

**BEFORE THE  
WORLD TRADE ORGANIZATION  
APPELLATE BODY**

***UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN  
THE EC – HORMONES DISPUTE***

**(AB-2008-5)**

**OTHER APPELLANT SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**June 13, 2008**

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<i>Chile – Alcohol (AB)</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
<i>EC – Bananas III (Article 22.6) (US)</i>	Arbitrator Award, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities</i> , WT/DS27/ARB, circulated 9 April 1999
<i>EC – Commercial Vessels</i>	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R, adopted 20 June 2005
<i>EC – Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by the Appellate Body Report, WT/DS315/AB/R
<i>EC – Hormones (Panel)</i>	Panel Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R
<i>EC – Hormones (Article 21.3(c))</i>	Arbitrator Award, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration under DSU Article 21.3©</i> , WT/DS26/15, WT/DS48/13, circulated 19 May 1998
<i>EC – Hormones (Article 22.6) (US)</i>	Arbitrator Award, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities</i> , WT/DS26/ARB, circulated 12 July 1999
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>Japan – Apples (AB)</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003

<i>US – Certain EC Products (Panel)</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS165/AB/R
<i>US – Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>US – Section 211 (AB)</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002
<i>US – Section 301</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000

## I. Introduction and Executive Summary

1. The United States seeks review by the Appellate Body of certain issues of law in the Panel Report on *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*<sup>1</sup> (“Panel Report”) and legal interpretations by the Panel.

2. First, the United States appeals from the Panel’s findings that, by maintaining unchanged the suspension of concessions<sup>2</sup> after the notification by the European Communities (“EC”) of Directive 2003/74/EC, the United States was “seek[ing] redress” of a violation within the meaning of Article 23.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”). The Panel’s finding re-characterizes the measure at issue without legal basis and improperly imputes to the United States a decision to direct the duties<sup>3</sup> away from the EC’s earlier hormone ban, which remained the sole basis for those duties, and instead re-direct the duties against Directive 2003/74/EC.

3. The Panel made this finding even though the United States did nothing to alter the duties, made no such decision (and indeed could not have made such a decision without notice that it was altering the legal basis for the duties), and was still waiting for the EC to provide the basis for its claim of compliance.

4. The Panel is assigning to a unilateral claim of compliance by a Member concerned, a legal status that has no basis in the DSU.

5. The Panel’s approach essentially reads into the DSU a requirement that a complaining party take some action in response to a claim of compliance by a Member concerned, and a requirement that such action take place by some unspecified but nonetheless binding deadline. Members did not agree to either of these requirements – neither one appears in the DSU. The Panel’s approach would “add to” obligations under the DSU, contrary to the DSU itself. The Panel’s approach is even more puzzling because it was taken in the context of a dispute settlement proceeding that itself offered the ability to resolve the matter. The Panel chose not to avail itself of this opportunity, but instead called for yet more, and completely redundant, dispute settlement proceedings.

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<sup>1</sup> Panel Report on *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, circulated 31 March 2008.

<sup>2</sup> Throughout this submission, the United States will use the term “suspension of concessions” to include suspension of other obligations.

<sup>3</sup> While the United States recognizes that “suspension of concessions,” the “duties” imposed pursuant to the suspension of concessions, and the “implementation” or “application” of the suspension of concessions in domestic law are different, these terms are generally used interchangeably for the purposes of this submission.

6. Furthermore, the Panel’s reasoning is inconsistent with the explicit authorization by the Dispute Settlement Body (“DSB”) of the U.S. suspension of concessions, and the Panel’s finding would render such authorization bereft of meaning.

7. Second, the United States appeals from the Panel’s finding that the United States made a “determination” within the meaning of Article 23.2(a) of the DSU. Specifically, the United States takes issue with the Panel’s findings that the U.S. statements made at the DSB meetings held on November 7 and December 1, 2003 either singly, or taken together, constitute a “determination” to the effect that a breach has occurred for the purposes of Article 23.2(a), or that a “determination” can be inferred to have been made by the United States on the basis of the U.S. DSB statements of November or December 2003 or on the basis of the fact that U.S. duties continued, unchanged, after the EC’s notification of Directive 2003/74/EC. These DSB statements do not constitute Article 23.2(a) “determinations.” In addition, there is no legal basis to infer that these statements became, at some unspecified later date, a “determination” within the meaning of Article 23.2(a) simply because the authorized suspension of concessions remained unchanged.

8. The Panel’s findings on Articles 23.1 and 23.2(a) of the DSU result in a significant shift in the balance of rights between original complaining and original responding parties that is unsupported by the DSU, inequitable, destabilizing to the WTO dispute settlement system, and that impermissibly adds to and diminishes the rights and obligations of Members.

9. Finally, the United States also appeals the Panel’s legal interpretation that the dispute settlement proceeding initiated by the European Communities is not a “procedure” of the Dispute Settlement Understanding for purposes of Article 23 and the Panel’s consequent suggestion that the United States bring itself into compliance with the Panel’s recommendations by “hav[ing] recourse to the rules and procedures of the DSU without delay.”<sup>4</sup> The United States also appeals the Panel’s conclusion that it was restricted from a direct determination of the compliance of Directive 2003/74/EC with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”). Recourse to dispute settlement in accordance with the rules and procedures of the DSU has been achieved in the present dispute and to conclude otherwise would mandate a senseless waste of resources and defeat the “prompt settlement” that is a central goal of the WTO dispute settlement system. Furthermore, the Panel’s terms of reference were not necessarily restricted by the structure of the EC’s claims outlined in its first written submission. The Appellate Body need not address these final items of appeal, however, should it reverse the Panel’s findings and conclusions on DSU Articles 23.1 and 23.2(a) described above.

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<sup>4</sup> Panel Report, para. 8.3.



**II. The Panel Erred in Concluding that the United States Breached Article 23.1 of the DSU Because the Continued Suspension of Concessions by the United States after the Notification of Directive 2003/74/EC Does Not Constitute “Seek[ing] Redress” against Directive 2003/74/EC**

10. It is useful to first recall the context of the present dispute. The United States had invoked dispute settlement against the EC’s hormone ban under the Tokyo Round Agreement on Technical Barriers to Trade in 1987, after a series of informal bilateral discussions. Formal bilateral consultations were held on two occasions without a satisfactory resolution. The United States then requested that the matter be referred to a group of technical experts. The EC blocked formation of the technical expert group, and the dispute went unresolved.<sup>5</sup> On January 26, 1996, shortly after the entry into force of the WTO, the United States requested consultations<sup>6</sup> with the EC challenging the EC’s prohibition on imports of meat and meat products from cattle to which any of six hormones<sup>7</sup> had been administered for growth promotion purposes. The United States requested the establishment of a panel on April 25, 1996,<sup>8</sup> and the Dispute Settlement Body (“DSB”) established a panel on May 20, 1996.

11. The DSB adopted its recommendations and rulings on February 13, 1998 that the EC’s ban was not consistent with the EC’s obligations under the *SPS Agreement* and thereby caused nullification or impairment of U.S. benefits. An arbitrator awarded the EC a reasonable period of time for implementation (“RPT”), expiring on May 13, 1999,<sup>9</sup> or twelve years after the United States had first sought multilateral resolution of the dispute and over three years after the United States had turned to the WTO dispute settlement mechanism. The EC did nothing.

12. Accordingly, upon expiration of the RPT, the United States requested the DSB’s authorization to suspend concessions pursuant to DSU Article 22.2.<sup>10</sup> When the EC objected to the level of the suspension requested by the United States, the United States engaged in an arbitration pursuant to Article 22.6 of the DSU. The arbitrator determined, pursuant to Article

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<sup>5</sup> See, e.g., TBT/Spec/18 and TBT/M/Spec/5 through 7.

<sup>6</sup> *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/1.

<sup>7</sup> Those six hormones are: the three natural hormones, estradiol-17 $\beta$ , progesterone, and testosterone, and the three synthetic hormones, trenbolone acetate, zeranol, and melengestrol acetate.

<sup>8</sup> WT/DS26/6.

<sup>9</sup> *EC – Hormones (Article 21.3(c))*.

<sup>10</sup> *Recourse by the United States to Article 22.2 of the DSU*, WT/DS26/19 (17 May 1999).

22.7 of the DSU, that the level of suspension of concessions equivalent to the level of nullification or impairment caused by the then-EC's<sup>11</sup> ban was \$116.8 million.<sup>12</sup>

13. On July 15, 1999, the United States requested the DSB's authorization to suspend concessions in the amount of \$116.8 million,<sup>13</sup> which the DSB granted pursuant to Article 22.7 at its meeting held on July 26, 1999.<sup>14</sup> Having obtained the DSB's authorization, the United States imposed a 100% *ad valorem* duty on a number of products imported from certain member States of the European Communities, effective as of July 29, 1999, through the publication of a notice in Vol. 64, No. 143 of the *Federal Register* on July 27, 1999.<sup>15</sup>

14. On October 27, 2003, nearly four and one half years after the RPT for the EC to comply had expired, over four years after the authorization and application of the U.S. suspension of concessions, and over seven and one half years after the United States first requested consultations, the EC notified to the DSB the adoption, publication and entry into force of Directive 2003/74/EC, which revised Directive 96/22/EC but nevertheless maintained the ban on the six hormones in question.<sup>16</sup> The EC claimed that, with the adoption of Directive 2003/74/EC, it had fully implemented the recommendations and rulings of the DSB in *EC – Hormones*.<sup>17</sup> First, the EC asserted that its permanent ban on estradiol-17 $\beta$  was now supported by a new risk assessment conducted in response to the results in *EC – Hormones*.<sup>18</sup> Second, the EC asserted that its ban on the other five hormones, which had been subject to a *permanent* ban under Directive 96/22/EC, was now “provisionally” banned while the EC sought “more complete scientific information . . . which could shed light and clarify the gaps in the present state of knowledge on these substances.”<sup>19</sup>

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<sup>11</sup> The EC at that time consisted of 15 member States.

<sup>12</sup> *Recourse to Arbitration EC – Hormones (Article 22.6) (US)*.

<sup>13</sup> *Recourse by the United States to Article 22.7 of the DSU*, WT/DS26/21 (15 July 1999).

<sup>14</sup> WT/DSN/M/65 at p. 19.

<sup>15</sup> *Implementation of WTO Recommendations Concerning EC – Measures Concerning Meat and Meat Products (Hormones)*, 64 Fed. Reg. 40,638 (July 27, 1999).

<sup>16</sup> WT/DS26/22.

<sup>17</sup> WT/DS26/22 at p.2.

<sup>18</sup> *See* Articles (3) and (10) of Directive 2003/74/EC.

<sup>19</sup> *See* Articles (7) and (10) of Directive 2003/74/EC.

