyres* panels analyzed reams of technical data and addressed an incredibly large number of variables to determine whether a measure was "necessary." For the

purpose of resolving tensions between trade and environmental goals, do you think this is a positive step forward? More generally, do you think the new test established by the Appellate Body strikes a better balance between trade and environmental goals than previous tests?

V. The Chapeau of Article XX

At 346, add a new Section C:

C. *Brazil–Retreaded Tyres*

Recall that the Panel found that Brazil's ban on the issuance of licenses to import retreaded tires was provisionally justified pursuant to Article XX(b). It then assessed whether that ban was consistent with the chapeau of Article XX. The Panel, and then the Appellate Body, focused on the discrimination caused by two measures. First, Brazil maintained an exemption of retreaded tires imported from countries participating in MERCOSUR, (a customs union called the Mercado Común del Sur, or Southern Common Market). Brazil implemented the exemption only after Uruguay successfully challenged Brazil's ban on the issuance of import licenses in a MERCOSUR dispute. Is such discrimination (retreaded tires from MERCSUR members versus those from the EC) contrary to the chapeau of Article XX? Second, Brazil allowed imports of used tires, despite a general ban on such imports, because importers obtained an injunction from a Brazilian court requiring Brazil to allow such imports. Did this measure violate the chapeau by enabling retreaded tires to be produced in Brazil from imported casings, while retreaded tires produced abroad using the same casings could not be imported into Brazil?

Brazil–Measures Affecting Imports of Retreaded Tyres,
Report of the Appellate Body, WT/DS332/AB/R
(decided Dec. 3, 2007, adopted Dec. 17, 2007)

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

* * *

226. The Appellate Body Reports in *US–Gasoline*, *US–Shrimp*, and *US–Shrimp (Article 21.5–Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision. In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US–Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market) was "difficult to reconcile with the declared objective of protecting and conserving sea turtles". Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is "unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination.

By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.[437]

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above , the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random" because it was adopted further to a ruling within the framework of MERCOSUR.

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.

233. Accordingly, we *find* that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. …

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[437] … We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan–Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims to ensure "equality of competitive conditions for imported products in relation to domestic products". (Appellate Body Report, *Japan–Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (*Ibid*., at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (*Ibid*. (footnote omitted))

234. This being said, we observe, like the Panel, that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo. Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.

2. The MERCOSUR Exemption and Disguised Restriction on International Trade

236. When examining whether the Import Ban was applied in a manner that constitutes a disguised restriction on international trade, the Panel was not persuaded by the European Communities' contention that Brazil adopted the prohibition on the importation of retreaded tyres as "a disguise to conceal the pursuit of trade-restrictive objectives".

[In reaching its conclusion, the Panel referred to its reasoning with respect to arbitrary or unjustifiable discrimination: if imports from MERCOSUR countries were to occur in significant amounts, then the Import Ban would be applied in a manner that constitutes a disguised restriction on international trade. The Panel concluded that, as of the time of its examination, "the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant."]

239. We agree with the European Communities' observation that the reasoning developed by the Panel to reach the challenged conclusion was the same as that made in respect of arbitrary or unjustifiable discrimination. Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also *reverse* the Panel's findings … that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

[As with the MERCOSUR decision, the Panel found that Brazilian imports of used tires due to court injunctions were not arbitrary. However, because imports of used tires were taking place under the injunctions in significant amounts to the benefit of the domestic industry, the Panel concluded that the imports constituted unjustifiable discrimination and a disguised restriction on international trade. The Appellate Body, for the same reasons that it reversed the Panel's legal analysis concerning the MERCOSUR decision, reversed the Panel's analysis concerning imports of used tires through court injunctions.]

Questions and Discussion

1. The *Brazil–Retreaded Tyre* Panel resorted to a dictionary to distinguish "arbitrary" from "unjustifiable" discrimination. It began by referring to *The Shorter Oxford English Dictionary* to discern the ordinary meaning of these terms:

> "***arbitrary*** **1** Dependent on will or pleasure; **2** Based on mere opinion or preference as pop. to the real nature of things; capricious, unpredictable, inconsistent; **3** Unrestrained in the exercise of will or authority; despotic, tyrannical."
> "***unjustifiable*** Not justifiable, indefensible."
> "***justifiable*** **2** Able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible."

Brazil–Measures Affecting Imports of Retreaded Tyres, Report of the Panel, WT/DS332/R, paras. 7.257, 7.259 (decided June 12, 2007) (adopted Dec. 17, 2007). The Appellate Body did not reverse the Panel's conclusions that these definitions should guide interpretation of Article XX's chapeau. Did the Appellate Body adhere to these definitions? Are these useful definitions for interpreting arbitrary and unjustifiable discrimination?

2. Using the definitions above, the Panel declared that the exception for the importation of retreaded tires from MERCOSUR members did not constitute arbitrary discrimination because the exception resulted from the decision of a MERCOSUR Tribunal; Brazil's exception was not capricious. On the other hand, the Panel concluded that the exception could result in unjustifiable discrimination if the volume of imports that took place under the discriminatory measure would "significantly undermine[]" Brazil's objective. The Appellate Body, however, concluded at paragraph 227 that a discriminatory measure could not be justified under Article XX if "the reasons for the discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective." Did the Panel establish a useful way to distinguish "arbitrary" from "unjustifiable" discrimination or did the Appellate Body rightfully reverse the Panel?

3. The *Brazil–Retreaded Tyre* Panel takes the time to interpret "disguised restriction on international trade." Is the Panel's approach a sound one? Do you think the Appellate Body rightly reversed the Panel?

C. Unbundling the Chapeau's Requirements (page 346)

Renumber this Section as Section D

Questions and Discussion (page 354)

Add new note 1 and renumber the notes that follow:

1. Do the Panel and Appellate Body Reports in *Retread Tyres* clarify the distinction between arbitrary and unjustifiable discrimination or the meaning of "disguised restriction on international trade"?

Chapter 7

Sanitary and Phytosanitary Measures, Science, and Risk Assessment

III. The Science-Based Rules of the WTO's SPS Agreement

Replace the paragraph straddling pages 460-461 with the following:

The exact scope of an SPS measure remains uncertain, but the Panel's report in *EC–Biotech*, which the DSB adopted, indicates that it is extraordinarily broad. European Communities–Measures Affecting the Approval and Marketing of Biotech Products, Report of the Panel, WT/DS291/R, WT/DS292/R, & WT/DS293/R (Sept. 29, 2006) (adopted Nov. 21, 2006). The Panel noted that the phrase "risks arising from," found in the definition of an SPS measure in Annex A(1), "is broad and unqualified" and includes "not just measures which are applied to protect against risks that *will* invariably and inevitably arise from, *e.g.*, the spread of a pest, but also measures applied to protect against risks which *might* arise from, *e.g.*, the spread of a pest." EC–Biotech, para. 7.225 (emphasis added). In addition, the Panel concluded that the SPS Agreement covers measures taken to protect against indirect or long-term risks arising from, e.g., pests. Do you agree with the Panel?

