5.124 Finally, a remark regarding the requirements of the "chapeau" of Article XX of the GATT 1994. There is nothing in facts of this case that indicate that the national measures in this dispute are applied in a discriminatory way, nor that they represent a disguised restriction on international trade. These bans on certain GMOs are based on legitimate concerns, and are applied equally to all Members of the WTO.

VI. INTERIM REVIEW

6.1 Pursuant to Article 15.3 of the DSU, the findings of the final panel report shall include a discussion of the arguments made by the parties at the interim review stage. This Section of the Panel reports provides such a discussion. As is clear from Article 15.3, this Section is part of the Panel's findings.

A. BACKGROUND

6.2 The United States, Canada, Argentina and the European Communities separately requested an interim review by the Panel of certain aspects of the interim reports issued to the Parties on 7 February 2006.[166] None of the Parties requested an interim review meeting.[167] However, in accordance with the Panel's Working Procedures, all Parties had, and used, the opportunity to submit further written comments on each others' requests.[168]

6.3 On 8 May 2006, the Panel sent a letter drawing attention to the fact that certain aspects of its interim reports had been misconstrued by groups or members of civil society following the unauthorized public disclosure of the Panel's confidential interim reports.[169] For this reason, the Panel in its letter made a number of statements relating to its findings in this case.[170]

6.4 On 10 May 2006, the Panel issued its final reports to the Parties on a confidential basis.

B. STRUCTURE

6.5 The Panel first addresses the Parties' requests for changes to the interim reports (Section VI.C). The Panel notes in this regard that it did not receive comments on each of the Sections of the interim reports from each of the four Parties. The Panel has structured its treatment of the Parties' requests below in the following manner:

(a) Section VI.C.1 concerns Section VII.A of the interim reports (Procedural and Other General Matters).

(b) Section VI.C.2 concerns Section VII.C of the interim reports (Relevant EC Approval Procedures).

(c) Section VI.C.3 concerns Section VII.D of the interim reports (General EC Moratorium).

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[166] Letters of the Parties of 17 March 2006.
[167] Letters of the Parties of 7 March 2006.
[168] Letters of the Parties of 19 April 2006.
[169] *See infra*, Section VI.F.
[170] Letter of the Panel of 8 May 2006. In the interests of transparency, the text of the letter is attached to these reports as Annex K (available on-line only). The text of the letter is reproduced in Annex K is not part of the Panel's findings and is not intended to modify them in any way.

(d) Section VI.C.4 concerns Section VII.E of the interim reports (Product-Specific Measures).

(e) Section VI.C.5 concerns Section VII.F of the interim reports (EC Member State Safeguard Measures).

(f) Section VI.C.6 concerns Section VIII of the interim reports (Conclusions and Recommendations).

6.6 In addition, this Section also notes certain other changes (editing, etc.) that were not specifically requested by the Parties (Section VI.D).

6.7 Next, this Section deals with the European Communities' request for redaction from the public version of the Panel reports of portions disclosing "strictly confidential information" (Section VI.E).

6.8 Finally, the present Section addresses the public disclosure of the Panel's confidential interim reports (Section VI.F).

C. PARTIES' REQUESTS FOR CHANGES TO THE INTERIM REPORTS

1. Procedural and other general matters

6.9 The **European Communities** identified an incorrect reference to the year 2005 at paragraph 7.47.

2. Relevant EC approval procedures

(a) Comments common to Canada and Argentina

6.10 **Canada** and **Argentina** request that the hypothetical example used by the Panel at paragraphs 7.162-7.163, and footnote 132 (Canada) be qualified to avoid the possibility that its use may be misconstrued. In these paragraphs, the Panel relies on a hypothetical example (concerning food labelling) to explain its interpretive approach to the issue of mixed measures. Canada is concerned that use of the hypothetical example could be misconstrued as the Panel expressing a view on the purpose of Regulations 1829/2003 and 1830/2003, measures that were not within the Panel's terms of reference. Argentina considers that the example is not an essential part of the Panel's reasoning and could be removed without affecting the Panel's conclusions. Moreover, in Argentina's view, the Panel's reasoning finds practical application when the Panel addresses whether the EC approval procedures are SPS measures in terms of their purpose.