15. At the same time, the EC placed its communication regarding Directive 2003/74/EC on the agenda for the next meeting of the DSB.<sup>20</sup> Eleven days later, on November 7, 2003, the DSB meeting took place at which the EC made its statements concerning the EC's notification of the Directive 2003/74/EC and assertion of compliance, and at that meeting the United States responded to those statements. Two weeks later, the EC requested that its claim of compliance in the *EC – Hormones* dispute be placed again on the agenda for the following DSB meeting.<sup>21</sup> Accordingly, at the DSB meeting held on December 1, 2003, the EC made additional statements on the subject of alleged EC compliance and the 2003 Directive and the United States again responded, including by noting that it was awaiting the response by the EC to the detailed points the United States made at the November DSB meeting.

16. During the period of time when the EC began initiating the present proceeding, the United States engaged in an effort to try to understand the basis for the EC's claim of compliance and the scientific basis for the new Directive. To this end, the United States made continued efforts to hold discussions with the EC and to seek information from the EC that would assist the United States in its process of fully understanding the scientific claims the EC asserted as support for Directive 2003/74/EC. However, the EC did not provide all of the scientific studies on which its new Directive was allegedly based. Since those discussions were less than satisfactory, the United States was also developing a request pursuant to Article 5.8 of the *SPS Agreement* to have the EC provide an explanation of the reasons for the restrictions set forth in Directive 2003/74/EC. On December 13, 2004, shortly after the EC requested consultations with the United States, the United States filed its Article 5.8 request.<sup>22</sup> The EC responded to the U.S. request in a five-paged letter on May 19, 2005,<sup>23</sup> approximately a week before the Panel in the present proceeding was composed.

17. The United States had fully complied with all relevant rules and procedures of the DSU and the *SPS Agreement* in bringing the *EC – Hormones* dispute, determining the applicable RPT for compliance, determining the appropriate level of suspension of concessions, and obtaining the authorization of the DSB to suspend concessions. These efforts consumed significant resources and time, all the while that the United States continued to be denied the market access to which it was entitled under the WTO.

18. The DSB's authorization granted on July 26, 1999 has never been revoked and the U.S. application of duties pursuant to that authorization has continued, unchanged, since July 27, 1999. *In other words, there was no question that the duties that the EC challenged in the current proceeding had been authorized by the DSB and had not been modified since that DSB*

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<sup>20</sup> See WT/DSB/M/157 para. 27.

<sup>21</sup> See WT/DSB/M/157 para. 22.

<sup>22</sup> U.S. SPS Article 5.8 Request of 13 December 2004. (Exhibit US-19).

<sup>23</sup> EC Response to U.S. SPS Article 5.8 Request. (Exhibit US-23).

*authorization*. Indeed, the United States had not changed the application of the duties even after the EC was enlarged on various occasions to include more member States – the United States never extended those duties to products of the new member States.

19. Despite this, the Panel nonetheless concluded that the United States was “seek[ing] redress” of a violation of obligations by the EC without recourse to, and abiding by, the rules and procedures of the DSU in breach of DSU Article 23.1. Similarly, despite the ongoing efforts to address the EC’s claim of compliance made several years after the application of the suspension of concessions authorized in *EC – Hormones* (i.e., in a “post-suspension situation”), and the fact that the EC had still not even provided to the United States the scientific studies on which the EC was basing its claims of compliance, the Panel concluded that the United States had breached DSU Article 23.2(a) by making a “determination” to the effect that a violation had occurred without recourse to dispute settlement in accordance with the rules and procedures of the DSU. The United States appeals both of these conclusions.

20. The Panel erred in finding that the continuation by the United States, without any modification, of the exact same application of the suspension of concessions after the EC notified Directive 2003/74/EC to the DSB, is “seek[ing] redress” of a violation within the meaning of DSU Article 23.1.<sup>24</sup> By doing so, the Panel groundlessly re-characterized the measure at issue; imputed to the United States, without basis in the DSU or in any evidence, a re-direction of the suspension of concessions from the EC’s 1996 ban to the EC’s 2003 amended ban; and rendered *inutile* the authorization granted by the DSB to the United States to suspend concessions. These errors, whether taken singly or together, require reversal of the Panel’s findings on Article 23.1 by the Appellate Body.

**A. The Panel’s Description of the Measure Is Confused and Reflects the Conceptual Difficulty with the Panel’s Approach**

21. The measure at issue is identified by the Panel in separate sections of its Report as either:

[T]he suspension of concessions and other obligations under the covered agreements, continued without recourse to the procedures under the DSU, after the European Communities’ adoption of Directive 2003/74/EC on 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stock-farming of certain substances having a hormonal or thyrostatic action and of beta-agonists. The measure is provided in the Federal Register Notice in Vol. 64, No. 143 of 27 July 1999 and is enforced as of 29 July 1999<sup>25</sup>

or:

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<sup>24</sup> Panel Report, para. 7.215.

<sup>25</sup> Panel Report, para. 2.7.

[T]he continued application by the United States, after the notification to the DSB of Directive 2003/74/EC by the European Communities, of its decision to apply, as from 29 July 1999, import duties in excess of bound rates by imposing a 100% ad valorem duty on a number of products imported from certain member States of the European Communities without recourse to the procedures under the DSU.<sup>26</sup>

22. There are some striking elements of these descriptions. First, of course, is that they are different. It is difficult to see how the “measure at issue” could be different in two different sections of the Panel Report.

23. Second, in the second description, the “measure” is described as the “continued application” of the U.S. “decision to apply” import duties. It is not clear how there can be a “continued application” of a “decision to apply.” The decision to apply was taken in 1999, as the Panel itself recognized. In paragraph 7.151 of its report, the Panel includes in the description of the measure at issue the following statement: “This decision [to apply import duties on a number of EC products in excess of bound rates] had been taken pursuant to an authorization granted by the DSB to the United States to suspend concessions and other obligations on 26 July 1999.”<sup>27</sup> There was no continued “application” of that decision.

24. Third, both descriptions state that the duties were applied “without recourse to the procedures under the DSU.” The description of a measure should be factual. However, the Panel’s description confuses the legal claims made by the EC with what should be a factual description. Furthermore, the “without recourse” language is inaccurate. The Panel has acknowledged that the duties were applied pursuant to authorization by the DSU, an authorization that has never been revoked. The United States will discuss this difficulty further below.

25. Fourth, the Panel references in each description the implementation of the U.S. suspension of concessions in 1999. Indeed, in the first formulation, the “measure” is said to be “provided in” the 1999 Federal Register notice. It is difficult to understand how a measure can date to 1999 while at the same time be said to date to “after the EC’s notice in 2003.”

26. Finally, in a related point, the relevant time frame for the suspension of concessions is defined in paragraph 7.151 as: “after the European Communities’ *adoption* of Directive 2003/74/EC on 22 September 2003 amending Council Directive 96/22/EC.” (Emphasis added.) In contrast, the relevant time frame for the suspension of concessions is defined in paragraph 2.7 as: “after the *notification* to the DSB of Directive 2003/74/EC by the European Communities,”

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<sup>26</sup> Panel Report, para. 7.151 (footnote references removed).

<sup>27</sup> Panel Report, para 7.151 (*id.*).

(emphasis added) which took place on October 27, 2003.<sup>28</sup> Given that the Panel found breaches by the United States of both Article 23.1 and Article 23.2(a) of the DSU by virtue of the continuation of U.S. suspension of concessions, the relevant time frame for the continuation of the suspension of concessions is essential not just to the Panel’s analysis but also to the implications arising from that analysis. As will be discussed in more detail below, the discrepancy in the time frames defined by the Panel reveal significant problems with the Panel’s analysis.

27. These difficulties in describing the “measure at issue” reflect a larger, conceptual difficulty with the Panel’s approach. The Panel appears to be struggling to explain how it could find that duties that were authorized by the DSB as a result of the EC’s failure to comply with the DSB recommendations and rulings are inconsistent with U.S. obligations under the WTO. Accordingly, the Panel appears to be trying to characterize the measure not as the duties themselves, but as something else, something that changed in the measure once the EC notified its (inaccurate) claim of compliance. Yet there was no new measure as a result of the EC claim of compliance and no modification or other alteration in the duties.

#### **B. The U.S. Suspension of Concessions Is Authorized by the DSB**

28. The authorization to suspend concessions or other obligations when a Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance within the determined RPT, is granted by the DSB pursuant to Article 22.2 of the DSU. The DSB, which was established to administer the rules of the DSU, comprises representatives of all WTO Members. Authorization by the DSB to suspend concessions is therefore by its nature multilaterally considered and multilaterally granted.

29. The Panel simply errs when it says that the application of the duties was “without recourse to the procedures under the DSU.” As described above, the United States had extensive and lengthy recourse to multiple procedures under the DSU before applying the duties. And the particular authorization by the DSB to suspend concessions in this dispute, i.e., the one granted by the DSB on July 26, 1999, was granted with respect to the nullification or impairment of benefits, the level of which was determined by an Article 22.6 arbitration, caused by the EC’s failure to bring Directive 96/22/EC into compliance with the requirements of the *SPS Agreement*. As the Panel agreed,<sup>29</sup> that authorization to suspend concessions has remained in place and unchanged, as has the U.S. suspension of concessions, at the time the EC adopted or notified Directive 2003/74/EC in 2003, at the time the EC requested consultations and panel establishment in November 2004 and January 2005 respectively, and to this day.

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<sup>28</sup> WT/DS26/22.

<sup>29</sup> “We agree with the United States that it was *authorized* to suspend concessions and that this authorization has not been revoked.” Panel Report, para. 7.209 (emphasis in original).

30. Article 22.8 of the DSU provides the time at which the DSB’s authorized suspension of concessions is to no longer be applied. “The suspension of concessions or other obligations 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.” In other words, the DSB’s authorization to apply the suspension of concessions remains in place until one of three conditions occurs:

- 1) the inconsistent measure is removed,
- 2) the Member concerned provides a solution to the nullification or impairment of benefits, or
- 3) the parties reach a mutually satisfactory solution.

The Panel did not find that any of these conditions had occurred. Accordingly, the DSB authorization remains in place and effective. As a result, the Panel’s findings on Article 23.1 are inconsistent with the DSB’s authorization – the Panel’s findings would effectively undermine and render the DSB’s multilateral authorization meaningless.

### **C. The Panel Erred by Re-Characterizing the U.S. Suspension of Concessions**

31. The Panel’s finding that the United States is “seeking redress of a violation” within the meaning of Article 23.1 once the EC notified Directive 2003/74/EC requires a re-characterization of the duties, which were authorized by the DSB in 1999 on the basis of the EC’s failure to bring Council Directive 1996/22/EC into compliance with the requirements of the *SPS Agreement*, as being now directed against Directive 2003/74/EC. This re-characterization by the Panel is without legal basis and the Appellate Body should accordingly reverse the Panel’s finding.

32. Article 23.1 of the DSU provides in relevant part:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . , they shall have recourse to and abide by, the rules and procedures of the [DSU].