The panel then analyzed the separate enumerated paragraphs of Annex A(1). With respect to the SPS measures covered by *Annex A(1)(a)*, the Panel concluded that the development of resistance to herbicides in target pests constitutes the "entry, establishment or spread" of a pest. *Id.* at para. 7.232. The term "pest" includes any "animal or plant that is destructive or causes harm to the health of other animals, plants or humans, or other harm, or a troublesome or annoying animal or plant." *Id.* at para. 7.240. Thus, the growth of genetically modified plants where they are undesired constitutes the spread of a pest. So, too, does the unintentional gene flow or transfer from a GM plant to other plants. *Id.* at para. 7.257. To the extent that a law seeks to prevent GM plants from impacting non-target populations and biogeochemical cycles, introducing or spreading diseases, or altering susceptibility to pathogens that facilitate the dissemination of infectious diseases and/or creating new reservoirs or vectors, that law constitutes a measure applied to protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms (*e.g.*, vectors) and disease-causing organisms (*e.g.*, pathogens). The Panel reached these findings in part by first concluding that "there is nothing in the text of Annex A(1) to suggest that the product subject to an SPS measure—in this case, a GM plant to be released into the environment—need itself be the pest which gives rise to the risks from which the measure seeks to protect." It is for that reason "that even if the GM plant or the [antibiotic resistance marker genes] were not viewed as a "disease-causing organisms" in and of themselves, the pathogen which develops resistance to the antibiotic in question could be regarded as a 'disease-causing organism' for the purposes of Annex A(1)." *Id.* at para. 7.282.

With respect to the SPS measures covered by *Annex A(1)(b)*, the Panel concluded that a GM crop grown for one purpose, for example as a feedstuff for farm animals, but is eaten by animals, including wild fauna, can be considered a "food" for that animal. According to the Panel, this would include pollen of the GM crop which is consumed by insects and GM plants consumed by non-target insects, deer, rabbits, or other wild fauna. GM seeds used for growing crops could also be considered animal "food" if the seeds are spilled and subsequently eaten by birds. *Id.* at para. 7.292. Genes, including antibiotic resistance marker genes, that are intentionally added to a product for a technological purpose are "additives" within the meaning of Annex A(1)(b). *Id.* at paras. 7.301, 7.303.

The Panel also distinguished the terms "additive," "contaminant," and "toxin" in Annex A(1)(b). A "contaminant" is the "unintentional" presence of a substance that is said to "infect or pollute." *Id.* at para. 7.313. Thus, if a GM plant produces an intended protein, then it is not a "contaminant," although the gene inserted to create that protein would still be an "additive." However, "proteins produced through the *unintended* expression of modified genes in agricultural crops may be considered 'contaminants' within the meaning of Annex A(1)(b), if these proteins 'infect or pollute' the food product." *Id.* Moreover, the introduction of herbicide-resistant GM crops might lead to a higher level of contaminants, specifically herbicide residues, in foods or feedstuffs. The Panel concluded that the term "contaminants" encompasses herbicide residues present in foods or feedstuffs, even though the herbicide residues are the direct result of applying herbicides, not the introduction of the herbicide-resistant GM plant. Meanwhile, "toxin" means "a substance that causes death or harm when introduced into or absorbed by a living organism," such as a poison. *Id.* at para. 7.336. It thus encompasses allergens, which the Panel considered to be poisons.

The Panel similarly interpreted *Annex A(1)(c) and (d)* broadly. For example, possible human health effects from increased herbicide use associated with a regulated product—in this case GMOs—may fall within the scope of Annex A(1)(c). The phrase "other damage" in subparagraph (d) includes impacts on non-living components of the environment, including effects on the dynamics of populations and effects on biogeochemistry.

Moreover, the Panel declared that whether a particular measure constitutes an SPS measure is to be determined:

> 7.1334 … by reference to such criteria as the objective of the measure, its form and its nature. Regarding the objective of SPS measures, subparagraphs (a) through (d) indicate that SPS measures must "be applied" to protect against certain enumerated risks. Regarding the form of SPS measures, the second paragraph of the definition provides that SPS measures include "all relevant laws, decrees [and] regulations." This enumeration suggests that the *SPS Agreement* does not prescribe a particular legal form and that SPS measures may in principle take many different legal forms. Finally, in relation to the nature of SPS measures, the second paragraph stipulates that SPS measures include "requirements and procedures." The second paragraph then goes on to mention, by way of example, a number of relevant substantive requirements (prescribed end product criteria, prescribed quarantine treatments, certain packaging and labelling requirements,

> etc.) and procedures (testing procedures, inspection procedures, certification procedures, approval procedures, etc.). We note that the term "requirements" is broad in scope. For instance, both an authorization to market a particular product and a ban on the marketing of a particular product may be considered "requirements", in that one is effectively a requirement to permit the marketing of a product and the other a requirement to ban the marketing of a product.
>
> 7.1335 Still in relation to the reference in the second paragraph of Annex A(1) to "requirements and procedures", we note that no reference is made to the "application" of "requirements and procedures." This omission suggests that whereas requirements and procedures as such may constitute SPS measures, the application of such requirements and procedures would not, itself, meet the definition of an SPS measure. The provisions of the *SPS Agreement* support the view that the omission of a reference to "application" is deliberate, for there are several provisions which establish obligations specifically with regard to the "application" of SPS measures. For instance, Article 2.3, second sentence, states that SPS measures "shall not be applied in a manner which constitute a disguised restriction on international trade." Similarly, Article 10.1 states in relevant part that "[i]n the preparation and application of [SPS] measures, Members shall take account of the special needs of developing country Members." Finally, we note that Article 8 draws a distinction between, on the one hand, the "operation" of procedures and, on the other hand, the "procedures", which, themselves, are defined in Annex A(1) as SPS measures.

Based on these interpretations of the "objective," "form," and "nature" of an SPS measure, the Panel ruled that the EC's decision to apply a general moratorium on approvals of biotech products was "a procedural decision to delay final substantive approval decisions [that] did not impose a substantive 'requirement' in relation to biotech products with pending or future applications" because the EC "neither approved nor rejected applications." Moreover, the EC's decision was not a "procedure" within the meaning of Annex A(1) because it "did not itself establish a new procedure or amend the existing EC approval procedures." Consequently, the Panel concluded that the EC's decision to apply a general moratorium did not meet the "nature" element of the second paragraph of Annex A(1), because it did not provide for "requirements [or] procedures." *Id.* at para. 7.1382. However, it did find that the "safeguard measures"—laws or regulations taken by individual EC members to limit the importation or marketing of GM products despite EC approval—to be requirements within the meaning of the second paragraph of Annex A(1), because they were adopted through formal legal procedures and took the form of laws or regulations.

Questions and Discussion (page 464)

Add new discussion note 2:

2. Consider the *EC-Biotech* Panel's division of "SPS measure" into three parts: (1) objective, (2) the form of the measure (laws, decrees, and regulations) and (3) the nature of the measure

(requirements and procedures). Is the Panel's distinction, particularly as regards "form" and "nature," consistent with the plain meaning of Annex A(1)? *See Simon Lested, International Decisions: European Communities–Measures Affecting the Approval and Marketing of Biotech Product*s, 101 A.J.I.L. 453 (2007) (suggesting that it is contrary to the plain meaning).