6.11 The **European Communities** responds that it fails to see how this example could be understood to refer to any "real life" measure such as Regulation 1829/2003 or to generally express any views on the WTO-compatibility of such a measure. Indeed, the Panel elsewhere in the report explicitly states that it does not take any view on the WTO-consistency of labelling requirements. Accordingly, the Panel need make no change to its report.

6.12 The **Panel** has removed the relevant example at paragraph 7.162 and deleted the old footnote 132.

(b) Comments by Canada

6.13 **Canada** requests that the Panel reconsider its representation, at paragraph 7.164, of Canada's position in relation to the issue of whether a requirement can constitute both an SPS measure and a non-SPS measure. Canada is concerned that the Panel's comments in footnote 127 suggest that the Panel has misapprehended Canada's position in this regard.

6.14 The **European Communities** argues that Canada fails to state clearly what it is that it requests the Panel to do. Presumably, Canada's concerns could be met if footnote 127 would be re-phrased as follows:

> "Canada had a more complex position and characterised the issue of whether a measure that addresses both SPS risks and other types of risks or policy objectives should be considered a single measure or a series of measures, as 'semantic'."

6.15 In response to Canada's comment, the **Panel** has expanded its representation of Canada's position in footnote 339.

6.16 **Canada** identified an editorial oversight at paragraph 7.337.

6.17 **Canada** also notes that at paragraph 7.411 the Panel states that "it is reasonable to assume that the requirement that the consumer be informed of the presence of a GMO irrespective of whether there is an associated health risk is at least in part imposed to prevent consumers from being misled. In other words, we consider that, at least in part, Regulation 258/97 requires the identification of the presence of a GMO in a food product in order to ensure that those consumers who have a preference for food not containing or consisting of GMOs are not misled into purchasing food containing or consisting of GMOs". Canada respectfully requests that this passage be revised to make it clear that the Panel is not making a finding that the absence of a GMO label necessarily leads to consumers being "misled". According to Canada, the presence of a GMO label may have the opposite effect and actually mislead consumers. In any event, Canada submits that whether consumers are actually being misled is a factual matter that was not addressed by any of the parties in their submissions.

6.18 The **European Communities** considers that Canada's comment on the use of the word "misled" must be dismissed. It is obvious that the Panel is merely referring to the wording used in Regulation 258/97, which in its Article 3 explicitly refers to the objective of not misleading consumers.

6.19 The **Panel** has added a footnote to paragraph 7.411 in response to Canada's comment.

(c) Comments by the European Communities

6.20 The **European Communities** argues that at paragraph 7.117 the third sentence should be deleted as it is not correct that the Council can adopt a "different" measure. The Council may adopt a modified measure, but not by qualified majority. In fact, the same rules as for legislative proposals apply here, *i.e.*, the Council can modify a Commission proposal only by unanimous vote (Article 250(1) of the *Treaty Establishing the European Community as Amended by Subsequent* Treaties (hereafter the "EC Treaty"). Furthermore, for the sake of completeness, it seems appropriate to describe what happens if the Council rejects the proposal.

6.21 The **United States** does not agree with the European Communities' suggested modifications concerning paragraphs 7.117, 7.123 and 7.136. First, the record in this dispute does not contain an

instance where the Council rejected a Commission proposal. (Instead, the Council failed to reach qualified majorities for acceptance or rejection). Thus, the Panel has no need for "sake of completeness" to address this possibility. Second, the EC comments do not cite to any prior EC submission that describes the procedures that apply when the Council rejects a Commission proposal.[171] Thus, the procedures to be followed by the Commission following a Council rejection by qualified majority would appear to be a new factual matter not previously considered by the Parties or the Panel. For these reasons, the United States submits that it is neither necessary nor appropriate to address such procedures for the first time at the interim review stage.