The Panel agreed that “Article 23.1 of the DSU is not breached when a Member’s suspension of concessions or other obligations has been multilaterally authorized by the DSB, because the Member concerned ‘ha[d] recourse to, and abide[d] by, the rules and procedures of [the DSU]’, within the meaning of Article 23.1.”<sup>30</sup> Furthermore, the Panel acknowledged that the U.S. suspension of concessions is the product of such recourse and the following of such rules and

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<sup>30</sup> Panel Report, para. 7.204.

procedures. As the Panel stated: “Indeed, the United States has already sought redress against the original EC ban under the DSU.”<sup>31</sup>

33. The Panel also found that the DSB’s authorization for the United States to suspend concessions is still in effect. The Panel stated without equivocation: “We agree with the United States that it was *authorized* to suspend concessions and that this authorization has not been revoked.”<sup>32</sup>

34. Yet the Panel found that the maintenance of the U.S. duties, which remained multilaterally authorized and unchanged, after the EC’s notification of Directive 2003/74/EC, indicated that a fundamental transformation of the suspension of concessions had occurred and that the suspension of concessions had to now be considered as re-directed from the 1996 Directive to Directive 2003/74/EC. But no such transformation had occurred.

35. While not dispositive, U.S. domestic law can be informative on the question of the target of the duties. The Federal Register notice of 1999 is clear. The duties are a “result of” the “authorization of the DSB on July 26, 1999” and are to apply to any of the listed products entered, or withdrawn from warehouse for consumption, “on *or after* July 29, 1999.”<sup>33</sup> In other words, under the plain terms of the notice, the basis for the duties is the 1999 DSB authorization, and the duties would continue indefinitely. It would require some affirmative action on the part of the United States to alter either the legal basis for the duties (for example, to have them based on a different measure of the EC), or to alter the duties themselves. The Panel, however, correctly did not find that the United States had taken any affirmative action that would indicate a decision to re-direct the suspension of concessions as a means of “seeking redress” against Directive 2003/74/EC.<sup>34</sup>

36. The Panel did find that there had been no multilateral review or examination of the EC’s notification of Directive 2003/74/EC or its assertion that the Directive constituted the EC’s implementation of the recommendations and rulings of the DSB in the *EC – Hormones* dispute.<sup>35</sup>

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<sup>31</sup> Panel Report, para. 7.204.

<sup>32</sup> Panel Report, para. 7.209 (emphasis in original).

<sup>33</sup> 64 Fed. Reg. 40,638 (July 27, 1999) (emphasis added).

<sup>34</sup> Instead, the Panel imputes the re-direction of the suspension of concessions based on the fact that the U.S. suspension of concessions continued after the EC notified Directive 2003/74/EC. (See section II.D *infra*.)

<sup>35</sup> Panel Report, para. 7.241: “For the reasons stated above, we consider that the EC implementing measure is . . . a measure which has not been subject to a recourse to the rules and procedures of the DSU.”



Accordingly, the Panel did not consider that the EC's notification and assertion were anything other than a unilateral declaration of compliance.

37. As noted above, one of three conditions would need to be satisfied under Article 22.8 of the DSU before the DSB's authorization would no longer operate. Nothing in Article 22.8 grants to the EC the authority to unilaterally determine that one of those conditions has occurred. By finding that the United States was actively seeking the redress of a violation of obligations after the EC notified Directive 2003/74/EC, therefore, the Panel not only caused a legally unsupported re-characterization of the U.S. duties as being now directed at Directive 2003/74/EC, but also permitted the unilateral declaration of compliance by the EC to transform the legal justification for the DSB-authorized U.S. suspension of concessions. There is no basis in the DSU, nor should there be a basis read into the DSU, to support the endowment of such power to the unilateral declaration of compliance by a Member concerned. Moreover, given the Panel's findings, it is also necessary for the Panel to infer into the DSU not only that the EC's unilateral declaration of compliance has legal effect, but also to infer into the DSU that there is some deadline by which a Member must respond to such a unilateral declaration. There is no such deadline, and the Panel's reading one into the DSU is impermissible and legal error.<sup>36</sup>

#### **D. The Panel Erred by Imputing to the United States a Decision to Convert the Basis for the Duties to Directive 2003/74/EC**

38. The Panel based its re-characterization of the U.S. duties as no longer being directed at the EC's earlier ban but rather being directed at the EC's Directive 2003/74/EC on an inference derived simply from the continued, unmodified duties themselves. This inference is inaccurate and baseless. The Panel found that the continuation of the U.S. suspension of concessions after the date of the EC's notification of Directive 2003/74/EC served as "*evidence* that the United States is actively 'seek[ing] the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements.'"<sup>37</sup> In other words, the Panel imputed to the United States the intention to convert the object and justification for its suspension of concessions from the EC's earlier ban to Directive 2003/74/EC. The Panel's reasoning and analysis on this subject are fundamentally flawed. Furthermore, the Panel's imputation is supported by neither the DSU nor the facts in this dispute.

##### **1. The Panel's Reasoning and Analysis Are Fatally Flawed**

39. What constitutes "seeking redress of a violation" within the meaning of Article 23.1 is a matter of first impression for the Appellate Body. Although at least two panels have addressed

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<sup>36</sup> The Panel's inconsistency in paragraphs 2.7 and 7.151, in defining the relevant time frame for the continuation of the U.S. suspension of concessions considered as part of the "measure at issue," further contributes to the errors in inferring such a deadline.

<sup>37</sup> Panel Report, para. 7.209 (emphasis added).

and interpreted the text of Article 23.1 in some depth,<sup>38</sup> the panel report in one dispute<sup>39</sup> and the Article 23.1 findings and conclusions in the panel report in the other dispute<sup>40</sup> were not appealed to the Appellate Body.

40. The Panel’s interpretation and analysis of Article 23.1 fails to follow or take into account the customary rules of interpretation of public international law reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* or to acknowledge in any way the interpretations undertaken by previous panels.<sup>41</sup> The approach and reasoning that the Panel did employ in its Article 23.1 analysis, which is founded on the imputation to the United States of a decision to re-direct its duties against a different object, is fatally flawed because it results in a logical paradox, i.e., that an act can be simultaneously legal and illegal, and relies on a false dichotomy, i.e., that the United States could respond to the notification of Directive 2003/74/EC only by either terminating the suspension of concessions based on a conclusion of consistency or continuing the suspension of concessions based on a conclusion of inconsistency.

**a. The Panel’s Reasoning Results in a Logical Paradox**

41. In its reasoning, the Panel began with the proposition that an “authorization” is not an “obligation” and that an authorization to act does not equate to a requirement to act. Next, the Panel observed that it is incumbent on the party suspending concessions to ensure that the

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<sup>38</sup> See *US – Certain EC Products (Panel)* and *EC – Commercial Vessels*.

<sup>39</sup> See *EC – Commercial Vessels*.

<sup>40</sup> See *US – Certain EC Products (AB)*, para. 58: “To us, the most significant aspect of this case may well be the Panel’s conclusions, which were not appealed, about the failure of the United States to comply with the legal imperative found in Article 23.1 of the DSU . . . .”

<sup>41</sup> In *US – Certain EC Products (Panel)*, para. 6.23, the panel interpreted “seeking redress of a violation” within the meaning of Article 23.1 by considering the ordinary meaning of the words “seeking” and “redress” in their context and concluded that “Article 23.1 of the DSU prescribes that when a WTO Member wants to take any remedial action in response to what it views as a WTO violation, it is obligated to have recourse to and abide by the DSU rules and procedures.” Similarly, the panel in *EC – Commercial Vessels*, para. 7.196, also undertook an interpretation of DSU Article 23.1, taking into account the approaches and interpretations of the panels in *US – Section 301* and *US – Certain EC Products*, concluding that:

the phrase ‘seek the redress of a violation . . .’ covers any act of a Member in response to what it considers to be a violation of a WTO obligation by another Member whereby the first Member attempts to restore the balance of rights and obligations by seeking the removal of the WTO-inconsistent measure, by seeking compensation from the other Member, or by suspending concessions or obligations under the WTO Agreement in relation to that Member.

suspension is applied only until such time as foreseen in Article 22.8 – i.e., when the measure found to be inconsistent has been removed, the responding party has provided a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. The Panel also noted that, pursuant to Article XVI:4 of the Agreement Establishing the WTO, Members must ensure the conformity of their laws, regulations, and administrative procedures with their WTO obligations, which includes their obligations under the DSU.

42. In light of these propositions and principles, the Panel erroneously considered the fact that the United States maintained its duties after the notification of Directive 2003/74/EC and found that it served as a basis for imputing to the United States an intention to convert the justification for its duties from Directive 96/22/EC to Directive 2003/74/EC. As the Panel reasoned: “If it were not [seeking redress of a violation with respect to the EC implementing measure], . . . the United States would not have to maintain that suspension.”<sup>42</sup>

43. The flaw in the Panel’s approach is revealed by the logical paradox resulting from it. The Panel agreed that the U.S. suspension of concessions remains authorized by the DSB.<sup>43</sup> “Authorize” is defined as: “Make legally valid”; “Give legal or formal warrant to (a person, body, etc.) *to do*; empower, permit authoritatively.”<sup>44</sup> “Authorized” is defined as: “legally or formally sanctioned or appointed.”<sup>45</sup>

44. An act that is “authorized” is therefore by definition consistent with and endorsed by the law. Thus, the Panel’s conclusion that the continued U.S. suspension of concessions – which it acknowledged remained authorized – nevertheless could constitute a violation of Article 23.1 of the DSU, is based on the paradoxical proposition that an act that is permitted by the law can at the same time be not permitted by the law. Such a conclusion – and the reasoning underlying it – are untenable and should be reversed.

#### **b. The Panel’s Reasoning Relies on a False Dichotomy**

45. The Panel reasoned that it was the obligation of the United States to ensure that the suspension of concessions be applied only until such time as foreseen in Article 22.8. From this, the Panel then reasoned that the continuation of the duties after the notification of Directive 2003/74/EC meant that the United States was seeking redress of a violation with respect to that Directive. However, the Panel’s reasoning relies on a false dichotomy.

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<sup>42</sup> Panel Report, para. 7.215.

<sup>43</sup> Panel Report, para. 7.209.

<sup>44</sup> New Shorter Oxford English Dictionary (Brown, L. Ed.) (1993), p. 151.

<sup>45</sup> *Id.*

46. The Panel considers that there are only two possible findings afforded by its analysis once the EC notified Directive 2003/74/EC and unilaterally declared itself in compliance: either (1) the United States concluded that the 2003 Directive did not bring the EC into compliance and therefore maintained the duties against the EC; or (2) the United States concluded that the 2003 Directive did bring the EC into compliance and therefore terminated the duties. According to the Panel's reasoning, because the latter scenario did not occur and the United States did not terminate its duties, the first scenario must apply.

47. As noted above, the Panel's approach depends on giving a legal status to the EC's notification that is nowhere justified under the DSU and reading into the DSU a deadline that does not exist to respond to such a notification. Even aside from this, these two alternatives do not exhaust the possible results of the EC's notification of the 2003 Directive and its declaration of compliance. One obvious alternative scenario that the Panel did not take into account in its analysis is that the United States kept the duties in place and maintained the *status quo* on the basis that the EC's declaration of compliance had not been multilaterally confirmed. Another is that the United States maintained the *status quo* while it was undertaking a detailed, scientifically-based examination of the merits of the EC's claim of compliance.