Questions and Discussion (page 486)

Add new discussion note 4:

4. This is surely not the last word on the SPS Agreement. On December 17, 2007, a panel was established to hear New Zealand's complaint that Australia's restrictions on the importation of apples from New Zealand violated articles 2 and 5 of the SPS Agreement.

A. The Meaning of Article 5.7

Questions and Discussion (page 507)

Replace discussion note 2 with the following:

2. In paragraphs 184 and 185, the Appellate Body takes pains to distinguish insufficient evidence from scientific uncertainty. What distinction does the Appellate Body make? Is the following explication, from the Panel in *Hormones II*, helpful?

EC–Hormones Dispute, WT/DS320/R, WT/DS321/R
(decided Mar. 31, 2008) (currently on appeal)

> 7.631 … [T]he existence of scientific uncertainty does not automatically amount to a situation of insufficiency of relevant scientific evidence. In other words, the fact that a number of aspects of a given scientific issue remain uncertain may not prevent the performance of a risk assessment. First, we should exclude theoretical uncertainty, which is the uncertainty that always remains because science can never provide absolute certainty about the safety of a given substance. In *EC–Hormones*, the panel and the Appellate Body concurred in agreeing that theoretical uncertainty was not the kind of risk to be assessed under Article 5.1. In the Panel's view, theoretical uncertainly therefore should also not determine the applicability of Article 5.7.
>
> 7.632 Second, we note that in *EC–Hormones*, the Appellate Body stated that the presence of divergent views on an issue could be a form of scientific uncertainty. We nevertheless note that scientific uncertainty may be factored into the conclusions of the risk assessment. We find support for this conclusion in the following comment of the Appellate Body in *Australia–Salmon*:

> "We might add that the existence of unknown and uncertain elements does not justify a departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph 4 of Annex A, for a risk assessment."

7.633 This issue was further addressed by the panel in *EC–Approval and Marketing of Biotech Products*, which acknowledged that the conclusions of a risk assessment may not be free from uncertainties or other constraints even though there was sufficient relevant scientific evidence to perform the risk assessment. The panel, in agreement with the Appellate Body in *EC–Hormones*, found "that such uncertainties may be legitimately taken into account by a Member when determining the SPS measure, if any, to be taken" and that the scientific uncertainties present in a risk assessment may support a range of possible measures and within the range of measures reasonably supported by the risk assessment and consistent with other applicable *SPS Agreement* provisions, the Member was entitled to choose one that best protects human health and/or the environment. As recalled by the panel in *EC–Approval and Marketing of Biotech Products*, Members were also justified in taking into account factors like a limited body of relevant scientific evidence, assumptions and other constraints that would affect the level of confidence in the risk assessment:

> "We consider that if there are factors which affect scientists' level of confidence in a risk assessment they have carried out, a Member may in principle take this into account in determining the measure to be applied for achieving its appropriate level of protection from risks. Thus, there may conceivably be cases where a Member which follows a precautionary approach, and which confronts a risk assessment that identifies uncertainties or constraints, would be justified in applying (i) an SPS measure even though another Member might not decide to apply any SPS measure on the basis of the same risk assessment, or (ii) an SPS measure which is stricter than the SPS measure applied by another Member to address the same risk".

7.634 The panel explicitly recognized that, even though scientific uncertainty existed, there could still be sufficient scientific evidence to perform a risk assessment.

7.637 While we agree that under certain circumstances what was previously sufficient evidence could become insufficient, we do not believe that the existence of scientific uncertainty means that previously sufficient evidence has in fact become insufficient nor should it *ipso facto* justify the applicability of Article 5.7 of the *SPS Agreement*.

Add the following discussion notes at page 507:

4. In *Hormones II*, international standards existed for five of the six hormones at issue, indicating that sufficient relevant scientific evidence existed at one time. Nevertheless, the EC argued that the data used for those risk assessments was old and insufficient to prepare risk assessments. When does previous sufficient evidence become insufficient? Consider the views of the Panel in *Hormones II*:

> 7.647 … [I]n order to properly take into account the existence of international standards, guidelines and recommendations in this case, our approach should be to assess whether scientific evidence has become insufficient by determining whether the European Communities has produced any evidence of some sufficient change in the scientific knowledge so that what was once sufficient to perform an adequate risk assessment has now become insufficient (i.e., "deficient in force, quality or amount"). In this respect, suggesting hypothetical correlations or merely arguing that there could be more evidence on one concern or another should not be deemed sufficient to successfully claim that relevant scientific evidence has become *insufficient*. Indeed, more studies can always be performed and there can always be more evidence. We note in this regard that the European Communities shares our position in its second written submission, where it makes a "brief description of insufficiency of pertinent scientific information for all five hormones (except oestradiol-17β)". We interpret the use of the word "pertinent" and not "relevant" as in Article 5.7 as meaning that the European Communities agrees that not any insufficiency of relevant scientific evidence would make the performance of a risk assessment impossible. Indeed, "insufficiencies in the evidence" does not necessarily equal "insufficient evidence" to do a risk assessment…. Moreover, as mentioned by the Appellate Body in *EC–Hormones*, risk assessments do not need to be based on "monolithic" evidence.
>
> 7.648 We therefore conclude that if relevant evidence already exists, not any degree of insufficiency will satisfy the criterion under Article 5.7 that "relevant scientific evidence is insufficient". Having regard to our reasoning above, particularly with respect to scientific uncertainty and the existence of international standards, we consider that, depending on the existing relevant evidence, there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient. In the present case where risk assessments have been performed and a large body of quality evidence has been accumulated, this would be possible only if it put into question existing relevant evidence *to the point that* this evidence is no longer sufficient to support the conclusions of existing risks assessments.

EC–Hormones Dispute, WT/DS320/R, WT/DS321/R (decided Mar. 31, 2008) (currently on appeal). Is the Panel's "critical mass" threshold an appropriate one?

5. Recall that the Appellate Body ruled that Article 2.4 of the TBT Agreement confers a right allowing WTO members to meet their legitimate objectives by adopting technical regulations

that differ from international standards (see page 385). Similarly, the Appellate Body concluded that Article 3.3 of the SPS Agreement grants a member the right to set a level of protection different from the relevant international standard. In other words, these provisions are not exceptions to the requirement to base technical regulations and SPS measures on international standards. Consistent with these conclusions, the Panel in *EC-Biotech* stated that Article 5.7 of the SPS Agreement does not provide an exception to the requirements of Article 2.2, in particular the obligation not to maintain an SPS measure without sufficient scientific evidence. Instead, it held that Article 5.7 confers a right. *EC–Biotech*, para. 7.2969. The Panel relied on the Appellate Body's description in *EC–Tariff Preferences* of when a provision constitutes a right or an exception:

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

Appellate Body Report, European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries, para. 88 WT/DS246/AB/R (decided April 7, 2004) (adopted April 20, 2004).