6.22 The **Panel** has made appropriate changes to paragraph 7.117 and its accompanying footnotes in response to this EC comment. However, the Panel agrees with the United States that it is not necessary, in the context of these proceedings, to address the procedures to be followed in the event that the Council rejects a draft measure of the Commission. The Panel has therefore refrained from adding relevant explanatory text at paragraphs 7.117, 7.123 and 7.136.

6.23 The **European Communities** submits that, for the sake of completeness in footnote 95 to paragraph 7.123 it should be explained what happens if the Council rejects the proposal.

6.24 For the reason explained in connection with the EC comment on paragraph 7.117, the **Panel** has refrained from making the requested addition to footnote 309.

6.25 The **European Communities** argues that at paragraph 7.129 the word "consent" should be replaced by the word "authorizations", since "consent" is a term which is not used in Regulation 258/97 but only in Directives 90/220 and 2001/18.

6.26 The **Panel** has made an appropriate change to paragraph 7.129 in response to this comment.

6.27 The **European Communities** submits that, at paragraph 7.136 the third sentence should be deleted as it is not correct that the Council can adopt a "different" measure. The Council may adopt a modified measure, but not by qualified majority. The same rules as for legislative proposals apply here, *i.e.*, the Council can modify a Commission proposal only by unanimous vote (Article 250(1) of the EC Treaty). Furthermore, for the sake of completeness, it seems appropriate to describe what happens if the Council rejects the proposal.

6.28 The **Panel** has made appropriate changes to paragraph 7.136 and its accompanying footnotes in response to this comment. However, for the reason explained in connection with the EC comment on paragraph 7.117, the Panel has refrained from addressing the procedures to be followed in the event that the Council rejects a draft measure of the Commission.

6.29 The **European Communities** identified a missing indefinite article in paragraph 7.152.

6.30 The **European Communities** requests that the Panel reflect, in a footnote to paragraph 7.199, the fact that in its response to Panel question No. 120 the European Communities also referred to the cover note accompanying the circulation of the so called "Dunkel Text" of 20 December 1990.

6.31 The **United States** argues that paragraph 7.199 addresses the EC arguments (properly rejected by the Panel) that the *SPS Agreement* does not cover measures meant to protect the environment. The

[171] In fact, the European Communities' comprehensive descriptions of its approval procedures set out in its prior submissions do not address this matter. *See, e.g.*, EC first written submission, pages 51-63; *see also* Exhibits EC-119 and 120 (presenting a flowchart of approval procedures under 258/97 and 90/220).

United States does not agree that the Panel should include the new footnote suggested by the EC summarizing an additional EC argument involving a cover note to the "Dunkel Text." The EC arguments regarding this matter are set forth in the EC answer to the Panel's questions (in particular, Question 120), and those answers are already appended in full to the interim report. Moreover, the EC comment does not acknowledge that the United States, in its response to the EC answer to Panel question No. 120, fully responded to the EC argument regarding the purported significance of this cover note to the "Dunkel Text". If a footnote were added that recited the EC argument, then – to maintain balance – a new footnote would be required to reference the US rebuttal of the EC argument. However, since all of this material is already appended to the report, and since (the United States submits) the EC argument is without merit, the interim report would not be improved by the addition of the footnote suggested by the European Communities.

6.32 The **Panel** has made appropriate changes to paragraph 7.199 in response to this EC comment, preferring to include the reference to the cover note in the text rather than in the footnote. For balance, the Panel also added a summary of the United States' and Canada's responses to the EC argument based on the negotiating history. Furthermore, in view of the European Communities' request for inclusion of a reference to the above-mentioned cover note and in view of the EC argument based on this note – that environmental damage is not covered by the *SPS Agreement* – the Panel found it appropriate (i) to address explicitly the cover note, which has also resulted in some restructuring (paragraphs 7.209-7.211), (ii) to clarify the example used at paragraph 7.210, and (iii) to add footnote 503 for further clarification of paragraph 7.209. In addition, the Panel has deleted the old footnote 158 which contained no text. The Panel furthermore corrected a typographical error at paragraph 7.209.