48. The DSU does not require a complaining party to form definitive conclusions regarding the unilateral declaration of compliance by a Member concerned, or to take any other action when such a Member declares its compliance. In fact, the DSU's prohibition under Article 23.2(a), which is discussed in more detail below, would appear to prohibit such actions. The Panel's finding that maintenance of the *status quo* by the United States and continuation of U.S. duties definitively indicated the desire or intention to seek redress against Directive 2003/74/EC was made in reliance on a false dichotomy based on obligations that do not exist in the DSU. It should therefore be reversed.

## 2. Other Errors in the Panel's Analysis

49. In making its findings that improperly impute to the United States a re-direction of its duties, the Panel also failed to abide by the ordinary meaning of the word "authorized," failed to apply the appropriate burden of proof in its analysis and failed to consider anything other than indirect evidence.

50. As already discussed, "Authorize" is defined as: "Make legally valid"; "Give legal or formal warrant to (a person, body, etc.) *to do*; empower, permit authoritatively."<sup>46</sup> Had the Panel properly taken into account the ordinary meaning of that word, as it is used in DSU Article 22, when conducting its Article 23 analysis in a post-suspension situation, it would not have come to the erroneous conclusion that continuing something that has been duly "authorized" could result

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<sup>46</sup> New Shorter Oxford English Dictionary (Brown, L. Ed.) (1993), p. 151.

in a violation. The fact that an action that is “authorized” is not obligatory or a requirement has no bearing on the legal status of that action as “warranted” or “permitted.”

51. With respect to burden of proof, the normal course would have been for the Panel to first examine whether the EC, as the complaining party, had met its burden of making a prima facie showing of a violation of Article 23.1 by the United States. Only thereafter would the Panel turn to the rebuttal evidence and arguments proffered by the United States as the responding party. Instead, the Panel *began* its analysis with the rebuttal arguments of the United States.<sup>47</sup> The Panel thus effectively relieved the EC of its burden of making a prima facie case of inconsistency with Article 23.1 by the United States.

52. The Panel considered no evidence of inconsistency by the United States other than one piece of indirect evidence, from which the Panel drew only an inference that the United States was “seeking redress of a violation” within the meaning of Article 23.1.

53. The evidence the Panel chose to scrutinize was the fact that the U.S. suspension of concessions continued after the notification of the EC’s 2003 Directive. On the basis of this one fact, the Panel imputed to the United States an intention to seek redress of a violation with respect to Directive 2003/74/EC. What the Panel failed to acknowledge or take into consideration, however, is that the unaltered, seamless continuation of the suspension of concessions by the United States after the EC’s notification of Directive 2003/74/EC serves equally, if not more persuasively, as a basis for inferring that the United States did not have any intention to re-direct its duties. Indeed, if the United States had intended to now direct its duties against Directive 2003/74/EC, it would have needed to amend its domestic action to alter the legal basis for the duties. As noted above, the Federal Register notice was clear that the basis for the duties was the earlier EC ban and the 1999 DSB authorization. Furthermore, it would have been expected that the United States would have updated its duties to now reflect the fact that the EC comprises 27 member States, not 15. The United States did neither.

54. Accordingly, the fact that there was no change to the duties after the EC’s notification of its 2003 Directive demonstrates instead that the duties remained directed against the earlier EC ban and remained based on the 1999 DSB authorization. The unchanged continuation of the duties cannot support the Panel’s inference. The Panel’s finding must also be reversed on these bases as well.

### **3. The Panel’s Imputation Is Not Supported by the DSU**

55. The DSU does not provide that any particular act or event must take place once a responding party that is subject to suspended concessions declares itself to be in compliance.

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<sup>47</sup> See Panel Report, para. 7.203.

There is therefore no basis in the DSU for finding any change, especially any *imputed* change, to the U.S. suspension of concessions based upon the EC notification of Directive 2003/74/EC.

56. The Panel based its finding of a change on its reasoning that it is solely the suspending party's obligation to ensure that the suspension of concessions "is only applied until such time as foreseen in Article 22.8."<sup>48</sup> However, the Panel's reasoning – and thus its finding of a change – is unfounded. The text of Article 22.8 provides:

The suspension of concessions or other obligations 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. . . .

Significantly, Article 22.8 does not assign responsibility to a specific party for ascertaining when a measure found to be inconsistent has been removed.

57. One of the Panel's mistakes in observing that "it is for the respondent in this case to take appropriate steps to ensure that the suspension of concessions or other obligations is only applied until such time as foreseen in Article 22.8"<sup>49</sup> is that the Panel overlooks the fact that Article 22.8 does not assign this responsibility to the complaining party. Nor does Article 22.8 specify how the WTO is to determine whether one of the conditions in Article 22.8 has occurred. The procedure chosen by the EC, i.e., bringing a proceeding against the duties, appears to be one appropriate means to obtain such a determination. What is clear is that there is no basis under Article 22.8 to find that a multilateral authorization to suspend concessions is to be terminated by a unilateral declaration by the Member concerned.

58. The Panel makes the additional observation that, "pursuant to Article XVI:4 of the Agreement Establishing the WTO, Members must ensure the conformity of their laws, regulations, and administrative procedures with their WTO obligations, which includes their obligations under the DSU."<sup>50</sup> However, this observation militates equally in favor of a finding that the continued suspension of concessions by the United States after the EC's notification of the 2003 Directive did *not* demonstrate that the United States was "seeking redress of a violation" within the meaning of Article 23.1 with respect to Directive 2003/74/EC. The Panel's approach in making the opposite inference is almost akin to a presumption that a Member's

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<sup>48</sup> Panel Report, para. 7.211.

<sup>49</sup> Panel Report, para. 7.211.

<sup>50</sup> Panel Report, para. 7.212.

measures are in breach of the WTO Agreements. The Appellate Body has previously found such a presumption to be impermissible.<sup>51</sup>

59. On the basis of all of the errors implicated in the Panel’s imputation to the United States of the intention to re-direct its suspension of concessions against Directive 2003/74/EC, the Appellate Body should reverse the Panel’s finding that the United States was “seeking redress of a violation” within the meaning of Article 23.1.

**E. The Problematic Consequences Resulting from the Panel’s Finding on  
“Seeking Redress” within the Meaning of Article 23.1**

60. The Panel’s findings on Article 23.1 should also be reversed because the consequences of the findings, if left to stand, would be fundamentally problematic and disturbing to the WTO dispute settlement system.

61. If the unilateral declaration of compliance by a party that is subject to suspended concessions is to have the effect ascribed to it by the Panel, then any time a Member concerned asserts compliance, the complaining party, which has most likely invested several years’ worth of time and resources into obtaining recommendations and rulings adopted by the DSB and the DSB’s authorization to suspend concessions, would be required to initiate new dispute settlement proceedings. Furthermore, in order to avoid the inference that any suspension of concessions is now directed at the measure that is the basis for the claim of compliance, the complaining party will likely cease applying the suspension of concessions.

62. This would mean that a Member concerned could escape the application of the suspension of concessions, and force the complaining party to spend additional time and resources on dispute settlement proceedings, simply by notifying a claim of compliance. And if, as the dispute settlement proceedings draw to a close, it appears that the WTO is likely to find that the Member concerned has not yet complied, then if the Member concerned notifies a new claim of compliance, the process would start all over again and the complaining party would still not apply the suspension of concessions. In other words, the Panel’s approach would threaten an “endless loop” of litigation and no suspension of concessions being applied. And this would apply regardless of whether the claims of compliance were made in good faith or not,<sup>52</sup> but

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<sup>51</sup> See *US – Section 211 (AB)*, para. 259 and n.187; *Chile – Alcohol (AB)*, para. 74 (“Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith.”) (Emphasis in original, references eliminated).

<sup>52</sup> While the Panel in this proceeding found that the EC’s Directive 2003/74/EC “shows all the signs” of a “measure adopted in good faith” in para. 7.238 of the Panel Report, the United States notes, for example, that for five of the hormones at issue, the EC simply took its existing, inconsistent ban (which dated back to 1985), and re-labeled it as a “provisional ban,” even

obviously would be of greater concern for their incentive to notify a claim of compliance perhaps prematurely.

63. Furthermore, the Panel’s findings on Article 23.1 also mean that the unilateral assertion of compliance by a Member concerned would mean that a successful complaining party’s implementation of the DSB authorized suspension of concessions would automatically mean a breach of DSU Article 23.1, even though that party had already had recourse to and abided by every relevant rule and procedure of the DSU in order to implement its suspension of concessions legally in the first place.

64. The United States also cannot help but note that it would appear that the EC in fact does not believe that the Panel’s approach is legally correct, based on its actions in the context of the *US – Offset Act* dispute. In that dispute, the EC, as a complaining party, has maintained its suspension of concessions even after the United States has stated that it has taken all steps necessary to comply.

65. Both the threat of being dragged into an “endless loop” of litigation and the creation of an automatic breach for a successful complaining party on the unilateral declaration of compliance by a Member concerned would significantly undermine the remedies afforded under the DSU. Moreover, they are not warranted by the text of the DSU. The findings should therefore be reversed.

**F. It Is Not the Role of Panels or the Appellate Body to Supply the Specificity that the DSU Lacks on the Post-Suspension State of Play**

66. Another consequence of the Panel’s reasoning and findings is that they effectively read into DSU Article 22.8 an obligation – once again on the part of a successful complaining party – to take steps by some deadline to ascertain whether the conditions in Article 22.8 have been met, even though Article 22.8, as discussed above, does not specify any such deadline or allocate that obligation to a specific party. The Panel’s approach would add to the rights and obligations of Members in contravention of DSU Article 19.2.

67. The suspension of concessions restores the balance of concessions under the WTO and encourages or induces compliance by Members whose measures have been found to be inconsistent with the covered agreements.<sup>53</sup> The question of whether, after concessions have been suspended against an original responding party, the assertion of compliance by that party equates to actual compliance is therefore crucially important to the justification for the

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though it had claimed in the original proceeding that there was sufficient scientific evidence to assess their risk.

<sup>53</sup> See *EC – Bananas III (Article 22.6) (US)*, para. 6.3.



suspension of concessions as a remedy and to the healthy functioning of the WTO dispute settlement system and the multilateral trading system as a whole.

68. It is clear, however, that the DSU does not specify the rules and procedures applicable in a situation like the present one, i.e., where an original responding party, in a post-suspension scenario, declares itself to be in compliance more than four years after the reasonable period of time for compliance has expired, and the notified “implementing” measure has no discernible effect on and makes no observable change to the *status quo*.