As a consequence, the complaining party, not the responding party, must demonstrate that the challenged SPS measure is inconsistent with at least one of the four requirements set forth in Article 5.7. According to the Panel, [i]f such non-compliance is demonstrated, then and only then, does the relevant obligation in Article 2.2 apply to the challenged measure." *EC–Biotech*, at para. 7.2976. Similarly, Article 5.7 is not an exception to Article 5.1, but rather a qualified right. Consequently, the complaining party must demonstrate that the challenged measure is inconsistent with at least one of the four requirements set forth in Article 5.7. If such non-compliance is demonstrated, then, and only then, is Article 5.1 applicable to the challenged SPS measure. The Panel thus concluded that "when a complaining party presents a claim of violation under Article 5.1, it has the burden to establish a prima facie case of inconsistency with both Articles 5.1 and 5.7." *Id.* at para. 7.3000.

Although the Panel concluded that a complaining party's claim under Article 5.1 could not succeed if the responding party complies with the requirement of Article 5.7, it declared that "it is both necessary and appropriate to examine the consistency of the safeguard measures with Article 5.7 within the context, and as part, of an examination of the consistency of the same measures with Article 5.1." para. 7.3005. It then decided to analyze the consistency of the safeguard measures with Article 5.1 first, because "the critical legal issue in our view is whether

the relevant safeguard measures meet the requirements set out in the text of Article 5.1, not whether they are consistent with Article 5.7." *Id.* at para. 7.3006. Do you agree with the Panel's analysis?

6. The Panel in *EC–Biotech* was asked to determine whether the insufficiency of relevant scientific evidence is to be judged at the time of adoption of a provisional measure or at the time a Panel is established to judge the validity of that measure. In answering this question, the Panel synthesized the Appellate Body's conclusions in earlier reports to determine that the first sentence of Article 5.7 refers to the *adoption* of a provisional SPS measure and the second sentence refers to the *maintenance* of a provisional measure. Because the phrase "[i]n cases where relevant scientific evidence is insufficient" is part of the first sentence of Article 5.7, the Panel concluded that the insufficiency of relevant scientific evidence is judged by reference to when the provisional SPS measure was adopted. *Id*. at para. 7.354.

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VIII. Genetically Modified Organisms, the SPS Agreement, and the Biosafety Protocol

Insert new Section B on page 515

B. The *EC–Biotech* Panel Report

The Report of the Panel in *EC–Biotech* answered a number of questions concerning the scope of the SPS Agreement. However, the Panel did not answer any questions relating to the validity of the EC's regulatory regime or the safety of genetically modified food products, because the United States, Canada, and Argentina did not challenge the EC GMO regulations themselves. Instead, they challenged three aspects of the EC regime as violating various provisions of the SPS Agreement:

> (1) *De Facto Moratorium.* The claimants argued that the EC imposed a de facto moratorium on the approval of biotech products between June 1999 and August 2003 without an adequate risk assessment and that the de facto moratorium constituted "undue delay" in violation of Article 8 of the SPS Agreement. The EC denied that it had imposed a general moratorium on the approval of biotech products and that the evolving science justified any delay.
>
> (2) *Various product-specific EC measures related to the approval of biotech products.* The claimants also argued that the EC's failure to consider applications for the approval of specific biotech products violated the risk assessment and transparency provisions of the SPS Agreement.
>
> (3) *Various EC Member State measures related to the import and/or marketing of specific biotech products*: The claimants challenged the prohibitions on the marketing of certain biotech products enacted by some EC Member States, arguing that these measures were not based on a risk assessment. These "safeguard measures" are permitted by EC regulations and allow EC Member States to limit the importation or marketing of certain biotech products already approved by the EC. The EC claimed that these measures, given their provisional nature, were in full compliance with the SPS Agreement.

Recall from the earlier discussion concerning the scope of SPS measures that the Panel in *EC–Biotech* required an inquiry into three distinct elements of a measure to determine whether it is an "SPS measure": the objective, legal form, and nature of the measure. Because (1) the EC failed to approve any applications between October 1998 and August 2003, (2) the EC member States and the European Commission failed to take actions required by EC regulations to consider applications for marketing biotech products, and (3) statements of EC officials indicated no further action on applications would be taken, the Panel concluded that a de facto moratorium existed. However, it concluded that the de facto moratorium on approvals of biotech products and the failure to approve specific biotech products did *not* constitute SPS measures, because those actions did not constitute "procedures" within the Panel's view of the second paragraph of Annex A(1). Nonetheless, it found the underlying procedures and requirements of Directives 90/220 and 2001/18 as well as Regulation 258/97 to be SPS measures. As a consequence, the

Panel reviewed the consistency of those Directives and Regulation with other aspects of the SPS Agreement, including Article 8 of the SPS Agreement. Article 8 provides:

> 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(1)(a) requires members to ensure that "any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures … are undertaken and completed without undue delay." According to the Panel:

> [I]n our view, Annex C(1)(a) … requires that there not be any unjustifiable loss of time. Thus, what matters is whether there is a legitimate reason, or justification, for a given delay, not the length of a delay as such. Accordingly, if a Member causes a relatively short, but unjustifiable delay, we do not consider that the mere fact that the delay is relatively short would, or should, preclude a panel from finding that it is "undue." Similarly, we do not consider that a demonstration that a particular approval procedure has been delayed by, say, two years would always and necessarily be sufficient to establish that the relevant procedure has been "unduly" delayed. Having said this, we note that a lengthy delay for which no adequate explanation is provided might in some circumstances permit the inference that the delay is "undue."

Id. at para. 7.1496.

Against this legal framework, the panel had no trouble finding that the EC's delays in approving biotech products—pursuant to the de facto moratorium as well as delays for 24 specific biotech products—amounted to "undue delay." It rejected the EC's reasons for the delay—the perceived inadequacies of the EC approval legislation and the evolving science concerning biotech products—as not providing a justification for the delays. On the question of evolving science, the Panel stated that WTO Members could impose provisional measures under Article 5.7 if the scientific evidence was insufficient to perform a risk assessment. *Id*. at paras. 7.1507–7.1529.

With respect to safeguard measures imposed by six different EC member States on nine different biotech products, the Panel concluded that these were "SPS measures." Unlike the de facto moratorium and the failure to approve specific products, the safeguard measures have the appropriate "form"—they were adopted as laws and regulations and other formal legal means—and the appropriate "nature"—they prohibited the marketing of biotech products and thus constituted a "requirement."

The Panel then followed the analysis of *EC–Hormones* and *Australia–Salmon* by confirming that the safeguard measures could be justified by a risk assessment prepared by another WTO member or an international organization. In addition, the Panel noted that:

> 7.3034 … Since what is being challenged is the maintenance of each safeguard measure, it is of no particular importance whether a specific risk assessment which is claimed to serve as a basis for a safeguard measure was performed before or after the adoption of that safeguard measure. What matters is that the relevant risk assessment was appropriate to the circumstances existing at the time this Panel was established.