6.33 The **European Communities** argues that the first sentence of paragraph 7.236 should be deleted as it does not seem to accurately reflect the arguments made by the European Communities and suggests that the second sentence be rephrased based on the EC reply to Panel question No. 119.

6.34 The **United States** does not agree with the EC suggestion. To the contrary, the United States submits that this statement in the interim report is indeed a fair characterization of the EC's arguments regarding the term "pest."[172] The United States would not object, however, if the interim report were to include a statement, as the EC suggests, to the effect that the EC believes that the IPPC may be relevant context for interpreting the term "pest."

6.35 The **Panel** has made appropriate changes to paragraph 7.236 in response to the EC comment.

6.36 The **European Communities** requests that a statement by Dr. Squire (Annex H, paragraph 468) be added to footnote 227 to paragraph 7.281 so that the view of all experts on the relevant issue are referred to.

6.37 The **United States** does not agree with the EC suggestion that a statement from Dr. Squire should be appended to the footnote. The statement of Dr. Squire cited by the European Communities states no scientific opinion regarding the risks of ARMGs. Instead, in the context of discussing EC member State objections, Dr. Squire simply notes that there is a "perception" that ARMGs should not be used in herbicide-tolerant ("HT") crops. Moreover, Dr. Squire explains that given the vagueness of the member State objections, he is not able to evaluate their scientific merit. He accordingly summarizes his opinion by explaining "[t]his notwithstanding, and as in other instances, unless

[172] *See, e.g.*, EC second written submission, para. 51 ("Thus not any 'undesirable cross-breed', as the Panel put it in question 32, can be considered a pest. In particular a cross-breed that harms biodiversity is not a pest. Nor is cross-breed that harms micro-organisms, animals or the environment.").

criteria can be given, from both the proposer and objector as to what is a desirable or acceptable comparator, then progress with the discussion is impossible, as it became in this instance."[173]

6.38 **Canada** also disagrees with the suggested addition of Dr. Squire's comments in relation to ARMG. The EC suggestion implies that Dr. Squire was of the view that ARMG presents risks to human health or the environment, neither of which is the case. Tellingly, the European Communities quotes Dr. Squire out of context. The full quote is as follows:

> "The issue of antibiotic resistance was considered in the SCP's opinion (EC-66/At.53) and found not to pose risk, but there is now widespread perception that antibiotic resistance should not be introduced through GMHT products."

6.39 Canada submits that it is unclear whether Dr. Squire agreed with the opinion of the SCP on the risks of antibiotic resistance. If Dr. Squire disagreed with the SCP, presumably he would have stated so explicitly. Therefore, in terms of the issue discussed by the Panel in paragraph 7.274, *i.e.*, the risk of transferral of antibiotic resistance, Dr. Squire's comment is unrevealing. Dr. Squire does not discuss "scientific evidence", but only "perception". The cause of the "widespread perception" may have nothing to do with the actual risks associated with the use of ARMG and may simply reflect the unfortunate politics of agricultural biotechnology in Europe. For instance, scientists working in this field may have stopped using ARMG because of "optics", manipulated by anti-GMO advocates, and the availability of alternative means to achieve the same objective. Canada notes that although Dr. Squire initially indicated that he would do so, he did not respond to either of these two general questions on the existence of scientific evidence relating to the transfer of antibiotic resistance (Questions 1 and 2). Consequently, his views on the actual risks associated with the use of ARMG are unknown.

6.40 **Argentina** likewise does not agree with the EC proposal and requests the Panel to maintain the wording of footnote 227 as it currently stands. It is important to recall that when the Panel addressed to the experts the specific issue of "antibiotic resistance marker genes" (Annex H, General Questions 1 and 2), Dr. Squire did not provide an answer that expressed his point of view as an expert. Additionally, Argentina points out that the addition suggested by the European Communities reflects a mere "perception" (as it is literally stated by Dr. Squire) and not a statement or opinion based on scientific evidence as requested by the Panel.

6.41 The **Panel** does not consider it appropriate to add the relevant statement to footnote 437. The statement that "there is now a widespread perception that antibiotic resistance should not be introduced through GMHT products" does not shed light on the risk of transferral of ARMG or the existence or magnitude of adverse effects on human health or the environment from the presence of ARMG or their products.

