Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada (WT/DS391)

Responses of the United States to the Questions from the Panel to the Third Parties following the First Substantive Meeting

May 5, 2010

I. ARTICLE 1.1 OF THE SPS AGREEMENT

Q.1 Can an SPS measure be taken for more than one of the purposes set forth in Annex A(1)?

1. The United States notes that the parties appear to agree that an SPS measure can be taken for more than one of the purposes set forth in Annex A(1).[1] The United States also believes that SPS measures could be taken for multiple purposes. For example, a measure could be taken to protect against a risk to the life and health of both animals and humans, therefore falling in both Annex A(1)(a) and (c). This is not surprising. Annex A(1)(a) refers to a measure applied "to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms." Annex A(1)(c) refers to a measure applied "to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests." So, for example, both refer to risks arising from diseases. The same disease can pose risks to both human and animal life and health. As a result, a measure applied to protect against that disease could be a measure applied to protect both animal life or health as specified in Annex A(1)(a) and human life or health as specified in Annex A(1)(c).

If yes, what implications might this have for the other definitions in Annex A (such as definition of international standards and risk assessment)?

2. With regard to the obligation to perform a risk assessment, that risk assessment or assessments must address the SPS risks that the measure is being applied to address. Thus, for example, measures applied to address risks to the life and health of both humans and animals must be based on risk assessments that address risks to both humans and animals to be consistent with the Member's obligations under Article 5. The same point would apply to a Member's Article 3 obligations as well. That is to say, for a Member's measure that addresses risks to the life or health of humans to be based on the international standard or standards as contemplated by Article 3.1, the measure must be based on the relevant international standards, guidelines, or recommendations that address the specified risks to humans. Similarly, the aspect of the measure that addresses risks to the life or health of animals must be based on the relevant international standards, guidelines, or recommendations that address the specified risks to animals. The relevant international standard for each aspect of the measure in this instance could each be developed by a different international body, for example Codex Alimentarius Commission ("Codex") and the World Organization of Animal Health ("OIE").

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[1] *Compare* Canada First Submission, para. 93 (stating that Korea's BSE measures "are applied allegedly to protect against . . . the risks identified in subparagraphs (a) and (c)" of Annex A.1), *with* Korea First Submission, at n. 131 ("Although this submission focuses on BSE as an issue of food safety and as a zoonosis, it should be noted that BSE is also a fatal cattle disease. Consequently, the possible contamination of Beef Products with the BSE agent presents an issue of animal health, especially if some portion of the Beef Products ultimately ends up being rendered and used in the production of cattle feed.").

Q.2 With respect to China's argument in paragraph 21 of its third party submission, please give the Panel your views on whether the *SPS Agreement* prescribes which government authorities may take SPS measures. If you believe it does, please tell the Panel from which provisions in the *SPS Agreement* you have derived such a prescription.

3. The United States disagrees with China's argument summarized in this question. Nothing in the SPS Agreement limits which authorities may establish or apply SPS measures on behalf of a Member or the domestic legal process those authorities must undergo in order to establish or apply an SPS measure. In particular, the SPS Agreement does not in any way indicate that a national legislature could not adopt an SPS measure. Annex A, which provides an expansive definition of SPS measures, speaks directly to this issue by stating that SPS measures "include[s] all relevant laws . . ."

Q.3 What is the meaning of the term "animals, plants or products thereof" in Annex A(1)(c)? Does a measure taken to protect human life or health from the risks arising from the BSE prion in bovine meat and meat products fall within the definition in Annex A(1)(c)?

4. The term "animals, plants or products thereof" should be given its ordinary meaning, which is that Annex A(1)(c) describes measures applied to protect against risks arising from diseases carried by animals, plants, animal-origin products, or plant-origin products. As such, the United States believes that the definition in Annex A(1)(c) clearly includes the risks arising from the BSE prion in bovine meat and meat products. The United States does not view whether the definition in Annex A(1)(c) includes the risks arising from the BSE prion to be an issue in dispute between the parties.

II. ARTICLE 3.1 AND 3.2 OF THE SPS AGREEMENT

Q.4 Please comment on the questions raised by Chinese Taipei in paragraph 14 of its third party submission and China in paragraph 6 of its third party submission, regarding the systemic issue of whether a Member is free to choose from *any one* of several relevant international standards, or whether a Member has to comply with all relevant international standards before applying an SPS measure.

5. Given the breadth of many SPS measures that Members routinely apply and the fact that, as discussed above in response to Question 1, a single SPS measure may be applied for more than one purpose, it may be that a Member's application of an SPS measure would implicate more than one international standard, guideline, or recommendation. Consistent with this common sense approach, by using the plural ("standards, guidelines or recommendations") in Article 3.3, the SPS Agreement contemplates that there may be more than one relevant international standard.