69. The DSU’s lack of specificity relating to the post-suspension situation is acknowledged and a number of Members have indicated that specifying the rules and procedures to be followed would be an improvement of the DSU.<sup>54</sup> No modifications to the DSU have been made. Consequently, it is not the role of panels (or the Appellate Body) to prescribe the particular procedures where the Members have not done so. Panels and the Appellate Body should not supplant the work and efforts of Members to provide clarifications or improvements to the DSU.

70. Even though the DSU does not specify the rules and procedures applicable in a post-suspension situation, it does not leave parties in a post-suspension state of play bereft of tools to obtain redress and resolution. As the Panel noted, once the EC notified Directive 2003/74/EC and declared compliance with the rulings and recommendations of the DSB in the *EC – Hormones* dispute, the DSU provided both parties with the means to obtain an examination of the actual compliance of Directive 2003/74/EC and/or to seek the termination of the suspension of concessions, including through: consultation; conciliation; good offices and mediation; Article 21.5 of the DSU; arbitration under Article 25 of the DSU; or recourse to a normal panel proceeding against the continuation of the suspension of concessions.<sup>55</sup> This last option, the recourse to a normal panel proceeding, is the option the EC exercised by bringing the present proceeding.

71. Reversing the Panel’s findings that the United States was “seeking redress” of a violation within the meaning of Article 23.1 would therefore not only preserve the integrity of the DSU but

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<sup>54</sup> See TN/DS/W/1 (The EC has observed that: “The current text of the DSU does not provide any specific procedure in case a Member implements the recommendations and ruling of the DSB after another Member has been authorized to suspend concessions or other obligations.”; see also WT/DSB/M/65 at p. 19 (at the DSB meeting held on July 26, 1999 at which the DSB granted to the United States the authorization to suspend the EC’s concessions in relation to the *EC – Hormones* dispute, the Australian representative stated that Australia “would like to know of the mechanisms, if any, that had been put in place to ensure the removal of the retaliatory measures immediately upon implementation, as required by Article 22.8 of the DSU.” In response, the Chairman of the DSB “noted that some of the issues raised by Australia were currently being discussed in the context of the DSU review.”).

<sup>55</sup> See Panel Report, paras. 6.45 and 7.350.

also would prevent the needless interpretations, imputations, and re-characterizations necessary to create an obligation for the United States to “have recourse to and abide by the rules and procedures of the DSU” where no such obligation is necessary to the satisfactory and proper resolution to the question of whether Directive 2003/74/EC actually complies with the EC’s obligations under the covered agreements. It would also prevent the addition of obligations on Members that is prohibited by Articles 3.2 and 19.2 of the DSU.

### **III. The Panel Erred in Finding that the United States Breached Article 23.2(a) of the DSU**

72. The fact that the Panel erred in finding that the United States was “seeking redress” within the meaning of DSU Article 23.1 with respect to Directive 2003/74/EC renders moot the Panel’s findings with respect to DSU Article 23.2(a), because Article 23.2(a) applies only in cases where a Member is seeking redress. However, the Panel also erred in concluding that the United States breached Article 23.2(a) by making a “determination.” The statement made by the United States at the meeting of the DSB on December 1, 2003, whether by itself or in combination with the statement made at the DSB meeting on November 7, 2003, does not constitute a “determination” within the meaning of Article 23.2(a). Nor can such a “determination” be inferred from those statements or from the continuation of duties against EC products after the notification of Directive 2003/74/EC.

#### **A. Statements Made at DSB Meetings Are Not “Determinations” within the Meaning of Article 23.2(a) of the DSU**

73. Article 23.2(a) of the DSU provides that, in cases where Members “seek redress” of a violation as provided in Article 23.1, they shall not “make a determination to the effect that a violation has occurred” except through recourse to dispute settlement in accordance with the DSU. According to the Panel, the statement made by the United States at the DSB meeting held on December 1, 2003 (either by itself or taken together with the U.S. statement made at the DSB meeting held on November 7, 2003)<sup>56</sup> constitutes a “determination” within the meaning of Article 23.2(a).<sup>57</sup> The Panel’s conclusion, however, is not supported by the ordinary meaning of the term “determination” in its context and in light of the object and purpose of the DSU.

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<sup>56</sup> It is unclear from the Panel’s analysis in paras. 7.219-7.239 of the Panel Report whether the Panel found that the December 1 DSB statement alone or in combination with the November 7 DSB statement constituted the Article 23.2(a) “determination,” or whether the two statements served as a basis for inferring that a “determination” had been made by the dates on which they were delivered.

<sup>57</sup> Panel Report, para. 7.226.

## 1. Ordinary Meaning

74. “Determination” is not defined in Article 23.2(a) or anywhere else in the DSU. The Panel relied [partly] on the interpretation of the panel in *US – Section 301* in finding that the U.S. DSB statement of December 1, 2003 constituted a “determination” within the meaning of Article 23.2(a). The report in *US – Section 301* was never appealed. Accordingly, the interpretation of the term “determination” as it is used in Article 23.2(a) is a matter of first impression for the Appellate Body.

75. Article 23.2(a) provides:

“In such cases [as provided in Article 23.1], Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of [the Dispute Settlement] Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under [the Dispute Settlement] Understanding.”

76. A “determination” is defined as:

“The settlement of a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision so made, an authoritative opinion”; “The settlement of a question by reasoning or argument”; “The action of coming to a decision; the result of this; a fixed intention”; “The action of definitely locating, identifying, or establishing the nature of something; exact ascertainment (of); a fact established, a conclusion or solution reached”.<sup>58</sup>

The definition requires that a “determination” be a decision or a settlement of something uncertain that is final and definitive. It is the “settlement” of a suit or controversy by “authoritative decision” of a “judge” or “arbiter;” a “fixed” intention; the action of “definitely” locating, identifying, or establishing the nature of something; “exact” ascertainment (of).

77. The ordinary meaning of “determination” also underscores that a determination is formal or official and results from some kind of deliberative process. A determination is made by the “decision of a judge or arbiter,” which presumes a decision-making process by the judge or arbiter; it is a settlement of a question by the process of “reasoning or argument;” it is the “result”

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<sup>58</sup> New Shorter Oxford English Dictionary (Brown, L. Ed.) (1993), p. 651; *see US – Section 301*, n.657.

of the process of “coming to a decision;” it is the “fact established” or the “conclusion or solution reached” through a process of establishing facts or reaching a conclusion.

78. Finally, the definition indicates that a “determination” leads to a significant consequence. For instance, it is a “settlement of a suit or controversy” that has the consequence of bringing the suit or controversy to an end; a “settlement of a question” that has the consequence of providing the answer to the question; a “decision” between options that has the consequence of allowing one option to become realized while putting an end to other options; it is the definite “location,” “identification,” or “establishment” of the nature of something that has the consequence of excluding the possibility that the nature of something could be otherwise.

79. In light of this definition of “determination,” it was incorrect to find that the U.S. DSB statements – whether considered individually or together – constituted a “determination.” The U.S. DSB statement of December 1, 2003, whether taken in isolation or together with the statement made at the DSB meeting on November 7, 2003, did not embody or convey definitiveness, finality, or the formality of resulting from some kind of deliberative process, and was not an act that had a significant consequence or legal effect in the United States – indeed it had no consequence or legal effect in the United States.

80. The language employed in the December 2003 DSB statement – and in the November 2003 DSB statement – was punctuated with equivocation and lacked definitiveness. In expressing its skepticism or belief that the EC’s claim of compliance rang hollow, the United States stated that: “[t]he United States *failed to see* how the revised EC measure could be considered to implement the DSB’s recommendations and rulings in this matter;”<sup>59</sup> “[t]he United States, however, *could not understand* how this new directive presented now could amount to implementation of the DSB’s recommendation.”<sup>60</sup>

81. Both statements also lacked the requisite finality to be considered a “determination.” First of all, the fact that the November 7 statement was made barely 10 days after Directive 2003/74/EC was notified, coupled with the fact that the United States made further statements on the notification of Directive 2003/74/EC at the December DSB meeting, demonstrate the lack of finality of the November 7 statement. Second, recalling that the definition of “determination” includes a “settlement of a question” that has the consequence of providing the answer to the question; a “decision” between options that has the consequence of allowing one option to become realized while putting an end to other options; the fact that the initial statement by the representative of the United States at the December 2003 DSB meeting was that “she would transmit the statement made by the EC at the present meeting to her authorities for their consideration” is significant in illustrating the lack of finality of the December 1 statement. The U.S. representative could not have indicated more clearly that her statements at the December

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<sup>59</sup> WT/DSB/M/157, para.29; WT/DSB/M/159, para. 25 (emphasis added).

<sup>60</sup> WT/DSB/M/159, para. 25 (emphasis added).

meeting were not – and were not intended to be – “the authoritative decision” on the matter of the compliance of Directive 2003/74/EC and that she was not the official deciding the question.

82. And as noted, Article 23.2(a) would only apply where the United States was “seeking redress” against Directive 2003/74/EC. The Panel’s approach would mean that the Panel had determined that as of December 1, 2003, the United States was “seeking redress” against Directive 2003/74/EC, but the Panel never made a finding as to the date on which it considered the “continued application” or “continued suspension of concessions” had endured long enough after the EC’s October 27 notification to the DSB to become directed against Directive 2003/74/EC rather than the EC’s earlier ban. Presumably even under the Panel’s erroneous approach, the Panel did not believe that this could have occurred on the day after the notification. And given that it was the EC that placed discussion of Directive 2003/74/EC on the agenda for the November and December DSB meetings, it can be presumed that the EC did not expect Members to have taken any position on the Directive until after hearing what the EC had to say about it at those meetings. Even aside from the fact that, as shown above, the United States has never sought redress against Directive 2003/74/EC, it is illogical to consider that the United States was seeking redress by the December 1, 2003 DSB meeting when, among other things, it was still awaiting the EC’s reactions to the detailed points it had made at the November DSB meeting.

83. In addition, the complexity and difficulty of making any good faith attempt at examining and assessing the EC’s scientific claims relating to Directive 2003/74/EC were demonstrated by the examination undertaken by the Panel in the present proceeding, and belie the fact that the United States could be expected to make a “determination” regarding Directive 2003/74/EC in a matter of weeks. Once the Panel decided to review the substantive compliance of Directive 2003/74/EC, it took the Panel, working in cooperation with the parties and a group of scientific experts convened pursuant to Article 4 of the DSU, *a full 21 months* to organize, review, deliberate and issue its findings and conclusions on the matters raised in the proceeding, including the compliance of the 2003 Directive with the requirements of the *SPS Agreement*. The Panel does not explain how the U.S. DSB statements made within six weeks of the notification of Directive 2003/74/EC could have constituted a “determination” when its own “determination” took 21 months (unless it was presuming bad faith on the part of the United States). The complexity of the substantive issues also sheds light on why the United States made a request pursuant to Article 5.8 of the *SPS Agreement* seeking explanations for the EC’s scientific justification for Directive 2003/74/EC many months after the U.S. DSB statements and further militates against a finding that these DSB statements were final or definitive.