The Panel concluded that the various member States had not presented valid risk assessments when imposing safeguard measures. For example, studies presented by Austria with respect to T25 maize did "not indicate relative probability of the potential risks it identifies, but rather makes reference to possibilities of risks or simply to the inability to determine probabilities." para. 7.3044. Consistent with the Appellate Body's decision in *Australia–Salmon*, the Panel said that a risk assessment cannot merely conclude that there is a possibility of entry, establishment or spread of diseases and associated consequences, but rather must evaluate the likelihood of such entry, establishment, or spread of diseases and associated consequences. *Id*. at para. 7.3045. Other documents evaluated risk assessment procedures, but did not evaluate potential risk. The Panel also clarified that governments may base their SPS measures on divergent (i.e., minority opinions), but those divergent opinions must be expressed in a risk assessment, because Article 5.1 requires an SPS measure to be "based on" a risk assessment. *Id*. at para. 7.3060. In the end, the Panel concluded that the safeguard measures for each of the nine products were not based on risk assessments within the meaning of Article 5.1, because:

(a) the European Communities or relevant member State did not identify any divergent opinions expressed in the risk assessments which were conducted by the lead competent authority or any other relevant scientific body with regard to the nine biotech products;

(b) the European Communities or relevant member State did not explain, by reference to these risk assessments, how and why relevant member State assessed the risks differently, and did not provide a revised or supplemental assessment of the risks;

(c) the European Communities did not identify possible uncertainties or constraints in the risk assessments in question, and did not explain why, in view of any such uncertainties or constraints, the safeguard measures were warranted by the relevant risk assessments; and

(d) there was no apparent rational relationship between the safeguard measures, which impose a prohibition, and a risk assessment concluding that any of the nine biotech products will give rise to any adverse effects on human or animal health and the environment.

The panel subsequently reviewed the measures pursuant to Article 5.7. However, in each case it determined that the safeguard measures were imposed without review of any new information. Indeed, for all of the nine biotech products subject to safeguard measures, the relevant EC scientific body determined that the information submitted by the relevant Member

State did not constitute new scientific information that would change the original risk assessment. As such, the Panel concluded that the safeguard measures violated Article 5.7 and, by implication, the requirements of Article 2.2 to ensure that SPS measures are "based on scientific principles" and "not maintained without sufficient scientific evidence."

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Chapter 9

Trade Rule and Multilateral Environmental Agreements

Replace Section III.B, "What Law Applies", pages 664-675, with the following:

B. What Law Applies?

If a dispute involving an MEA trade measure must be taken to the WTO, what law may panels and the Appellate Body apply? What is the range of law that panels and the Appellate Body can rely on to make decisions? The *EC–Biotech* dispute, in which the European Communities argued that the Convention on Biodiversity, the Biosafety Protocol, and the precautionary principle should inform the Panel's understanding of the SPS Agreement, has placed new emphasis on these questions. As the following readings make clear, the answer is anything but clear.

Several provisions of the DSU offer clues as to whether panels can look outside the four corners of the WTO agreements.

- Article 3.2 provides that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."
- Article 3.2 also provides that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."
- Under Article 7, the standard terms of reference for a panel are "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."
- Article 11 states that the function of panels is to make an objective assessment of the matter before it, including the applicability of and conformity with the covered agreements.

Several questions follow from these provisions concerning the applicability of non-WTO law to WTO disputes. First, can panels use rules of treaty interpretation to clarify terms and provisions of a WTO Agreement? Article 3.2 makes clear that they must. These principles of treaty interpretation are found largely in the Vienna Convention on the Law of Treaties (Vienna Convention). As we have seen in *Reformulated Gasoline* and several other decisions, panels and

the Appellate Body frequently resort to Article 31(1) of the Vienna Convention for the principle that terms should be given their Aordinary meaning.@ *See* Chapter 2, Section IV.D.4. The more challenging question for panels and the Appellate Body is whether other international law, such as an MEA, may be used to shape the meaning of a term used in a WTO agreement. Can an MEA shape the scope of a WTO obligation, such as the scope of a member=s national treatment obligation?

Vienna Convention on the Law of Treaties
May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331
(entered into force Jan. 27, 1980)

Article 30BApplication of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. * * *

Article 31BGeneral rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32–Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

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1. The Early Decisions

Panels and the Appellate Body have suggested that non-WTO law could be applicable in WTO disputes. The Appellate Body in *Reformulated Gasoline* stated that the GATT "is not to be read in clinical isolation from public international law." The Appellate Body=s focus on public international law suggests that the Appellate Body believed that panels and the Appellate Body could apply a corpus of law broader than the law of treaty interpretation. A panel later declared:

7.96 We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or

> inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO. * * *
>
> 7.101 Thus, … we will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.[755] To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of [Agreement on Government Procurement] commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements.

Korea–Measures Affecting Government Procurement, Report of the Panel, WT/DS163/R (June 19, 2000).

Similarly, the Appellate Body in *Shrimp/Turtle* noted that its task was to interpret the chapeau of Article XX, "seeking additional interpretive guidance, as appropriate, from general principles of international law." United States**B**Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, para. 158 (Nov. 6, 1998), *reprinted in* 38 I.L.M. 121 (1999). The following excerpt encapsulates the Appellate Body's conclusions in *Shrimp/Turtle*, which can be read in full in Chapter 5 at pages 337-345.

Howard Mann & Steve Porter, *The State of Trade and Environment Law 2003: Implications for Doha and Beyond,* 22-24 (Int'l Inst. for Sustainable Development and the Center for International Environmental Law 2003)

> Consistent with other instances of the AB [Appellate Body] moving towards a greater inter-relationship between trade law and public international law more generally, the Appellate Body significantly expanded the scope for considering

[755] We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the [Agreement on Government Procurement] would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

MEAs in the first Shrimp-Turtle decision and both the Panel and AB do so again in the implementation review. Through various passages, the AB provides guidance in the initial Shrimp-Turtle decision:

- In ruling that the content of the term exhaustible natural resources in Article XX(g) is evolutionary, not static, the AB considers the content of the 1982 United Nations Convention on the Law of the Sea, the 1992 Convention on Biological Diversity, Agenda 21 from the 1992 Rio UNCED Conference, the Convention on the Conservation of Migratory Species of Wild Animals and the Convention on International Trade in Endangered Species.

- Moreover, the AB does so while expressly recognizing that not all the parties to the dispute, let alone the WTO, are signatories or parties to all the outside agreements they cite.

- They cite the 1992 Rio Declaration on Environment and Development as part of the legal and policy developments that lead to the integration of the concept of sustainable development into the fabric of the WTO.

- All of the above gets factored into crafting the balance that the AB seeks between the right to enact measures for the protection of the environment and the duty to meet one's obligations under the WTO Agreements. They state, "Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretive guidance, as appropriate, from the general principles of international law."

- The AB also refers to Principle 12 of the 1992 Rio Declaration and to the concluded MEAs already listed above to support its view that measures to address common environmental problems should be, as far as possible, based on international consensus as opposed to unilateral action. Hence, the AB uses these sources of law not just to address the environmental issues but also the development and trade issues.