6. Further, Chinese Taipei's submission raises the important questions of how Article 3.2 of the SPS Agreement applies when a Member's SPS measure conforms to a relevant international standard, guideline, or recommendation, but the measure has additional aspects that are beyond the scope of the international standard, guideline, or recommendation. For example, in the situation where the measure addresses risks to both human and animal life or health so that there is a relevant international standard with respect to protecting human life or health and a separate international standard with respect to protecting animal life or health. It appears likely that when there is more than one international standard that is relevant, the scope of those standards would not be co-extensive with each other or the measure at issue. As such, for a measure to "conform" with international standards as contemplated in Article 3.2, each relevant element of the measure must conform with each corresponding relevant international standard, guideline or recommendation. In other words, it would not be enough for just one element of the measure to conform to just one relevant international standard, guideline or recommendation for the measure to be "deemed" and "presumed" as provided in Article 3.2. To interpret Article 3.2 differently would allow a measure the benefit of the presumption afforded by Article 3.2 when, for example, only 10 percent of the measure conforms to a relevant international standard, guideline, or recommendation.

Q.5 Does Article 3.2 require conformity with the *relevant* international standard in order to benefit from the presumption of compliance or just any international standard, guideline or recommendation? In your answer please refer to the definition in Annex A(3).

7. Yes, Article 3.2 requires conformity with the relevant international standard. Article 3.2 is to be interpreted in context, and Article 3.3, which is context for Article 3.2, makes explicit what is implicit in Article 3.1 and 3.2, that is, the measures must be based on the "relevant" international standards, guidelines, or recommendations.

Q.6 Can the OIE Terrestrial Animal Health Code be the standard for an Annex A(1)(b) measure, given the provisions of Annex A(3)(b)?

8. Yes, the OIE Terrestrial Animal Health Code ("OIE Code") can be the standard for a measure that addresses the risks discussed in Annex A(1)(b). For example, the OIE Code addresses the risk posed by the Specified Risk Materials ("SRMs"), stating that an importing country should require, among other things, that the exporting controlled risk country attest that its "fresh meat and meat products were produced and handled in a manner which ensures that such products do not contain and are not contaminated with" SRMs.[2] SRMs included within meat and meat products are properly considered "contaminants" as that term is used in Annex A(1)(b).

9. Nothing in Annex A(3)(b) is inconsistent with this interpretation as that provision states

[2] 2009 OIE Terrestrial Animal Health Code Chapter 11.6, at Art. 11.6.11(2) (Exh. KOR-3-I).

that an international standard could be one covering zoonoses by the OIE. The exclusion of SRM's from products intended for human consumption falls squarely within that definition as that exclusion prevents the BSE disease-causing agent from moving from cattle to humans.

Q.7 In paragraph 14 of its third party submission, Brazil argues that Korea's measures are not based on the international standard because they are more trade restrictive than those standards. Can a measure be "based on" the relevant international standard if it is more trade restrictive than the standard? Please address the reasoning of the panel and Appellate Body in *EC – Hormones* in your answer.

10. It may first be useful to clarify some of the relevant differences between an international standard, which is not a measure, and a measure of a Member. An international standard does not, by definition, indicate how that standard would be put into effect by means of a measure. Nor does an international standard by itself indicate what the trade effect would be of a measure based on that international standard. There may be more than one way for a Member to express an international standard by means of a measure. A number of different measures, all of which have different levels of trade restrictiveness, could be "based on" on a single international standard. As a result, it is not possible to assign to an international standard a particular level of trade-restrictiveness.

11. As one example, consider a hypothetical situation where the international standard for food containing a residue of a certain chemical is that the food should not contain in excess of 10 parts per million of that chemical. A Member could adopt a measure controlling for the chemical at the point of production, point of sale, or some other point, and could call for different methods of enforcement, record-keeping, and means or frequency of testing. In that case, it may be that a number of different measures could all be "based on" the one international standard even though some of those measures may be more trade restrictive than others.

12. This hypothetical also highlights the fact that there is no definition in the SPS Agreement of trade restrictiveness, nor any agreed means to measure it. It is possible that the types of trade involved between Members could differ (for example, traditional sources of supply and the characteristics of that supply could differ). As a result, a measure adopted by one Member could have a different degree of trade-restrictiveness than the same measure adopted by another Member. This would provide a further reason why it would be problematic to attempt to assign a particular degree of trade-restrictiveness to an international standard.

13. Furthermore, this relatively simply hypothetical does not take account of the flexibility inherent in the concept of "based on." As the Appellate Body in *EC – Hormones* stated, "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon 'is supported by' the latter," which is a much different thing that saying a thing

"conforms to" another thing.[3] The Appellate Body then rejected not only the panel equating "based on" to "conform to,"[4] but also concluded that the panel was wrong to conclude that under Article 3.3 "for a sanitary measure to be based on an international standard ..., that *measure* needs to reflect the same level of sanitary protection as the *standard*."[5]

14. Consistent with the Appellate Body report in *EC – Hormones*, in examining whether a measure is "based on" the relevant international standard, it does not appear productive to attempt to assign a degree of trade-restrictiveness to the international standard and then compare that assigned degree of trade-restrictiveness with the measure of a Member at issue.