6.42 The **European Communities** requests that footnote 252 to paragraph 7.316 be deleted in its entirety, arguing that Canada's description of Directive 91/414 does not properly reflect the requirements set by the legislation and the way the legislation is implemented. The European Communities submits that in any event, the Panel itself takes the view that the question of whether Directives 90/220 and 2001/18 are applied, *inter alia*, to avoid diseases to humans or animals resulting from herbicide residues in food or feedstuff ultimately can be left open. The footnote, therefore, is also not necessary.

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[173] Annex H, para. 468.

6.43 **Canada** disagrees with the EC suggestion to delete footnote 252. This footnote is important context to explain the Panel's statement that "[i]t is not clear to us from reading Directives 90/220 and 2001/18 whether they are applied, *inter alia*, to avoid disease to humans or animals resulting from herbicide residues in GM plants used as food or feedstuff." In this footnote, the Panel sets out Canada's argument that the European Communities failed to acknowledge that the risks associated with the use of plant protection products, including the risks to human and animal health from herbicide residues in food and feedstuff, were addressed by other relevant EC legislation. Canada pointed out that Commission decisions and scientific committees have repeatedly confirmed that "the authorization of chemical herbicides applied to plants and the assessment of the impact of their use on human health and the environment falls within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market…and not within the scope of Directive 90/220/EEC."[174] Moreover, Canada emphasized that the herbicides used in conjunction with herbicide tolerant crops, specifically glyphosate, had received a full evaluation under Directive 91/414/EEC, including an assessment of the use of glyphosate with glyphosate tolerant crops, as early as 2001.[175] In addition, the risks to human and animal health of residues of glyphosate had been fully assessed prior to the establishment of MRLs under Directive 98/82/EC.[176] This information is important in that it reveals that many of the purported risks associated with biotech crops advanced by the European Communities are in fact risks associated with the use of plant protection products generally, and that these risks, contrary to the European Communities' selective portrayal of its own regulatory environment, have received a full assessment under other pertinent legislation. On this basis, Canada is of the view that the footnote should be retained. That being said, however, Canada suggests that the Panel clarify that MRLs are not established pursuant to Directive 91/414/EEC, but, rather, pursuant to other relevant European Community rules.[177]

6.44 The **Panel** considers that the old footnote 252 is not essential and has therefore deleted it as requested by the European Communities.

6.45 Like Canada, the **European Communities** identified an editorial oversight at paragraph 7.337.

6.46 The **European Communities** requests that the Panel delete a sentence in paragraph 7.368 which it considers does not accurately reflect its position.

6.47 The **Panel** has deleted the relevant sentence in paragraph 7.368 in response to this comment.

6.48 The **European Communities** submits that the wording "even in cases where" in paragraph 7.384 should be deleted as it implies that authorizations may be granted in either scenario, *i.e.*, where the product has been found to be safe and where the product has not been found to be safe. The latter is not possible, as market authorizations are only granted if there is no risk to human health and the environment.

6.49 **Canada** disagrees with the suggested alternative wording for paragraph 7.384. The wording "even in cases where" does not imply that authorizations may be granted in cases where the product has been found not to be safe. To the contrary, this wording highlights the fact that the labelling requirement in Directive 2001/18 is applicable regardless of the conclusion of the risk assessment or the actual risks associated with a particular biotech product. This emphasis is appropriate given the

[174] Canada's second written submission, para. 142 and footnote 163.
[175] *Ibid*., para. 183 and footnotes 194 and 195.
[176] *Ibid*., para. 185 and footnote 196.
[177] *See ibid*., para. 180.

Panel's inquiry in paragraph 7.377 and succeeding paragraphs regarding whether the imposition of a labelling requirement under these circumstances can be considered an SPS measure. Alternatively, the Panel may wish to consider replacing "even in cases where" with "regardless of the fact that".