- The AB uses the regional MEA concluded by the United States with Brazil, Costa Rica, Mexico, Nicaragua and Venezuela on the protection of turtles during shrimp harvesting to help in its analysis of whether alternative, non-unilateral measures were available to the U.S., and whether such alternatives might be less discriminatory or trade restrictive. It does so even though it notes, once again, that not all the parties to the dispute are signatories to that Convention and it had not yet even been ratified by any of the signatories.

All of the above is done in the context of interpreting and applying the terms and tests in Article XX(g) and the chapeau of Article XX. Given these specific and

express arguments by the AB, it is clear that the constraints on the use of extraneous materials spoken of in the Tuna-Dolphin II, Superfund and the landing of unprocessed herring and salmon cases has been rejected. In its place, the approach of allowing outside material to be used to help inform the interpretation of the WTO provisions has been adopted. And this has been done whether or not the parties to the dispute are all parties to the agreements in question, or even whether the agreements are in force. * * *

In the implementation review decision, the Panel and the AB both take a further step in the use of MEAs under WTO law. The Panel concludes in its review on implementation that Athe Inter-American Convention can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of conservation and protection.@ The Panel then went on to use it to assess what elements could reasonably be anticipated in a cooperative agreement, based on the Inter-American Convention, and apply these to test whether the United States was, under its revised measure, still acting in a manner that was arbitrarily or unreasonably discriminatory under the chapeau of Article XX. It found the U.S. was not acting in such a manner, as there was a large degree of concordance between the new U.S. measure and the Inter-American Agreement.

This approach was specifically challenged by Malaysia before the Appellate Body. The AB found that, while the use of the word "benchmark" was unfortunate, the concept of using the Inter-American Agreement as an Aexample@ was appropriate. It then went on to analyze what the Panel had done, and concluded it has used the Agreement in just such a way. Moreover, the AB stated expressly: "The mere use by the Panel of the Inter-American Convention *as a basis for comparison* did not transform the Inter-American Convention into a 'legal standard.'"

It may be noted that this brings the use of MEAs, whether the states in the dispute are parties or not, or the measures in question in the MEA are specific and mandatory or not, into a source that can be analogized to an international standard. * * *

There is no specific standard for expressing when an MEA can be used as an example to apply for WTO compliance. This issue therefore remains very discretionary. Despite these differences, the conceptual convergence [with rules for the use of international standards in the TBT and SPS agreements] is noteworthy, and is a good basis for understanding that the AB has established an approach to integrating outside agreements such as MEAs into its role of interpreting and applying the WTO Agreements. Thus, the relationship of the WTO to MEAs at its most critical point of potential conflictCin the dispute resolution processChas some specific and cogent direction at this time: it is not a *tabula rasa*.

2. EC–Biotech

In *EC–Biotech*, the Panel considered the relationship between the SPS Agreement and other international law, including the Convention on Biological Diversity (CBD), the Cartagena Protocol on Biosafety to the Convention on Biological Diversity ("the Biosafety Protocol") and the precautionary principle. The European Communities argued that, consistent with Article 3.2 of the DSU and the Appellate Body's conclusions in *Shrimp/Turtle*, the WTO agreements must be interpreted and applied by reference to relevant rules of international law arising outside the WTO context. For the European Communities, it was irrelevant that the United States was not party to the CBD and Biosafety Protocol and that neither Argentina nor Canada had ratified the Biosafety Protocol. In addition, the European Communities argued that the Biosafety Protocol and the SPS Agreement are complementary and that the Protocol's provisions on precaution and risk assessment inform the meaning and effect of the relevant provisions of the WTO agreements.

In contrast, the United States, Canada, and Argentina argued that Article 7 of the DSU required the Panel to consider only relevant WTO agreements and that Article 3.2 of the DSU allowed reference to non-WTO law only if that law would assist the Panel in interpreting the particular terms of the covered agreements at issue in this dispute. Moreover, they argued that the reference to "parties" in Article 31 of the Vienna Convention refers to parties to the treaty that is being interpreted, not the parties to the dispute.

European Communities–Measures Affecting the Approval and Marketing of Biotech Products, Report of the Panel, WT/DS291-293/R (Sept. 29, 2006)(adopted Nov. 21, 2006)

> 7.67 Article 31(3)(c) directly speaks to the issue of the relevance of other rules of international law to the interpretation of a treaty. In considering the provisions of Article 31(3)(c), we note, initially, that it refers to "rules of international law." Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. In our view, there can be no doubt that treaties and customary rules of international law are "rules of international law" within the meaning of Article 31(3)(c). We therefore agree with the European Communities that a treaty like the *Biosafety Protocol* would qualify as a "rule of international law." Regarding the recognized general *principles* of law which are applicable in international law, it may not appear self-evident that they can be considered as "*rules* of international law" within the meaning of Article 31(3)(c). However, the Appellate Body in *US–Shrimp* made it clear that pursuant to Article 31(3)(c) general principles of international law are to be taken into account in the interpretation of WTO provisions. As we mention further below, the European Communities considers that the principle of precaution is a "general principle of international law." Based on the Appellate Body report on

US–Shrimp, we would agree that if the precautionary principle is a general principle of international law, it could be considered a "rule of international law" within the meaning of Article 31(3)(c).

7.68 Furthermore, and importantly, Article 31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term "the parties." In considering this issue, we note that Article 31(3)(c) does not refer to "one or more parties."[240] Nor does it refer to "the parties to a dispute."[241] We further note that Article 2.1(g) of the *Vienna Convention* defines the meaning of the term "party" for the purposes of the *Vienna Convention*. Thus, "party" means "a State which has consented to be bound by the treaty and for which the treaty is in force." It may be inferred from these elements that the rules of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force.[242] This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members. * * *

7.70 Taking account of the fact that Article 31(3)(c) mandates consideration of other applicable rules of international law, and that such consideration may prompt a treaty interpreter to adopt one interpretation rather than another, we think it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. Requiring that a treaty be interpreted in the light of other rules of international law which bind the States

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[240] We note that, by contrast, Article 31(2)(b) of the *Vienna Convention* refers to "one or more parties."

[241] By contrast, Article 66 of the *Vienna Convention*, which deals with procedures for judicial settlement, arbitration and conciliation, refers to "the parties to a dispute." We note that the absence of a reference to "the parties to a dispute" in Article 31 is not surprising given that Article 31 does not purport to lay down rules of interpretation which are applicable solely in the context of international (quasi-)judicial proceedings.

[242] We are aware that Article 31(2)(a) of the *Vienna Convention* refers to "all the parties." However, we do not consider that Article 31(2)(a) rules out our interpretation of the term "the parties" in Article 31(3)(c). In our view, the reference to "all the parties" is used in Article 31(2)(a) to make clear the difference between the class of documents at issue in that provision (namely, agreements relating to a treaty which were made between "all the parties") and the class of documents at issue in Article 31(2)(b) (namely, instruments made by "one or more parties" and accepted by "the other parties" as related to a treaty). In other words, we think that the use of the term "all the parties" in Article 31(2)(a) is explained, and necessitated, by the existence of Article 31(2)(b). Consistent with this view, we think that the absence of a reference to "all the parties" in Article 31(3)(c) is explained by the fact that Article 31(3) contains no provision like Article 31(2)(b), *i.e.*, that Article 31(3) contains no provision which refers to "one or more parties" and hence could render unclear or ambiguous the reference to "the parties" in Article 31(3)(c).