Q.8 Please provide your views on the European Union's argument in paragraph 17 of its oral statement that "[t]hrough their incorporation in WTO law *via* the cross-reference in the *SPS Agreement*, [international standards, guidelines, or recommendations] effectively become part of the package of obligations and rights constituting WTO law."

15. It is not clear what the EU means by this statement. If the EU means that the SPS Agreement incorporates international standards, guidelines, and recommendations into the covered agreements, then there is no legal basis for that view. There is nothing in the text of the SPS Agreement that *incorporates* international standards, guidelines, or recommendations into the text of the SPS Agreement. Rather, there are obligations *related to* international standards, guidelines, and recommendations. Article 3 of the SPS Agreement, for example, provides a general obligation for Members to base their measures on such standards, guidelines, or recommendations where they exist, and paragraph 5 of Annex B provides for notification procedures contingent on whether an international standard, guideline, or recommendation exists.

16. Indeed, it is hard to understand how it would be possible to reconcile the "incorporation" of international standards, guidelines, and recommendations into the covered agreements with the fact that there is nothing in the SPS Agreement which mandates conformity with such standards, guidelines, and recommendations. The question would be then in what sense such international standards, guidelines, or recommendations are "incorporated" unless the use of the term is simply intended to be a shorthand means of referring to the obligations in the SPS Agreement with respect to international standards, guidelines, or recommendations.

17. Where the Members have chosen to incorporate the content of a document or agreement into the covered agreements, making them part of WTO rights and obligations, the Members have done so clearly, as they have done in Article 9.1 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"), for example. The Members did not

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[3] Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, adopted 13 February 1998, para. 163 ("*EC – Hormones (AB)*").

[4] *See id.*, paras. 163-66.

[5] *Id.*, para. 167 (emphasis in original).

provide for such an incorporation in the SPS Agreement.

18. The Appellate Body in *EC – Hormones* covered much the same ground in discussing Codex standards in the context of Article 3.1:

> To read Article 3.1 as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations, in the here and now, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex recommendatory in form and nature) with obligatory force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding norms. But, as already noted, the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary.[6]

> **(a) Please also respond to the European Union's argument in paragraph 40 of its oral statement that because international standards, guidelines or recommendations are part of the system of WTO treaties "it is therefore appropriate in principle to interpret and apply them in the same way as other WTO treaties."**

19. As explained above, there is no basis for considering that international standards, guidelines, or recommendations have become part of the covered agreements. Furthermore, as the EU itself acknowledges, international standards, guidelines, or recommendations are not "treaties" and therefore it is not appropriate to interpret them in accordance with customary rules of interpretation of treaties. For example, it is possible that the bodies that promulgated the international standard, guideline, or recommendation could have its own rules of interpretation.

> **(b) Does this mean that the *Vienna Convention on the Law of Treaties* provides the appropriate analytical tool for interpreting international standards, guidelines or recommendations referred to in Annex A(3) of the *SPS Agreement*?**

20. As the EU acknowledges, standards, guidelines, and recommendations promulgated by Codex, the OIE, and the International Plant Protection Convention ("IPPC") are not treaties and are not even international agreements, and are therefore not susceptible to interpretation in accordance with the customary rules of interpretation of public international law reflected in the

[6] *Id.*, para. 165.

Vienna Convention on the Law of Treaties.[7]

Q.9 With reference to the arguments of the European Union in paragraphs 25-26 of its oral statement, and assuming Korea's measures are taken for food safety purposes please clarify whether in your view, pursuant to Annex A(3)(a), a Codex standard, guideline or recommendation could be the applicable standard, guideline or recommendation for purposes of Article 3 of the *SPS Agreement*?

21. The United States agrees with the EU that SRMs could properly be considered "contaminants" as that term is used in both Annex A(1)(3) and A(3)(a). Accordingly, to the extent that Codex has produced a standard, guideline, or recommendation addressing SRMs in food products, and to the extent a Member's measure addresses SRMs in food products, then such document could be considered a relevant "standard, guideline or recommendation" as that phrase is used in Article 3. (As discussed in response to Questions 4-5, however, more than one standard, guideline, or recommendation may be relevant to any particular measure. As such, it may perhaps be more accurate to refer to "a" relevant standard, guideline, or recommendation.)

Q.10 Do the parties share the view of the European Union, set forth in paragraph 37 of its oral statement, that "nothing in the SPS Agreement precludes the conclusion that both the OIE instrument referred to by Canada as well as the Codex instruments referred to by Korea are concurrently relevant international standards, guidelines or recommendations"

(a) Are the OIE Terrestrial Animal Health Code and the two Codex codes referred to by Korea concurrent international standards, guidleines or recommendations?

(b) Is there any conflict between the OIE Terrestrial Animal Health Code and the two Codex codes?

(i) If yes, in light of your answer to Question 9 above, what rules should the Panel apply in resolving such conflict?