6.50 **Argentina** does not consider the proposed amendments to paragraph 7.384 to be acceptable. Regarding the first proposed amendment, the European Communities is changing the scope and sense of the first two sentences. It is cutting off the first sentence by adding a full stop after the word "GMO", and thus linking the rest of it with the proposed amendment which Argentina considers not to be acceptable. As to the second proposed amendment, the European Communities is giving no reason for it (it only refers to the first one). Argentina notes that, the competent authorities have not granted a market authorization even when the scientific evidence showed that the release was safe. Since the European Communities' proposed description is not accurate, especially the word "therefore", Argentina respectfully requests the original wording to be maintained.

6.51 The **Panel** has made appropriate changes to paragraph 7.384 in response to this EC comment.

6.52 The **European Communities** argues, with reference to the old paragraph 7.381, that it does not agree with the Panel that the labelling requirement in Directive 2001/18 only serves the purpose of protecting human health and the environment in the way the Panel has described it. This said, the European Communities does not object to the statement that this is one possible purpose of labelling and therefore bears a rational relationship. However, as, in the European Communities' view, it is not the only purpose – the other one being consumer information – the European Communities submits that the wording should be more "open" and the last sentence should be deleted as it suggests exclusivity of purpose. Finally, the European Communities suggests to use the words "even though" instead of "even in cases where".

6.53 The **United States** submits that the European Communities has no basis for its suggestion that the Panel delete one of the most important sentences in that section of the interim report: namely, the concluding sentence to paragraph 7.381. That paragraph (and sentence) provide:

> "The preceding paragraph makes clear that there is a rational relationship between the labelling requirement in Directive 2001/18 and the purpose of protecting human health and the environment, even in cases where a product containing or consisting of a GMO has been found to be safe for human health and the environment. Accordingly, we see no reason to assume that the labelling requirement is intended to serve a purpose which is different from the purpose Directive 2001/18 says it seeks to achieve, *i.e.*, the protection of human health and the environment."

6.54 The United States contends that the European Communities' only basis for suggesting the deletion of the last sentence in paragraph 7.381 is the assertion that the labelling requirement also serves the purpose of "consumer information." However, the European Communities provides no basis for this assertion, and does not, for example, cite to any supporting provision of the Directive. Indeed, as the Panel correctly notes, the labelling requirement is an integral requirement of Directive 2001/18, and the very first article of that directive states that its objective is "to protect human health and the environment." Thus, the European Communities has provided no basis in the record for its suggested change to paragraph 7.381.

6.55 **Canada** also disagrees with the European Communities' proposed deletion of the last sentence of paragraph 7.381. The Panel's conclusion that there is "no reason to assume that the labelling requirement is intended to serve a purpose which is different from the purpose Directive 2001/18 says it seeks to achieve, *i.e.*, the protection of human health and the environment"

is a sound one given the text of Directive 2001/18 and the European Communities' own submissions in this case. The Panel rightly points out that the only stated purpose of the Directive, other than approximation of member State laws, is to protect human health and the environment. Moreover, the European Communities did not refer to "consumer information" as an objective of Directive 90/220 or 2001/18 in its description of its legislative framework set out in its first written submission, paragraphs 155 to 163, or in its explanation of the flaws in Directive 90/220 that it claims needed to be rectified by Directive 2001/18.[178] The European Communities' position has been that the new labelling requirements in Directive 2001/18 were intended to strengthen post-marketing surveillance, and not for "consumer information" purposes. Consequently, the suggested change does not reflect the position taken by the European Communities in these proceedings and should be disregarded.

6.56 **Argentina** considers that the first phrase of paragraph 7.381 should remain unchanged. First, as the European Communities indicates, the Panel does not state in paragraph 7.380 that protecting human health and environment "is the only" purpose. The Panel explicitly stated that the purposes in Article 20 of Directive 2001/18 referred *inter alia* to situations described in paragraph 7.380, and correctly describes to what extent the identification and labelling of GMOs contributes to some of the purposes of Article 20. Second, both the described purposes of Article 20 in paragraph 7.380, and the wording of Article 20 itself (especially paragraphs 2 and 3) explicitly refer to foreseen situations of risks to human health and the environment. Consequently, Argentina considers that the wording proposed by the European Communities ("can be") diminishes the real extent of these situations, foreseen in Directive 2001/18/EC, and which are provided for with a specific procedure. The wording proposed by the European Communities could be understood as envisaged for situations "merely happening" to deal with human health and environment, and would not express the clear purpose stated in Directive 2001/18 referring to the sense of labelling.