84. Furthermore, the multiple expressions of the readiness and willingness of the United States to discuss “any matters” regarding the EC’s compliance, “any outstanding issues” regarding the EC’s ban including substantive issues, and the EC’s suggestion of initiating proceedings and “other procedural options,” and the SPS Article 5.8 Request made by the United States demonstrate the lack of finality in the U.S. DSB statement of December 2003. They also demonstrate the lack of any decision or settlement, inherent in the definition of “determination,”

that would have the effect, legally or otherwise, of putting an end to a controversy or question or eliminating any options or possibilities in favor of one option or possibility.

85. The Panel acknowledged that these expressions of interest by the United States in engaging in or continuing discussions might militate against a finding that the U.S. DSB statements constituted an Article 23.2(a) determination. However, it dismissed them on the basis that the United States could have, but never, expressly stated that it was “still reviewing” Directive 2003/74/EC or the documents related to that Directive; that it was waiting for or contemplated difficulties in obtaining the studies underlying Directive 2003/74/EC; or that it needed more time or information to review the 2003 Directive.<sup>61</sup> In the Panel’s view, therefore, the presumption that opinions on the inconsistency of another Member’s measure expressed at DSB meetings constitute “determinations” is so strong that only express renunciations can rebut that presumption. Considering the nature and content of these particular DSB statements of the United States, the nature of DSB statements described in more detail below, and the proper interpretation of “determination” within the meaning of Article 23.2(a), there is no support for such a presumption.

## **2. Context**

86. The context of Article 23.2(a) also indicates that a “determination” within the meaning of that provision is something that is final and definitive, results from a deliberative process, and carries a significant or legal effect. The final clause of Article 23.2(a) provides that, in order for a Member’s determination to be consistent with Article 23.2(a), the Member “shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.” This language contemplates that a determination would be made only after an adopted panel or Appellate Body report, or an arbitration award – all of which result from a deliberative process – comes into existence. In addition, by requiring that the determination be consistent with the rulings and recommendations adopted by the DSB, this language also reflects the expectation that the determination will have a legal effect.

87. The U.S. DSB statements of November and December 2003 also fail to satisfy the element of formality in an Article 23.2(a) “determination” underscored by the context of Article 23.2(a). The Panel noted that the U.S. statements made at the DSB meetings in November and December 2003 were:

delivered by an official of the U.S. government at a formal meeting of a WTO body. There is no formal difference between that statement and any other statement where a formal decision of a Member is conveyed to the DSB.<sup>62</sup>

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<sup>61</sup> Panel Report, paras. 7.226, 7.228, and 7.233.

<sup>62</sup> Panel Report, para. 7.223.

The Panel’s reasoning, while linguistically convenient, is unpersuasive. The formality in question is a matter of not just form but also of substance, including an aspect of formality that is implicated from being the result of a decision-making or deliberative process. The statement made by the United States at the DSB meeting of December 1 – as well as the statement made at the DSB meeting of November 7 – was not a pronouncement of an authoritative U.S. decision resulting from a decision-making or deliberative process regarding the compliance of Directive 2003/74/EC with the rulings and recommendations of the DSB in the *EC – Hormones* dispute. In fact, as the United States has repeatedly explained, no such process had taken place or concluded by November and December 2003.

### 3. Supplementary Means of Interpretation Confirm This Reading of “Determination”

88. A review of the negotiating history of the DSU and Article 23 confirms the meaning derived above. The danger of “unilateralism” perceived by some of the DSU’s negotiators, which required the provisions on the strengthening of the multilateral dispute settlement system in Article 23, was represented in Section 301 of the U.S. Trade Act of 1974, as amended in 1988. The “determination” prohibited under Article 23.2(a) was, therefore, intended to be of the nature and quality of a “determination” under Section 301 – i.e., a formal declaration resulting from a legal, deliberative process leading to statutorily mandated consequences.

89. In 1988, the U.S. Omnibus Trade and Competitiveness Act amended Section 301 of the U.S. Trade Act of 1974 to the consternation of a multitude of GATT contracting parties. At the meeting of the GATT Council on September 22, 1988, the representative of the EC expressed “grave concern” about the provisions in the Act that “could incite a recourse to unilateral actions inconsistent with the GATT.”<sup>63</sup> The EC representative specifically cited the amendments to Section 301 as an example of this concern because it appeared to

g[i]ve the President’s Special Representative for Trade Negotiations the possibility of taking unilateral actions on the basis of a *unilateral determination* without prior Contracting Parties’ authorization. The amendments to Section 301 now required automatic action, *inter alia*, when the United States’ rights, in its own opinion, were not recognized or were violated or placed in jeopardy. That increased the propensity to take unilateral actions. It was extremely serious for a country to grant itself the right to take GATT-inconsistent measures to counter GATT-consistent measures taken by third countries.<sup>64</sup>

90. By 1989, negotiation of the DSU in the Uruguay Round had already become focused on combating the perceived problem of U.S. “unilateralism,” as represented by Section 301, through

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<sup>63</sup> C/M/224, p. 28.

<sup>64</sup> C/M/224, p. 29 (emphasis added).

the strengthening of the multilateral dispute settlement system.<sup>65</sup> In a September 1990 draft text on dispute settlement authored by the Chairman of the Negotiating Group on Dispute Settlement, the provision on “Strengthening of Multilateral System,” set forth, in relevant part:

The CONTRACTING PARTIES agree to: . . . (iii) refrain from unilateral measures or the threat of unilateral measures inconsistent with the GATT rules and procedures; . . .<sup>66</sup>

This language was reproduced in the draft text circulated on December 3, 1990, which came to be known as the “Brussels Draft Understanding.”<sup>67</sup> In the draft text circulated in December 1991, known as the “Dunkel Draft,” the language in this provision changed from “refrain from unilateral measures or the threat of unilateral measures inconsistent with the GATT” to specify three types of measures that could not be undertaken unilaterally, which included: “not mak[ing] a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the General Agreement has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, . . . .”<sup>68</sup> This text was then adopted, with minor changes, as DSU Article 23.2(a).

91. The “determination” that the negotiators intended to target in Article 23.2(a) is, therefore, of the type and nature of the unilateral determinations feared under Section 301 – which were challenged under Article 23.2(a) in the *US – Section 301* dispute<sup>69</sup> – i.e., a determination, made at

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<sup>65</sup> At the meeting of the Trade Negotiations Committee (“TNC”) in September 1989, a number of delegations commented that “the strengthening of the multilateral dispute settlement system necessitated agreement by all contracting parties to refrain from taking unilateral measures and to seek resolution of all GATT disputes exclusively through the GATT dispute settlement system.” MTN.GNG/NG13/16 (November 13, 1989) at p. 6. At the TNC meeting in December, another representative made a non-explicit reference to U.S. Section 301 in stating that “any agreement on improved mechanisms for GATT dispute settlement should include a precise commitment from all contracting parties to adapt their domestic procedures to the new multilateral disciplines.” MTN.GNG/NG13/17 (December 15, 1989), p. 4.

<sup>66</sup> MTN.GNG/NG13/W/45, p. 6.

<sup>67</sup> MTN.TNC/W/35/Rev.1, p. 301.

<sup>68</sup> MTN.TNC/W/FA, p. S.18.

<sup>69</sup> See *US – Section 301*, paras. 7.2 - 7.3:

7.2 The EC claims that by adopting, maintaining on its statute book and applying Sections 301-310 of the 1974 Trade Act after the entry into force of the Uruguay Round Agreements, the US has breached the historical deal that was struck in Marrakech between the US and the other Uruguay Round participants.



the conclusion of a formal trade investigation, that a Member's trade rights are being denied or that an act, policy, or practice of another Member violates the provisions of a trade agreement or burdens or restricts the Member's commerce, which leads to taking action.<sup>70</sup>

92. The problematic "determinations" targeted by Article 23.2(a) are therefore the type of determinations that embody formal conclusions reached as a result of a domestic legal process carrying a concrete legal consequence. (In fact, the implementation of the duties against the EC in 1999 after the United States obtained the DSB's authorization, was effected pursuant to a Section 301 determination and in accordance with Article 22 of the DSU.) Such "determinations" are, therefore, qualitatively different from the expressions of skepticism or articulations of an opinion or point of view regarding the WTO-consistency of a matter that are contained in Members' DSB statements and were contained in the U.S. DSB statement of December 2003.

93. Statements made by Members at DSB meetings, especially those expressing a view as to the WTO consistency of another Member's measures or actions, are generally diplomatic or political in nature and prepared and delivered independently of any legal, deliberative proceedings. They also generally have no legal effect or status in and of themselves. This point also serves to underscore how far an expression of skepticism or even incredulity made by a Member at a DSB meeting is from the nature and quality of the "determinations" that are contemplated by the prohibition in Article 23.2(a).

94. In finding that the United States made a "determination" by making its statements at the DSB meetings in November and December 2003, the Panel has concluded that a determination may be made without any connection to domestic legal proceedings and without any legal effect

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According to the EC, this deal consists of a trade-off between, on the one hand, the practical certainty of adoption by the Dispute Settlement Body ("DSB") of panel and Appellate Body reports and of authorization for Members to suspend concessions – in the EC's view, an explicit US request – and, on the other hand, the complete and definitive abandoning by the US of its long-standing policy of unilateral actions.

7.3 The EC claims, more specifically, that: (a) inconsistently with Article 23.2(a) of the DSU: Section 304(a)(2)(A) requires the US Trade Representative ("USTR") to determine whether another Member denies US rights or benefits under a WTO agreement irrespective of whether the DSB adopted a panel or Appellate Body finding on the matter; and (b) Section 306(b) requires the USTR to determine whether a recommendation of the DSB has been implemented irrespective of whether proceedings on this issue under Article 21.5 have been completed.

<sup>70</sup> See *US – Section 301*, paras. 2.1-2.11.

or status. The Panel has thereby made the bold and novel move of transforming the minutes of DSB,<sup>71</sup> other WTO committee meetings,<sup>72</sup> and even Trade Policy Review meetings<sup>73</sup> into a fertile source of comments that, under the Panel’s reasoning, could constitute “determinations” actionable under Article 23.2(a).<sup>74</sup> There is no basis for concluding that Members are breaching Article 23.2(a) on a constant basis.

95. The DSB was established to administer the rules and procedures of the DSU and the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB was endowed with the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize the suspension of concessions and other obligations under the covered agreements.<sup>75</sup> Meetings of the DSB are convened as often as necessary to allow the DSB to carry out these functions.<sup>76</sup> The purpose of DSB meetings is, therefore, to facilitate the settlement of disputes between Members – not to perpetuate and foster disputes. Subjecting Members’ DSB statements to the Article 23.2(a) prohibition on making “determinations” will undoubtedly result in a “chilling” effect on those statements. There is no indication that Members intended so dramatically to limit their ability to express their opinions about the state of their rights. Such limitation would serve neither the individual interests of Members nor the collective interests of the Membership in either the facilitation of the settlement of disputes or the security and predictability of the multilateral trading system.