It is useful to note, in addition, that the view that the term "the parties" in Article 31(3)(c) should be understood as referring to all the parties to a treaty has also been expressed by Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités", in *Recueil des Cours de l'Académie de Droit International* (1976), Vol. III, p. 63, para. 7.

parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.

7.71 * * * In relation to the present dispute it can thus be said that if a rule of international law is not applicable to one of the four WTO Members which are parties to the present dispute, the rule is not applicable in the relations between all WTO Members. Accordingly, based on our interpretation of Article 31(3)(c), we do not consider that in interpreting the relevant WTO agreements we are required to take into account other rules of international law which are not applicable to one of the Parties to this dispute. But even independently of our own interpretation, we think Article 31(3)(c) cannot reasonably be interpreted as the European Communities suggests. Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.

[Because the United States is not a party to the CBD and Argentina, Canada, and the United States are not parties to the Biosafety Protocol, the Panel concluded that neither treaty was "applicable" in the relations between these WTO Members and all other WTO Members and that it was not required to take them into account in interpreting the WTO agreements at issue in this dispute. In addition, the Panel concluded, as in *EC–Hormones*, that the legal status of the precautionary principle remains unsettled and that it would refrain from expressing a view on the issue. See pages 508-509.]

7.90 Up to this point, we have examined whether there are other applicable rules of international law which we are required to take into account, in accordance with Article 31(3)(c) of the *Vienna Convention*, in interpreting the WTO agreements at issue in this dispute. We now turn to examine whether other rules of international law could be considered by us in the interpretation of the WTO agreements at issue even if these rules are not applicable in the relations between the WTO Members and thus do not fall within the category of rules which is at issue in Article 31(3)(c). * * *

7.92 The **Panel** recalls that pursuant to Article 31(1) of the *Vienna Convention*, the terms of a treaty must be interpreted in accordance with the "ordinary meaning" to be given to these terms in their context and in the light of its object and purpose. The ordinary meaning of treaty terms is often determined on the basis of dictionaries. We think that, in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative

character. It follows that when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it.

7.93 In the light of the foregoing, we consider that a panel may consider other relevant rules of international law when interpreting the terms of WTO agreements if it deems such rules to be informative. But a panel need not necessarily rely on other rules of international law, particularly if it considers that the ordinary meaning of the terms of WTO agreements may be ascertained by reference to other elements.

7.94 This approach is consistent with the Appellate Body's approach in *US–Shrimp*, as we understand it. In that case, the Appellate Body had to interpret the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. The Appellate Body found that this term was by definition evolutionary and therefore found it "pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources." Thus, as we understand it, the Appellate Body drew on other rules of international law because it considered that they were informative and aided it in establishing the meaning and scope of the term "exhaustible natural resources." The European Communities correctly points out that the Appellate Body referred to conventions which were not applicable to all disputing parties. However, the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted.

7.95 In the present case, in response to a question from the Panel, the European Communities has identified a number of provisions of the *Convention on Biological Diversity* and of the *Biosafety Protocol* which it considers must be taken into account by the Panel. The European Communities has not explained how these provisions are relevant to the interpretation of the WTO agreements at issue in this dispute. We have carefully considered the provisions referred to by the European Communities. Ultimately, however, we did not find it necessary or appropriate to rely on these particular provisions in interpreting the WTO agreements at issue in this dispute.

Questions and Discussion

1. The *EC–Biotech* Panel makes two important distinctions. First, it explicitly answers whether Panels *must* use or *may* use non-WTO law in a WTO dispute. Second, in answering the first question, it implicitly answers whether non-WTO law may be used to interpret the terms of WTO agreements only or whether that law may be used more broadly to define the scope of WTO obligations. How does the Panel answer these questions?

2. Look closely at the excerpt from Howard Mann and Steve Porter and the excerpts from the *Shrimp/Turtle* dispute in pages 337-345. Did the Appellate Body use non-WTO law merely to

interpret terms in Article XX(g), as the Panel in *EC–Biotech* asserts in paragraph 7.94 or did it also use that law to shape the content of GATT obligations, as Mann and Porter assert?

3. Scholars have been quick to criticize the *EC–Biotech* Panel's conclusions regarding the applicability of international law. The International Law Commission is among those that have criticized the *EC–Biotech* Panel. It has noted that the Appellate Body, in resolving previous disputes such as *Shrimp/Turtle*, *EC–Poultry*, and *Korea–Beef*, among others, has referred to bilateral and regional trade agreements entered into by select parties as a "supplementary means of interpretation," or "for the purpose of interpreting an ambiguous WTO provision." Do you think that the Panel has taken a different approach from *Shrimp/Turtle* and these other decisions?

Concerning the use of other agreements to interpret WTO agreements and provisions of them, the International Law Commission stated:

> 447. One sometimes hears the claim that this might not even be permissible in view of the express prohibition in the DSU according to which the "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (DSU 3:2 *in fine*). Such a view would, however, presume that the covered agreements are "clinically isolated" precisely in the way the AB has denied. Two considerations are relevant here. First, when article 31(3)(c) VCLT is used, it is used with the specific authorization of the DSU itself. But second, and more important, interpretation does not "add" anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment. Here it appears immaterial whether recourse to other agreements is had under article 31(3)(c), as supplementary means of interpretation, as evidence of party intent or of ordinary meaning or good faith (the presumption that States do not enter agreements with the view of breaching obligations). The rationale remains that of seeing States when they are acting within the WTO system as identical with themselves as they act in other institutional and normative contexts. Interpretation *does not add or diminish rights or obligations* that would exist in some lawyers' heaven where they could be ascertained "automatically" and independently of interpretation. All instruments receive meaning through interpretation—even the conclusion that a meaning is "ordinary" is an effect of interpretation that cannot have *a priori* precedence over other interpretations.

International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, P 450, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

With respect to the conclusions of the *EC–Biotech* Panel, the International Law Commission stated:

> 450. * * * [The Panel] interpreted article 31(3)(c) so that the treaty to be taken account of must be one to which all parties to the relevant WTO treaty are parties.

> This latter contention makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31(3)(c) would be allowed. The panel buys what it calls the "consistency" of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, taking "other treaties" into account as evidence of "ordinary meaning" appears a rather contrived way of preventing the "clinical isolation" as emphasized by the Appellate Body.

Whose analysis is more persuasive, the International Law Commission's or the Panel's?

4. Prior to the *EC–Biotech* case, Professor John Knox argued that "parties" under Article 31 of the Vienna Convention meant all parties bound by a treaty. He then challenged those commentators, such as the International Law Commission, who have resisted this interpretation because they believe that too few extratextual agreements will be able to satisfy it.