22. As discussed above, the United States agrees that more than one standard, guideline, or recommendation may be relevant to any particular measure. In theory, the United States would also agree that, for example, standards issued by two of the three organizations referred to in Annex A(3) could be concurrently relevant with one another.

23. On these particular facts, the United States notes that the two Codex documents at issue, the 2004 Code of Practice on Good Animal Feeding and the 2005 Code of Hygienic Practice for Meat, only make the briefest of references to BSE. For example, the Code of Practice on Good

[7] *See Vienna Convention on the Law of Treaties*, Art. 1.

Animal Feeding makes reference to BSE when stating that, as a general matter, it is essential that levels of "undesirable substances[,]" which includes animal products that could be a source of the BSE agent, "are sufficiently low in feed and feed ingredients that their concentration in food for human consumption is consistently below the level of concern."[8] The Code of Hygienic Practice for Meat also makes similarly brief references. Accordingly, their relevance may be limited. For example, neither Codex code appears to address the main issue of this dispute, *i.e.*, what rules are appropriate for trade in beef and beef products in light of the food safety risk posed by the BSE prion agent. This issue, however, is the main focus of the OIE Code.

24. In any event, the United States, like the EU, does not see there to be any conflict between the Codex codes and the OIE Code. That is to say, the United States does not see any differences between the three codes that would prevent Korea from applying measures on the import of bovine meat and meat products from Canada that would be based on all three codes.

III. ARTICLE 2.2 AND 5.1 OF THE SPS AGREEMENT

Q.11 In paragraph 171 of its first written submission Korea argues that "Contrary to Canada's assertions, the Appellate body has never stated that inconsistency with Article 5.1 conclusively demonstrates inconsistency with Article 2.2 as well. To the contrary, the Appellate Body has, at most, suggested that a failure to comply with the provisions of Article 5.1 that require SPS measures to be based on a proper assessment of risks "can be *presumed* to imply a violation of the more general provisions of Article 2.2 (citing Appellate Body Report, *Australia – Salmon*, paras. 137-138)." And that the Appellate Body has never said that the presumption is irrebuttable. Please provide the Panel with your views on the relationship between Articles 2.2 and 5.1 citing to relevant panel and Appellate Body reports which have dealt with the issue in the past.

25. It is not clear that this is an issue the Panel needs to resolve for purposes of this dispute. If the Panel finds in favor of Canada on its Article 5.1 claim, then the Panel could exercise judicial economy and not make a finding on Canada's Article 2.2 claim.[9] On the other hand, if the Panel finds that Canada's Article 5.1 claim fails, the Panel need not address Canada's Article 2.2 claim given that Canada does not appear to have put forward a stand-alone legal argument that Korea has acted inconsistently with Article 2.2.[10]

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[8] 2004 Code of Practice on Good Animal Feeding, para. 17 (Exh. KOR-21-B); *see also id.* at para. 25 ("Animal products that could be a source of the Bovine Spongiform Encephalopathy ("BSE") agent should not be used for feeding directly to, or for feed manufacturing for, ruminants.").

[9] Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 23 January 2007, paras. 731-32 (determining that a panel properly exercised judicial economy when it refrained from ruling on claims that were unnecessary to resolving the matter in dispute).

[10] *See* Canada's First Submission, at paras. 128-130.

26. As a general matter, however, the United States notes that it would not appear that a breach of Article 5.1 would always necessarily imply a breach of Article 2.2. That is to say, Article 5.1 is a more specific obligation than Article 2.2, and it is possible that a Member could act inconsistently with Article 5.1 and not breach Article 2.2. Such a situation could occur, for example, where the Member's risk assessment contains flaws sufficient enough to make it not conform with Article 5.1, but those flaws do not go to whether the measure is based on scientific principles or there is sufficient scientific evidence. For example, the Member could better explain its analysis of the risk without needing any further scientific evidence. In such a situation, a Member's measure could be said to be "based on scientific principles" and is being "maintained" with "sufficient scientific evidence" even though the measure is not based on a risk assessment consistent with Article 5.1.

Q.12 In paragraph 172 of its first written submission Korea states that it "believes that the equation of "risk assessments" with "scientific principles" and "scientific evidence" that Canada has been promoting in this case and other disputes is dangerously simplistic. Risk assessments may be a tool of science, but they are not an exclusive tool. Indeed there may well be circumstances in which risk assessments are not required for action based on scientific principles and scientific evidence. Do you agree with Korea's argument?

27. As a general matter, Article 5.1 of the SPS Agreement requires that measures be based on a risk assessment "as appropriate to the circumstances." However, Article 5.7 of the SPS Agreement provides that there may be instances in which relevant scientific evidence is insufficient to perform a risk assessment, but a Member may nonetheless provisionally adopt an SPS measure. It is possible that Korea is referring to the situation contemplated in Article 5.7.

Q.13 BRAZIL: With regard to paragraph 23 of Brazil's third party submission, would Brazil clarify whether it considers the study referred to by Korea is a proper risk assessment as defined in Annex A (4) of the SPS Agreement?