#### **4. Conclusion**

96. The statement made by the United States at the meeting of the DSB on December 1, 2003, whether on its own or taken together with the U.S. statement at the DSB meeting on November 7, 2003, fails to satisfy any of the elements of a “determination” within the meaning of DSU Article 23.2(a) and the Panel’s finding that it constitutes such a “determination” should be reversed. Furthermore, upholding the Panel’s finding that a typical statement made by a Member at a DSB meeting can rise to the level of an Article 23.2(a) “determination” would not only perpetuate a legal error, but would also start the descent down a slippery slope that would leave the multilateral system worse off in a way that could not have been intended by the Members.

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<sup>71</sup> See Annex A.

<sup>72</sup> See Annex B.

<sup>73</sup> See Annex C.

<sup>74</sup> In cases where a Member is considered to be “seeking redress” per DSU Article 23.1.

<sup>75</sup> DSU Article 2.1.

<sup>76</sup> DSU Article 2.3.

## **B. “Determinations” Cannot Be Inferred**

97. The Panel makes what appears to be an alternative finding, although it is expressed rather unclearly. The Panel appears to find that even if no determination had been made by December 1, 2003, then such a determination was made at some later point, based on its view that the continuation of duties served as “evidence that the United States made a determination.”<sup>77</sup> The Panel never explains at what point in time the determination was made based on this “evidence.” Nor does the Panel explain how such evidence would ripen into a determination within the meaning of Article 23.2(a). Such an “inferred” determination would not meet the criteria for a “determination.” These Panel findings should therefore be reversed.

### **1. “Determinations” Cannot Be Inferred from Other Actions or DSB Statements**

98. Inferring a “determination” from inaction by a Member and attaching to that Member the legal consequences that flow from violating Article 23.2(a) is a high risk exercise in which the Appellate Body and panels should be extremely wary of taking part. If determinations do not need to be identifiable and identified in order to be found, but can instead be implied from inaction, Members would never be able to know if they were complying with their WTO obligations and would be unable to take action to ensure that their measures remained consistent.

99. Here, there is nothing in the DSU that triggered an obligation on the part of the United States as the original complaining party to make any determination at all about the unilateral declaration of compliance by an original responding party in a post-suspension situation. The continued suspension of concessions therefore does not serve as a basis for imputing that at some unspecified point the inaction by the United States resulted in a “determination” of inconsistency.

100. Not only would DSB meeting minutes and press reports provide limitless fodder for Article 23.2(a) challenges, but, under the Panel’s logic, the very decision to seek consultations or bring a dispute would be subject to scrutiny as indications that a determination had been made in violation of Article 23.2(a). Such inferences are not tenable. Members obviously must have the ability to draw conclusions and form views regarding the WTO-consistency of another Member’s measures in order to exercise their WTO rights. Indeed, the ability of Members to resort to WTO dispute settlement rules when they consider their agreement rights have been breached would be frustrated if even the decision to pursue WTO dispute settlement were considered a “determination” for the purposes of Article 23.2(a).

101. The requirement that a “determination” within the meaning of Article 23.2(a) result from some deliberative process leads to the conclusion that, in order to constitute a “determination,” a formal decision on the WTO-consistency of another Member’s measure must be disclosed by

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<sup>77</sup> Panel Report, para. 7.232.

that Member outside its government. In agreeing to Article 23.2(a), Members cannot have intended to limit their own ability to draw conclusions concerning other Member's measures in the context of internal deliberations or decision-making processes. Members could not have intended to reach the "thoughts" or internal deliberations of governments. Without such deliberations or decision-making, a Member could never exercise its right to challenge another Member's measure under the DSU. An "implied" determination is unlikely to have been disclosed; otherwise, there would be little need to imply it.

102. Likewise, the required elements discussed above as being implicit in the dictionary definition of "determination"<sup>78</sup> argue against the conclusion that a determination can be "implied." The terms of an inferred "determination" could not be known, but only implied, and it is difficult to see how they are final, definitive, formal or have any legal effect.

103. Other DSU provisions support this view. For example, several DSU provisions, such as Articles 3.3, 4.1, 4.7, 5.4 and 10.4, lay out the steps a party may take to assert its WTO rights when it believes these rights have been denied. Again, it is axiomatic that Members invoking dispute settlement procedures are doing so based on a belief that their rights have been denied. The DSU reflects this concept through use of the term "considers." For example, Article 3.3 provides that "prompt settlement of situations in which a Member considers that any benefits accruing to it . . . are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." Likewise, Article 10.4 provides that a third party to a dispute may have recourse to normal dispute settlement procedures if it "considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement." The DSU's use of the term "considers" makes clear that no "determination" within the meaning of Article 23.2(a) is involved. To imply such a determination from such a decision or belief would, again, undermine the ability of a Member to exercise its rights under these DSU provisions.

104. In conclusion, the Panel's apparent alternative finding that there was a "determination" at some point after the December 1, 2003, DSB meeting within the meaning of Article 23.2(a) should be reversed.

## **2. Problematic Consequences of the Panel's Findings on Article 23.2(a)**

105. The Panel's apparent alternative finding effectively reads into Article 23 a deadline by which a determination will be imputed to a Member. Yet a review of the text of Article 23 reveals the fact that no such deadline exists, which the Panel itself acknowledged: "[w]e agree

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<sup>78</sup> See section III.A.1 *supra*.

with the United States that there is no deadline in Article 23 by which a Member shall have recourse to the DSU.”<sup>79</sup>

106. The Panel’s findings appear to require complaining parties and other Members to be silent in the face of a claim of compliance or risk having any reaction other than agreement be construed to be a “determination.” And even if the reaction is not sufficient to be a “determination,” it appears that a Member would risk such a reaction ripening into a “determination” based simply on the passing of an unspecified deadline, which the Panel acknowledged does not exist.

107. The Panel attempted to side-step this issue in its Report by stating that the fact that Article 23 does not provide a deadline within which a Member shall make a determination “is not the issue before the Panel.”<sup>80</sup> But this issue was very much before the Panel and is very much implicated by the Panel’s findings on Article 23.2(a). While the Panel found it significant that the United States continued the suspension of concessions “over the period between the EC notification and the date of request of consultations by the European Communities,”<sup>81</sup> the two formulations of the “measure at issue” in the Report cited above define the relevant time frame relating to the continuation of the suspension of concessions differently. In the case of the description provided in paragraph 2.7 of the Report, the Panel considers the significant time period for the continuation of duties to be “after the notification to the DSB of Directive 2003/74/EC by the European Communities” on October 27, 2003. In the case of the description provided in paragraph 7.215 of the Report, the relevant time frame for the Panel’s consideration of the suspension of concessions is “after the European Communities’ adoption of Directive 2003/74/EC on 22 September 2003.” The confusion and inconsistency underscore the lack of clarity in the Panel’s reasoning and the lack of coherence in its conclusion.

#### **IV. The Panel Erred in Concluding that the United States Must Have Further Recourse to Dispute Settlement**

108. Although the Appellate Body would not need to reach this issue if it reverses the Panel’s erroneous findings on Article 23.1 and 23.2(a) discussed above, the United States also appeals the Panel’s erroneous suggestion<sup>82</sup> that the United States must bring its measure into conformity with its obligations under the DSU by, e.g., “hav[ing] recourse to the rules and procedures of the

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<sup>79</sup> Panel Report, para. 7.232.

<sup>80</sup> Panel Report, para. 7.232.

<sup>81</sup> Panel Report, para. 7.232 (emphasis added).

<sup>82</sup> This statement is framed in paragraph 8.3 as a “suggestion” and in paragraph 6.57 as an “observation” or “belief.”

DSU without delay.”<sup>83</sup> In addition, the United States appeals the Panel’s erroneous conclusion that it is “bound” by the EC’s assertion of a conditional claim that the United States violated Article 22.8 “*per se*.” The suggestion is made in error because recourse to the rules and procedures of the DSU has already been achieved with respect to the question of whether U.S. suspension of concessions may remain in place as a result of the EC’s failure to remove the measure found to be inconsistent. The Panel’s conclusion is also erroneous because the Panel is not necessarily restricted from directly examining the compliance of Directive 2003/74/EC with the *SPS Agreement*.

**A. Recourse to Dispute Settlement in Accordance with the Rules and Procedures of the DSU Has Been Achieved in the Present Proceeding**

109. Having been composed to hear the present proceeding, the Panel has engaged in a detailed review of Directive 2003/74/EC in light of the EC’s assertion of compliance with the rulings and recommendations of the DSB in *EC – Hormones* and the requirements of the *SPS Agreement*. The Panel convened a panel of scientific experts pursuant to Article 13 of the DSU; became educated and versed in the complexities in the field of risk analysis; heard and questioned the parties and experts regarding their views on the science relating to the six hormones at issue; and made all the findings necessary to resolve the question of whether Directive 2003/74/EC brings the EC into compliance with the DSB recommendations and rulings. By nevertheless rejecting the position that if the Panel Report were to be adopted, recourse to dispute settlement will have been achieved<sup>84</sup> and suggesting that the United States should initiate some form of dispute settlement proceeding as a result of the Panel’s findings of Article 23 violations, the Panel adopts a legal interpretation that contradicts DSU Article 23, the interests of the parties, the WTO dispute settlement system, and the multilateral trading system.

110. In response to the parties’ request for clarification on the implication of its findings of breach by the United States of its obligations under Article 23 of the DSU, the Panel clarified that it “reads Article 23.2(a) and 23.1 as requiring that the dispute settlement procedure be initiated by the United States.”<sup>85</sup> Specifically, the Panel asserted its belief that “the United States would [not] satisfy its obligation under Article 23.2(a) if any party to the dispute such as, for instance, the European Communities had recourse to dispute settlement.”<sup>86</sup>

111. Article 23.1 of the DSU provides that Members seeking redress of a violation of obligations under the covered agreements “shall have recourse to, and abide by, the rules and procedures of this Understanding.” Similarly, Article 23.2(a) provides that Members shall not

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<sup>83</sup> Panel Report, para. 8.3.

<sup>84</sup> Panel Report, para. 6.57.

<sup>85</sup> Panel Report, para. 6.45.

<sup>86</sup> Panel Report, para. 6.45.

make a determination to the effect that a violation has occurred “except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.” While it is reasonable to understand the obligation to “have recourse” in Articles 23.1 and 23.2(a) as covering instances where the Member in question initiates the recourse, a fair and objective reading of the language in Articles 23.1 and 23.2(a) does not exclude instances where a Member “has recourse” by participating in dispute settlement, in accordance with the rules and procedures of the DSU, that another Member initiates.