> [I]t is easier than it may first appear for such agreements to be considered. First, Article 31(3) does not prevent the parties from jointly deciding that subsequent agreements may be relevant to interpretation even if not all of the parties have adopted them. For example, the WTO Agreement allows the General Council to make interpretive decisions on the basis of a three-fourths majority. Second, subsequent agreements, whether reached expressly or through practice, may establish an interpretation of a treaty that is not subject to challenge by states ratifying the treaty later. In other words, new parties have to take the treaty as it is when they join it, including any interpretations of it already established under Article 31(3). Third, rules of customary international law potentially relevant under Article 31(3)(c) may bind nations that have not specifically agreed to them, at least as long as the nations have not persistently objected to their formation.
>
> Fourth, subsequent practice establishing the agreement of the parties under Article 31(3)(b) need not be by every party; the practice need only be accepted by all, and the acceptance can be tacit. MEAs containing trade restrictions provide an example of such subsequent practice. From the early 1970s, when CITES was drafted and adopted, to the present, when it and other major MEAs with trade restrictions have attained close to universal membership, the vast majority of GATT parties have negotiated, signed, and ratified the MEAs without contemporary claims by other GATT parties that the trade restrictions violate GATT. While "negative practice"—i.e., "the absence of action which would have been expected had a certain interpretation of a treaty been the correct one"—should be carefully employed, when coupled with such a long-standing positive

> practice, there can be little doubt that GATT parties have accepted the MEAs as consistent with GATT. * * *
>
> [A]pplying Article 31(3) would narrow the range of extratextual agreements that the Appellate Body could take into account. In particular, even widely adopted political declarations such as Rio Principle 12, which the Appellate Body cited in *Shrimp-Turtle I* as evidence of the preference of the international community for multilateral approaches to environmental protection, could be taken into account only if they were "regarding" the text under review (in that case, GATT Article XX), or if they reflected relevant customary international law. Principle 12 would not meet either requirement. Political declarations are far more likely to meet the first criterion if they are made in the WTO context. The WTO members' consensus statement in the 1996 CTE Report that they support and endorse "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature" probably does qualify as a subsequent agreement under Article 31(3)(a), especially since the following sentence of the report specifically refers to the need to ensure a "mutually supportive relationship" between WTO agreements and MEAs.

John H. Knox, *The Judicial Resolution of Conflicts between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 67-69 (2004). Professor Knox says that the requirement of Article 31(3) of the Vienna Convention to have agreement among "all" parties may not be difficult to overcome. Does Knox suggest reasonable responses to overcome these problems?

5. In arguing that the DSU allows consideration of more than WTO covered agreements and does not include a general and automatic conflict clause in favor of WTO covered agreements, Joost Pauwelyn asks us to consider the following extreme example.

> Imagine that the WTO treaty included an agreement regulating the slave trade. Would a WTO panel be obliged to apply and enforce this agreement at the request of a WTO member complaining about trade restrictions regarding slaves imposed by another member? If the DSU were read as precluding reference to international law other than WTO covered agreements (i.e., as a mechanism created outside the system of international law) and/or as containing a conflict clause to the effect that WTO rules always prevail, a WTO panel would be so obliged. This example confirms the absurdity of portraying the DSU as some alien mechanism divorced from, and superior to, all other international law. Following the theory put forward in this paper, the defending party in our hypothetical dispute would be allowed to invoke Article 53 of the Vienna Convention as a legal defense against the WTO slave trade agreement (the applicable law for defenses not being inherently limited). Article 53 provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." On that ground, the WTO panel would be obliged to find the WTO slave trade agreement invalid, hence inapplicable to and unenforceable against the WTO member in question. Nevertheless, given the limited jurisdiction of WTO panels

> (claims under WTO covered agreements only), the WTO member concerned could not itself bring a complaint to the WTO against the WTO member trading in slaves.

Has Pauwelyn convinced you that non-WTO must be considered by panels in a WTO dispute?

6. Gabrielle Marceau concludes that panels may use non-WTO law only in limited circumstances. By focusing on Article 3.2 and Article 19.1 of the DSU, she comes to another conclusion. Article 19.1 provides that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, "it shall recommend that the Member concerned bring the measure into conformity with that agreement." As a result, she concludes:

> At best WTO adjudicating bodies could make Asuggestions,@ yet such suggestions refer to the way the member may implement and correct the situation condemned by the recommendation that a AWTO provision has been violated.@ Article 3 of the DSU also states that the dispute settlement process is not the occasion to add to or diminish WTO rights and obligations of Members.
>
> Thus the WTO adjudicating bodies, although they have to perform all necessary reasoning to establish the state of international law and the applicable law between the two WTO members, do not seem to have the constitutional capacity to reach any standard recommendations in situations where another treaty provision has superseded (and thus added to or diminished) a WTO provision. Since there would be no applicable WTO provision, the panel would be faced with a form of WTO *non-liquet*, if this concept is defined [as] a situation where there is no law on the matter.

Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, at 1103-1104.

If Marceau is correct, then it is possible that the DSB has exclusive jurisdiction over issues arising under the GATT and other WTO agreements, but that the panels do not have any authority to rule on the relationship between the relevant WTO Agreement and the MEA. Is that possible? How does one get out of that untenable position? To the extent that the MEA supersedes the WTO agreement, Marceau suggests that a panel or the Appellate Body decline jurisdiction, because there would be no applicable WTO provision to review. *Id*. at 1107. Marceau=s suggestion is particularly important, because if panels and Appellate Body cannot turn to non-WTO law, then most international law, except rules of treaty interpretation, cannot be used to judge a member=s trade obligations.

7. According to Article 38(1) of the Statute of the International Court of Justice, there are three sources of international law: treaty law, customary international law, and general principles of law. Customary international law represents the general practice of nations as determined by state practice consistent with the rule and *opinio juris*. State practice can be identified when the States particularly affected by the rule comply with it. This state practice must follow from a sense of legal obligation (*opinio juris*), not a sense of moral obligation. General principles of

law, on the other hand, are rules "accepted in the domestic law of all civilized states" or the principles of private law used within all or most States. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16 (4th ed. 1990). Such rules need not have attained status as customary international law. In *Reformulated Gasoline*, the Appellate Body's use of the phrase "general principles of *international* law" suggests that the Appellate Body has added a second source of law by which to interpret the rules of the WTO. Has the Appellate Body exceeded the scope of its authority under Article 3.2?

8. Panels and the Appellate Body have also invoked Article 32 of the Vienna Convention to justify the use of "supplementary means" of interpretation. Thus, they have reviewed the negotiating history of WTO agreements to confirm a conclusion reached on the basis of a textual and contextual analysis of a treaty. *See, e.g.*, EC–Computer Equipment, Report of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84 (June 5, 1998). Japan–Alcoholic Beverages II, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p.10 (Oct. 4, 1996). United States–Measures Treaty Export Restraints as Subsidies, Report of the Panel, WT/DS194/R, para. 8.64 (June 29, 2001). The Appellate Body in *EC–Computer Equipment* also referred to the EC's classification practice as part of the "circumstances of the conclusion" of the WTO Agreement and that this may be used as a supplementary means of interpretation. EC–Computer Equipment, at paras. 92–95.