Q.14 If an SPS measure fits under the definitions in Annex A(1)(a), (c), and (b) which type of risk assessment under Annex A(4) must a Member base its measure on?

(a) Could a Member be required to base its measure upon *both types* of risk assessment?

(b) Would a Member be able to choose which type of risk assessment it wishes to utilize?

28. The definition in paragraph 4 of Annex A is presented as two alternatives. To satisfy the obligations contained in Article 5, the Member's risk assessment must conform to whichever alternative is relevant to the risks referenced in paragraph 1 of Annex A that the measure is applied to protect against. Accordingly, a measure applied to protect against the risks referred to

in both alternatives in paragraph 4 of Annex A would need to be based on both types of risk assessments described in that paragraph; the Member would not have the discretion to choose between the two types of assessments.

(c) If an SPS measure is taken under Annex A(1)(c) to protect human health from a zoonosis in animal products, which type(s) of risk assessment in Annex A(4) would be required?

29. If a measure is applied to protect only against the risks referred to in paragraph 1(c) of Annex A, then it would appear to call for the first type of risk assessment (the "evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences"). The second type of risk assessment would not appear applicable since it applies only to risks related to "food, beverages or feedstuffs," which would appear to be an issue under paragraph 1(b) of Annex A rather than paragraph 1(c). However, if the zoonosis poses a risk described in both paragraph 1(b) and 1(c) of Annex A, then a measure to address both types of risk may call for both types of risk assessment under paragraph 4 of Annex A.

IV. ARTICLE 2.3 AND 5.5 OF THE SPS AGREEMENT

Q.15 Korea argues in paragraph 248 of its first written submission that "it is not clear whether the traditional mandatory/discretionary dichotomy continues to provide a limitation on challenges to legislation "as such" in disputes brought under the WTO Agreements." Please provide the Panel with your legal analysis as to whether the mandatory/discretionary principle is still applicable in WTO disputes.

Q.16 In paragraph 249 of its first written submission Korea argues that "a complaining party cannot prevail on the merits unless it somehow overcomes this presumption [of good faith compliance] – by showing, *inter alia*, that the legislation would not be applied in a manner consistent with "good faith in the implementation of . . . WTO commitments". Please provide the legal basis for your understanding of the value of the presumption of good faith compliance.

30. The United States will address Questions 15 and 16 together. In considering the question of the mandatory/discretionary distinction, it is useful to recall its history. The distinction arose in a situation where a measure had been enacted but was not yet being applied. The distinction was used by a panel under the GATT 1947 to find that despite the fact that the measure was not yet in effect, it could nonetheless be subject to dispute settlement:

> Just as the very existence of a regulation providing for a quota, without it restricting particular imports, has been recognized to constitute a violation of Article XI:1, the very existence of mandatory legislation providing for an internal

> tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence. The Panel noted that the tax on certain imported substances had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken. The Panel therefore concluded that Canada and the EEC were entitled to an investigation of their claim that this tax did not meet the criteria of Article III:2, first sentence.[11]

31. At the same time, where a measure provides discretion to a Member to either act in accordance with its WTO obligations or not, it should not be presumed that the Member will act in breach of its obligations. Parties to an international agreement have, by becoming parties, committed to implement their agreement obligations in good faith. It is this very fact that leads to the conclusion that one cannot assume that authorities will exercise discretion under domestic legislation so as to violate international obligations.

32. If authorities exercise their discretion such that they actually deviate from their international obligations, they may then be found to have violated those obligations. Until that point, however, it may not be assumed that they will exercise their discretion in this manner. It may not be assumed that parties will act in bad faith. As the Appellate Body has explained, "where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith."[12]

33. These two points are key to the mandatory/discretionary distinction, which has frequently been applied in GATT 1947 and WTO dispute settlement proceedings.[13] That distinction

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[11] Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, para. 5.2.2.

[12] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998,* WT/DS176/AB/R, adopted 1 February 2002 ("*US – Section 211 (AB)*"), para. 259.

[13] *E.g., US – Section 211 (AB)*; Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005 ("*Korea – Commercial Vessels*"); Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R; Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000; Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000; GATT 1947 Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, adopted 17 June 1987; GATT 1947 Panel Report, *EEC – Regulations on Imports of Parts and Components,* L/6657, BISD 37S/132, adopted 16 May 1990 ("*EEC – Parts and Components*"); GATT 1947 Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, BISD 37S/132, adopted 7 November 1990; GATT 1947 Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, BISD 41S/131, adopted 4 October 1994; GATT 1947 Panel Report, *United States – Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, BISD 39S/128, adopted 19 June 1992; GATT 1947 Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages,* DS23/R, BISD 39S/206, adopted 19 June 1992; and Panel

continues to have force in WTO dispute settlement.[14]