6.57 Argentina submits, in addition, that from paragraph 7.379 the Panel seeks to identify the rationale of labelling as set out in Directive 2001/18, and uses, among other provisions, Article 20. The Panel did find a rationale and found it to be related with the purpose of protecting human health and the environment. The European Communities states that there is another purpose, namely consumer information. Argentina considers, as it believes the Panel to have done, that the purpose of informing both the consumer and the authorities is not exhaustive in itself but also aimed towards a proper handling of the information on the labelled product. Argentina acknowledges that there might be a purpose for information related to what the Panel correctly recognized as "nice to know", or for avoiding confusion about the product, but Argentina considers - and believes that the European Communities would agree with this - that the purpose of informing does serve another purpose, a more important one than the answering to what is "nice to know" or avoiding confusion, directed to the better management of risks should these occur and therefore related to what one "needs to know", as the Panel said. Argentina considers that this far more important purpose than the one of mere information with no subsequent purpose of action, should not be diminished.

6.58 Finally, Argentina argues that the Panel sought to find the rationale for labelling in order to determine whether it relates to the protection against the risks established in the *SPS Agreement*. The Panel found the rationale precisely "besides" the purpose of consumer information (assuming *arguendo* the statement of the European Communities is correct in putting at the same level of importance consumer information and information provided for risk management) and "within" the same information (in order to make a further use of it -information is of no great value unless one uses it for a purpose - for risk management, as correctly established in paragraph 7.380). Therefore, Argentina considers that it is proper to say that there clearly "is" a rational relationship between the

[178] EC reply to Panel question No. 92.

labelling requirement and the purpose of protecting human health and the environment, and requests that the original wording by the Panel be maintained.

6.59 The **Panel** has made appropriate changes to paragraph 7.389 in response to this EC comment. The Panel also found it appropriate to make further changes, or additions, in response to the EC comment at paragraphs 7.385-7.389 and 7.391.

6.60 Regarding the EC assertion that the labelling requirement in Directive 2001/18 serves two purposes – the protection of human health and the environment, on the one hand, and consumer information, on the other hand – we note that the European Communities, in its comments on the interim reports, does not put forward a single argument to substantiate its assertion. Nor does it identify any evidence on the record which would support the conclusion that consumer information is one purpose for which the labelling requirement in Directive 2001/18 is applied.[179] We point out in this regard that in its first written submission the European Communities described the EC legislation concerning the approval of biotech products in some detail, including Directive 2001/18. The European Communities stated that Directive 2001/18 pursues the related but distinct objectives of "protecting human health and the environment". Consumer information was not mentioned as an objective of the Directive or of the labelling requirement contained therein.[180]

6.61 We further note that whereas Regulation 258/97 explicitly refers to the concept of "consumer information" in the context of labelling[181], neither the preamble nor the main text of Directive 2001/18 do. This is consistent with the fact that Directive 2001/18 is concerned with the deliberate release of GMOs into the environment and not with food containing or derived from GMOs, Indeed, Directive 2001/18 refers, not to final consumers of GMOs[182], but to "users" of GMOs (such as crop farmers, or livestock farmers using GMOs for animal feed)[183]. We also note that, unlike Regulation 1829/2003 (on genetically modified food and feed) and Regulation 1830/2003 (concerning the traceability and labelling of GMOs and the traceability of food and feed produced from GMOs), Directive 2001/18 does not refer to such concepts as "informed choice" of consumers, or users, or "freedom of choice" of consumers, or users, in connection with its labelling provisions.[184] The preamble to Directive 2001/18 merely states that labelling to indicate the presence in a product of a GMO serves to "ensure that the presence of GMOs in products containing, or consisting of, genetically modified organisms is appropriately identified".[185] This leaves unanswered the question of why appropriate identification is sought. We therefore consider that the preamble to

[179] It is worth noting that in its first written submission the European Communities described the EC legislation concerning the approval of biotech products in some detail, including Directive 2001/18. The European Communities stated that Directive 2001/18 pursues the related but distinct objectives of "protecting human health and the environment". Consumer information was not mentioned as an objective of the Directive or of the labelling requirement contained therein. EC first written submission, paras. 142-143.