112. The language is “have recourse” – not “initiate proceeding settlement proceedings.” “Recourse” is defined as: “Access or opportunity to resort *to* (esp. a person).”<sup>87</sup> The word “resort” is in turn defined as: “the use of something as an aid, to give assistance, or as a means to an end.”<sup>88</sup> The ordinary meaning of “having recourse” therefore requires having an “opportunity to” “use, as an aid or as a means to an end” a “person or thing for help, advice, or protection.” The proceeding brought by the EC provided an “opportunity” for the United States to “use as an aid or a means to an end” the “persons or thing” of WTO dispute settlement. Nothing in the ordinary meaning of “having recourse” requires initiation of obtaining aid to the exclusion of participation in obtaining aid. Indeed, the context makes clear that “have recourse” does not mean “initiate.” Article 23.2, which explains what it means to “have recourse to” the rules and procedures of the DSU, includes in paragraph 2(c): “follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations.” The procedures in Article 22 include the referral to arbitration *by the Member concerned* of the request for authorization. It is not the complaining party that initiates arbitration, but the Member concerned. “Having recourse” for purposes of Article 23, then, includes procedures initiated by the Member concerned, which would include the current proceeding.

113. As discussed in more detail above, Article 23, consistent with its title “Strengthening of the Multilateral System,” aims to strengthen the multilateral dispute settlement system by requiring Members to resolve their WTO disputes through the WTO’s dispute settlement system and not by unilateral self-help or through other fora.<sup>89</sup> The United States and the EC have fulfilled these mandates of Article 23 by participating and cooperating in this dispute settlement proceeding in accordance with all of the rules and procedures of the DSU. Requiring a re-litigation of the matters already reviewed and resolved in this dispute through proceedings that are specifically initiated by the United States would not only be exalting form over function without a basis in the actual requirements of Article 23, but would also result in an absurd

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<sup>87</sup> New Shorter Oxford English Dictionary (Brown, L. Ed.) (1993), p. 2507.

<sup>88</sup> *Id.*, p. 2565.

<sup>89</sup> See *US – Certain EC Products (AB)*, para. 111: DSU Article 23 “imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action.”

redundancy in light of the goals of Article 23.<sup>90</sup> Requiring a re-litigation of a matter already reviewed and considered in this proceeding, including re-hearings by a panel, another resort to experts, re-briefings by the parties and third parties, re-translating by the WTO Secretariat, and re-argument before the Appellate Body, would also be offensive to the efficient use of the resources afforded by the WTO dispute settlement system.

114. The factual and legal findings undertaken by the Panel in order to review and resolve the EC's Article 22.8 claim that it had removed the measure found to be in violation and the U.S. duties must be terminated, serve the purpose of resolving the dispute between the parties that has both procedural and substantive elements. The EC brought the present proceeding against the United States within its rights as the Member concerned in the *EC – Hormones* dispute. The parties and the WTO's multilateral dispute settlement system have within their grasp a comprehensive resolution of this post-suspension matter obtained in accordance with both the letter and spirit of DSU Article 23.

115. Furthermore, as acknowledged in Article 3.3 of the DSU, “[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.” The present proceeding was brought by the EC nearly three and a half years ago. Requiring the re-litigation of the proceeding could easily take another three and a half years, a result which would contribute to neither the effective functioning of the WTO, the “prompt settlement” of the situation, nor the proper balance between the rights and obligations of the parties.

116. For all of the foregoing reasons, the Panel's conclusion that the United States must nevertheless initiate dispute settlement on matters already reviewed and resolved in this proceeding should be reversed.

## **B. The Panel Is Not Bound by the EC's Conditional Claim in This Case**

117. The Panel also erred in finding that its terms of reference were constricted by the EC's articulation of its claim that the United States violated Article 22.8 of the DSU in isolation as a conditional claim that could only be reached by the Panel if the Panel failed to find a violation of either of the Article 23-based claims advanced by the EC.<sup>91</sup> A panel's terms of reference, once

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<sup>90</sup> Of course, it is significant that the Panel does not include any of the original panelists in the dispute, as there is no guarantee that any of them would serve in any further proceedings. Upholding the Panel's interpretation would potentially require yet another set of panelists to become familiar with all of the legal and scientific issues involved and raise the potential for inconsistent findings from those of the Panel in DS320.

<sup>91</sup> Panel Report, paras. 7.164 - 7.166.



determined at the outset of the dispute, cannot be narrowed or otherwise modified by a complaining party. The relevant provision governing the terms of reference of a panel is Article 7 of the DSU. That Article, however, does not provide for a change to the terms of reference based on the complaining party's submissions. Instead, as the panel in *EC – Customs* recalled, "a panel's terms of reference do not change over time and are not affected by the way in which complaining Members advance their case."<sup>92</sup> Furthermore, in *Guatemala – Cement I*, the Appellate Body found that the measure and claims that a complaining party identifies in its panel request constitute the "matter" before a panel that forms the basis of a panel's terms of reference.<sup>93</sup>

118. The Panel's findings are also inconsistent with the findings in previous Appellate Body reports making clear that a panel is free to develop its own legal reasoning on a matter before it. In *Japan – Apples*, the Appellate Body stated: "[u]ndoubtedly, a party has the prerogative to pursue whatever legal strategy it wishes in conducting its case. However, that strategy must not curtail the right of other parties to pursue strategies of their own; nor can the strategic choices of the parties impose a straightjacket on a panel."<sup>94</sup> These findings confirm that a complaining party is not free to "require" that a panel follow "a specific approach to the provisions allegedly breached."

119. The Panel's finding that it cannot address the EC's claim of "direct" violation of Article 22.8 unless the EC fails to establish its "main" claims is in error and should therefore be reversed. Accordingly, the Panel's findings related to the lack of compliance of Directive 2003/74/EC with the requirements of the *SPS Agreement* should be considered "direct" findings, and the conclusion that the United States needs still to bring its measure into conformity with its obligations under the DSU should be reversed.

## V. Conclusion

120. For all of the foregoing reasons, the United States respectfully requests that the Appellate Body:

- Reverse the Panel's finding on DSU Article 23.1;
- Reverse the Panel's finding on DSU Article 23.2(a);

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<sup>92</sup> *EC – Customs Matters*, para. 7.42.

<sup>93</sup> *Guatemala – Cement I (AB)*, paras. 72-73.

<sup>94</sup> *Japan – Apples (AB)*, para. 136.

- Reverse the Panel’s legal interpretation that the United States should have recourse to the rules and procedures of the DSU in order to comply with the recommendations and rulings in this dispute; and
- Reverse the Panel’s conclusion that it is restricted from a direct determination of the compliance of Directive 2003/74/EC..

The Appellate Body need not reach these last two issues in the event the Appellate Body reverses the Panel’s findings on Article 23.1 and Article 23.2(a) of the DSU.

## Annex A

### Examples of Statements Made by Members at Meetings of the DSB

WT/DSB/M/245, para. 45:

“The representatives of the [EC] said that the United States had now completed its seventh illegal distribution under the CDSOA.”) and para. 46 (“Japan failed to see the rationale behind the US assertion that it had taken all necessary steps for implementation in this case. Japan, once again, urged the United States to immediately terminate the illegal disbursements and repeal the CDSOA not just in form, but also in substance.”

WT/DSB/M/245, para. 46:

“Japan failed to see the rationale behind the US assertion that it had taken all necessary steps for implementation in this case. Japan, once again, urged the United States to immediately terminate the illegal disbursements and repeal the CDSOA not just in form, but also in substance.”

WT/DSB/M/241, para. 28:

“Thailand remained disappointed at the US continued illegal disbursement of funds . . .”);

WT/DSB/M/225, para. 58:

“The EC representative stated: “It was now more than five years after the expiry of the implementation deadline but the United States was still taking WTO incompatible actions in application of the 1916 Anti-Dumping Act.”

WT/DSB/M/217, para. 52:

“. . . despite the US contrary claims, the repeal of the 1916 Anti-Dumping Act was only in form; the fact was that the Act had continued to be in force and applied, and had actually caused the nullification or impairment of benefits accruing to Japan, even one and a half year after the United States had declared the completion of its implementation.”)

WT/DSB/M/163, para. 18:

“Argentina considered that Law No. 19.897 and Supreme Decree No. 831 of the Ministry of Finance had not brought into conformity the Chilean measure found to be inconsistent in this dispute.”

WT/DSB/M/87, para. 2:

“In Canada’s view, the U.S. measures were unjustified and were inconsistent with the WTO obligations.”

WT/DSB/M/79, para. 3:

“Korea regretted that the United States had not complied with the DSB’s recommendations and rulings”

WT/DSB/M/76, para. 31: The representative of Japan stated,

“The U.S. actions were inconsistent with the WTO Agreement . . .”.

## **Annex B**

### **Examples of Statements Made by Members at WTO Committee Meetings**

G/ADP/M/26 (15 September 2004) para. 89: China's representative stated that the

“EC's automatic imposition of anti-dumping measures to the new member states without proving dumping, injury and causal link was inconsistent with the EC's obligations under WTO rules.”

G/ADP/M/25 (9 March 2004) para. 178: The EC representative, complaining about antidumping duty imposed by the Andean Community on sorbitol from France, stated

“Therefore it was a clear breach of WTO rules to impose such measures.”

G/ADP/M/22 (21 March 2003) para. 140: Korea's representative, complaining about Japan AD measure on polyester staple fibre, stated

“These actions were not only in contravention of Article 5.10 of the Agreement, but also were violations of the letter and spirit of the Agreement.”

G/SCM/M/54 (20 March 2006) para. 87:

“The delegate of the [EC] stated that countervailing measures adopted by Venezuela in June 2004 on potato starch originating in the European Communities were in clear breach of the SCM Agreement.”

G/AG/R/45 (13 April 2006) para. 139: Argentina, expressing its view on Swiss cheese subsidy, stated

“Since these subsidies are given to milk for processing into cheese, in Argentina's view, they are inconsistent with Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures.”

## Annex C

### Examples of Statements Made by Members at TPR Meetings

WT/TPR/M/191 (Thailand, 18 January 2008), para. 63: The EC representative stated,

“These customs valuation practices were, *inter alia*, inconsistent with the relevant WTO provisions . . .”

WT/TPR/M/185 (Bahrain, 10 September 2007), para. 35:

“The current import ban on beef and beef products from EC countries with controlled or undetermined BSE risk was an unjustified measure. The EC urged Bahrain to bring its SPS measures in conformity with its obligations under the WTO SPS Agreement.

TPR WT/TPR/M/179 (Canada, 21 June 2007), para. 30:

“New Zealand was also concerned about the conditions imposed on the import and sale of wine . . . which appeared to be inconsistent with Canada’s WTO obligations . . .”

WT/TPR/M/177 (EC, 30 April 2007), para 51: The representative from Japan stated that

“he believed that the EC's classification was not consistent with the Information Technology Agreement (ITA) . . .

WT/TPR/M/177 (EC, 30 April 2007), para 155:

“Colombia found the new banana regime inconsistent with the WTO . . .”

WT/TPR/M/165 (Taiwan, 22 September 2006), para 59: The representative of China stated

“Chinese Taipei had maintained import prohibitions on 2,237 tariff lines of products from China without WTO-consistent justification. . . China urged Chinese Taipei to . . . take steps to correct these trade policies and practices, which were inconsistent with WTO rules . . .”