34. In every case, "where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith."[15] This will be true regardless of whether a Member has in the past exercised discretion provided in a measure in a WTO-inconsistent manner, because it may not be assumed that, *in the future,* the Member will act in bad faith in breach of its obligations. Indeed, precisely this scenario occurred in *Korea – Commercial Vessels,* in which the panel found that specific transactions made pursuant to Korea's KEXIM and PSL programs constituted prohibited export subsidies in breach of Articles 3.1(a) and 3.2 of the SCM Agreement, while at the same time rejecting the EC's argument that these programs, and the legal regime within which they operated, "as such" breached the SCM Agreement.[16] In undertaking its "as such" analysis, the panel explicitly applied the mandatory/discretionary distinction.[17]

35. Likewise, in both *Canada – Aircraft II* and *EEC – Parts and Components*, panels analyzed measures under the mandatory/discretionary distinction even while finding that the measures had been applied so as to breach their obligations.[18] Thus, the mandatory/discretionary distinction does not call on panels to predict future behavior based on their judgment as to what a Member may, or is likely, to do. As one panel has noted: "The WTO dispute settlement system allows a Member to challenge a law as such or its application in a particular case, but not its possible future application."[19] Rather, under the distinction, what is important is whether the measure in question deprives the Member of the discretion to avoid a breach.

Report, *European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, circulated 28 April 1995 (panel established under the 1979 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*) (unadopted).

[14] *See, e.g.*, *United States – Custom Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008, para. 7214 (deciding to "apply the 'mandatory/discretionary' distinction as an analytical tool where necessary to evaluate India's *as such* claims"); *id.*, para. 7.210, n.229 (citing to numerous Appellate Body and panel reports that have recognized the importance of mandatory/discretionary distinction).

[15] *US – Section 211 (AB)*, para. 259.

[16] *Korea – Commercial Vessels*, paras. 7.111, 7.121, 7.129, 7.223, 7.330, and 8.696.

[17] *Id.*, para. 7.67.

[18] In *Canada – Aircraft II*, the panel found that the EDC Canada Account program was not "as such" inconsistent with Article 3.1(a) of the *SCM Agreement*, even though it found that individual transactions under the Canada Account were inconsistent with Article 3.1(a). Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R, adopted 19 February 2002. Similarly, in *EEC – Parts and Components,* the GATT panel found that the EEC's application of its anti-circumvention provision was inconsistent with Article III:2 of GATT 1947. However, with respect to the anti-circumvention provision itself, the panel found that the provision authorized, but did not require, GATT-inconsistent action. *EEC – Parts and Components,* para. 5.26.

[19] Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted 1 November 2002, para. 7.157.

36. The concept that a WTO panel or the Appellate Body cannot presume that a Member will exercise its discretion in breach of its WTO obligations is often confused with a presumption that a Member is in compliance with its obligations. The two presumptions are distinct, and the second does not exist in WTO dispute settlement. There is no presumption for a complaining party to overcome that a Member's measure is in compliance with the WTO Agreement. In other words, to say that it cannot be presumed that a Member will breach its obligations in the future is not the same as saying that it is presumed that a Member is currently in compliance with its obligations.[20]

Q.17 In its third party submission, the European Union, in its third party submission, notes that "the Appellate Body has yet to clarify, in express terms, whether the "different situations" referred to in Article 5.5 relate not only to different products, for example, but also extend to different Members; and in the latter case precisely how this aspect of Article 5.5 would relate to the first sentence of Article 2.3." Please provide the Panel with your views on this interpretative issue.

37. The United States notes that the Panel may not need to address this question as Korea maintains that it is not applying different appropriate level of protection to Canadian and U.S. products. Furthermore, as the United States explained in its oral statement, it is incorrect to refer to an appropriate level of protection for a "product" from a particular "Member." The appropriate level of protection is for a particular *risk* – it is "protection" from a "risk" (which is why it is also referred to as the acceptable level of risk).[21]

38. As the Appellate Body explained in *EC – Hormones*, Article 2.3 is an important part of the context of Article 5.5. In particular, the "discrimination" in Article 2.3 is *international trade* discrimination – that is, discrimination between products of different Members. And because Article 2.3 is context for interpreting Article 5.5, the "discrimination" in Article 5.5 must likewise be discrimination between products of different Members.[22] As the Appellate Body stated in *EC – Hormones,* "when read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3."[23] This is also the manner in which the term is used in the Guidelines adopted by the SPS

[20] Korea quotes paragraph 173 of the Appellate Body report in *United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina,* WT/DS268/AB/R. However, paragraph 172 makes it clear that the Appellate Body was referring to a *prospective* situation: "By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct."

[21] *See e.g.*, SPS Agreement, Art. 5.3 and 5.5, which refer to protection "from" or "against" risks; *see also* SPS Agreement, Art. 9.1, which makes it clear that the appropriate level of protection is "in the market" of a Member, not with respect to particular products of particular Members.

[22] *EC – Hormones (AB)*, paras. 212, 238.

[23] *Id.*, para. 212.

Committee in 2000. Please refer to the U.S. Oral Statement of April 14 for a fuller explanation of the U.S. position on this issue.

Q.18 Please respond to Korea's argument in paragraphs 278-279 of its first written submission that Article 2.3 of the *SPS Agreement* applies only to SPS measures that discriminate between WTO Members, but does not apply to SPS measures that apply equally to all WTO Members, but apply differently at different times. Can a Member discriminate between Members, within the meaning of Article 2.3 of the *SPS Agreement* or Article I:1 of the GATT by changing its laws and applying that change equally to all WTO Members prospectively?

39. It does not appear possible to answer this question in the abstract. The question of whether a Member's measure is discriminating between Members within the meaning of Article 2.3 of the SPS Agreement or Article I:1 of the GATT 1994 will be a case-by-case determination.

Q.19 Is an arbitrary or unjustifiable distinction in ALOPs in different situations which results in discrimination (Art. 5.5) the same thing as the application of an SPS measure in a manner which arbitrarily or unjustifiable discriminates between Members (Art. 2.3)?

(a) Given your answer, does a violation of Article 5.5 *necessarily imply* a violation of Article 2.3?

40. The United States notes that the Panel may not need to address this question as Korea maintains that it is not applying different appropriate levels of protection to Canadian and U.S. products. Furthermore, as a general matter, a valid Article 5.5 claim with respect to discrimination must show that some distinction in appropriate levels of protection in different situations results in discrimination between products of different Members. The United States notes differences in the texts that at least raise some question as to whether they will necessarily always end up in the same place. For example, any "discrimination" found for purposes of Article 5.5 would also need to be "arbitrary and unjustifiable" in order to be inconsistent with Article 2.3.

V. ARTICLE 2.2 AND 5.6 OF THE SPS AGREEMENT

Q.20 Given the relationship between Article 2 of the *SPS Agreement* and Article XX(b) of the GATT, should the Panel refer to the prior interpretations of the meaning of the term "necessary" in Article XX of the GATT as context for understanding the obligation in Article 2.2?

41. No, it would not be appropriate to refer to prior interpretations of the meaning of the term "necessary" under Article XX(b) of the GATT 1994 (or the GATT 1947) as context for the term "necessary" in Article 2.2 of the SPS Agreement. Article XX(b) and Article 2.2 serve vastly

different roles – Article XX is an affirmative defense to challenges that a Member has acted inconsistently with the GATT 1994 while Article 2.2 contains affirmative obligations for a Member. Moreover, the text of the two articles are substantially different. In Article XX(b), "necessary" refers to the necessity of a measure in terms of *achieving* certain policy objectives. In Article 2.2, "necessary" addresses the necessity of the *extent of application* of an SPS measure (in other words, the first test in Article 2.2 appears to start from the premise that the measure is "necessary" to protect human, animal, or plant life or health and is only concerned with the extent of application of the measure). Accordingly, Article XX(b) does not appear to be relevant context for interpreting "necessary" in Article 2.2. The United States notes that the Appellate Body has previously disapproved of the importation of the meaning of terms from Article XX to the SPS Agreement in the past.[24] Much more relevant context would appear to be Article 5.6 of the SPS Agreement.

(a) If the Panel were to apply the typical "necessity test" used in Article XX analyses would that require the complainant to present a reasonably available alternative measure?

42. For the reasons discussed above, it would not be appropriate to use the interpretation of Article XX(b) for purposes of Article 2.2.

(b) If so, how is an analysis under Article 2.2 substantively different from one under Article 5.6?

43. Aside from the fact that it would not be appropriate to use the interpretation of Article XX(b) for purposes of Article 2.2, Article 5.6 addresses the issue covered in both Articles in more detail than does Article 2.2. As a result, Article 5.6 could be viewed as helping to make operational Article 2.2 (or, in Canada's words: "Article 5.6 is a more specific expression of the general obligation set out in the first element of Article 2.2"[25]), and Article 5.6 would appear to be the logical starting point for an analysis of the issues.

(c) Given your answers to the above, is it possible to independently violate Article 2.2?

44. It is difficult to answer this question in the abstract, and it may not be necessary for the Panel to address this question in this dispute.

VI. ARTICLE I: 1 OF THE GATT 1994

[24] *Id.*, para. 239 ("[W]e disagree with the Panel on two points. First, in view of the structural differences between the standards of the *chapeau* of Article XX of the GATT 1994 and the elements of Article 5.5 of the SPS Agreement, the reasoning of our Report in *United States – Gasoline*, quoted by the Panel, cannot be casually imported into a case involving Article 5.5 of the SPS Agreement.").

[25] Canada's First Submission, para. 284.

Q. 21 Korea alleges, in paragraph 224 of its first written submission that the beef products from the US and Canada are not "like" products for sanitary purposes. Please comment on Korea's interpretation of the criterion of "physical properties" in this regard.

45. As the Appellate Body has previously stated, the determination of whether two products are "like" must be made on a "case-by-case basis."[26] In this regard, the Appellate Body's conclusion that "evidence related to the health risks associated with a product may be pertinent in an examination of 'likeness'" applies with equal force to the Article I:1 analysis as it did in the Appellate Body's Article III:4 analysis in *EC – Asbestos*.[27]

VII. ARTICLE XI: 1 OF THE GATT 1994

Q.22 What is the definition of "classification, grading and marketing" for the purposes of the application of Article XI:2 (b)?

46. Article XI:2(b) provides an exception to the obligation of Article XI:1 whereby Members are allowed to impose "import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." The United States notes that a panel has not thoroughly investigated these terms as of yet, although the terms were discussed by a GATT 1947 panel in *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* where the panel treated these terms as relating to quality and marketing standards.[28] The ordinary meaning of these terms confirm this conclusion.[29]

Q.23 In paragraphs 300, 302 and 312 of its first written submission, Canada relies on the ruling of the panel in *Colombia – Ports of Entry* (at paras. 7.240-7.241) for the proposition that a measure which creates uncertainties, such as the possibility of the re-imposition of the import ban if a new case of BSE were detected, is inconsistent with Article XI. Please comment on Canada's arguments and whether the ruling of the panel in *Colombia – Ports of Entry* supports Canada's conclusions. Does any uncertainty caused by government policy fall within the scope of Article XI?

47. No, the United States does not agree that any uncertainty, including the uncertainty

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[26] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2110, para. 101.

[27] *Id.*, para. 113.

[28] *See* L/6268-35S/98, adopted March 1998, paras. 4.2-4.3.

[29] *See The New Shorter Oxford English Dictionary*, at 412 (1993), (defining "classify" as arrange in classes; assign to a class; grade: a class of persons or things of a similar degree of ability, rank, or quality); *id.* at 1125 (defining "grade" to be of good or specified quality; reach a required or expected standard" and noting that "Grade A" refers to "the highest grade or quality").

Canada alleges that Article 32(2) causes (or would cause) its exporters, can be considered a "restriction" falling within the scope of Article XI of the GATT 1994.

48. Article 32(2) provides that Korea may impose a temporary import ban on all beef and beef products from a country that detects a new BSE case in its territory. Canada contends that "even if Korea were to reopen its borders to bovine meat and meat products from Canada, Canadian exporters would always be faced with *the possibility* that the Minister, following the detection of a new case of BSE in Canada, may temporarily ban the importation of these commodities or take other unspecified action."[30] The possibility of a restriction is not a restriction, nor is the uncertainty that such possibility will come to pass a restriction. Indeed, all Members at all times are faced with the uncertainty, for example, whether a health or safety problem might be discovered that could lead to import restrictions on particular products. This is a simple reality. There is no basis to find that this ever-present uncertainty represents an ever-present import restriction for purposes of Article XI of the GATT 1994.

49. The finding of *Colombia – Ports of Entry* is not to the contrary. In that case, Colombia restricted the entry of textile, apparel, and footwear goods that arrive from Panama to either the Bogota airport or Barranquilla seaport. There, the panel found that the measure, like the measure examined in *India – Autos*, actually creates "a condition that is limiting, i.e. that has a limiting effect,"[31] and thus found the measure to be a "restriction," inconsistent with Article XI. The United States further notes that the same is true for the cases the *Colombia – Ports of Entry* panel relies on in the paragraphs prior to 7.239, including *Canada – Provincial Liquor Boards (EEC)* (listing/delisting requirements and limitations on the availability of points of sale) and *EEC – Minimum Import Prices* (minimum import price and security system for tomato concentrate).[32] In each case, the measure examined actually limited imports.

VIII. ARTICLE XX (b) OF THE GATT 1994

Q.24 Please provide your views on whether an SPS measure could be justified pursuant to Article XX (b) of the GATT 1994 without complying with the *SPS Agreement*.

50. The SPS Agreement and the GATT 1994 are different agreements with different obligations. In particular, the scope of the SPS Agreement on the one hand, and Article XX(b) of the GATT 1994 on the other hand, are not equivalent. The SPS Agreement is both narrower in scope than Article XX(b) and goes beyond what is required under Article XX(b). The SPS Agreement is narrower than Article XX(b) because it only applies to a particular subset of measures to protect human, animal or plant life or health (those that meet the definition in the SPS Agreement of a sanitary or phytosanitary measure). The SPS Agreement goes beyond

[30] Canada's First Submission, para. 302 (emphasis added).

[31] *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted 20 May 2009, para. 7.234 ("*Colombia – Ports of Entry*") (quoting *India – Autos*).

[32] *Colombia – Ports of Entry*, paras. 7.238-39.

Article XX(b) by imposing numerous affirmative obligations on Members while Article XX(b) presents conditions for a measure to qualify for the affirmative defense. For example, the obligation under the SPS Agreement to base the measure on a risk assessment has no corollary in the text of Article XX(b). Similarly, the SPS Agreement contains obligations with respect to inquiry points and notification procedures that do not appear in Article XX(b). As such, a Member's measure could be inconsistent with the SPS Agreement even though the measure meets the conditions of Article XX(b).