[180] EC first written submission, paras. 142-143.

[181] Article 8(1) of Regulation 258/97.

[182] In contrast, Article 8(1) of Regulation 258/97 concerning novel foods and food ingredients refers to the "final consumer" of a novel food or food ingredient.

[183] Articles 19(3)(f) and 20(2) of Directive 2001/18.

[184] The preamble to Regulation 1829/2003 (on genetically modified food and feed) states that labelling of biotech products enables the "consumer", or "user", to make an "informed choice" and precludes "potential misleading of consumers" as regards methods of production (17th, 20th and 21st preambular paragraphs of the Regulation). Along similar lines, the preamble to Regulation 1830/2003 (concerning the traceability and labelling of GMOs and the traceability of food and feed produced from GMOs) states that accurate labelling of biotech products enables operators and consumers to "exercise their freedom of choice in an effective manner" (4th preambular para. of the Regulation).

[185] 40th preambular para. of Directive 2001/18.

Directive 2001/18 does not assist in determining whether the labelling requirement serves the additional purpose of consumer information.

6.62 Even if we were to accept, *arguendo*, that the relevant labelling requirement in Directive 2001/18 could help processors of raw materials (*e.g.*, rape seeds) to provide information and assurances to the final consumer about their food products (*e.g.*, highly refined rape seed oils produced from non-GM rape seeds) and in particular about their method of production[186] – for instance by reducing the likelihood of accidental and unintentional use of GM raw materials (*e.g.*, GM rape seeds) – the fact remains that neither the preamble nor the main text of Directive 2001/18 contains any reference to "consumer information" as an objective of the Directive in general or its labelling requirement in particular.[187]

6.63 We also find relevant in this connection the provisions of Article 26 of Directive 2001/18, which applies to GMOs subject to containment measures (contained use) or to GMOs to be made available for research and development activities. Like the GMOs which are for placing on the market, the GMOs covered by Article 26 are subject to a requirement whereby the presence of GMOs must be indicated on a label or in accompanying documentation using the words "This product contains genetically modified organisms". Given that the GMOs at issue in Article 26 are not released into the environment for the purpose of placing on the market, *i.e.*, for making available to third parties such as consumers we are of the view that the labelling requirement contained in Article 26 is not imposed for the purpose of "consumer information", that is to say, for the purpose of enabling consumers to make an informed choice and preventing potential misleading of consumers.

6.64 We recall that the requirement to identify the presence of a GMO is exactly the same in the case of contained use or release at the research stage (Article 26) and release for the purpose of placing on the market. This circumstance, coupled with the fact that the labelling requirement applicable in the situations envisaged in Article 26 is not, in our view, applied for "consumer information" purposes, and that there is no indication in Directive 2001/18 that the labelling requirement applicable to GMOs which are for placing on the market is imposed, at least in part, for "consumer information" purposes, raises further doubt in our minds about the validity of the unsubstantiated EC assertion that the latter labelling requirement is partly imposed for the purpose of "consumer information".

6.65 Canada and Argentina submitted the Commission's 1996 Report on the Review of Directive 90/220/EEC in the context of the Commission's Communication on Biotechnology and the White Paper.[188] This Report was not submitted by the United States or the European Communities, but the European Communities referred to its content in very general terms in a response to a question from the Panel.[189] We note that the Report contains the following two paragraphs:

> "The issue of labelling of products under Directive 90/220/EEC has been the subject of controversy. Some Member State Authorities object to the placing on the market of a product whose labelling will not indicate that it is genetically modified. The

[186] We note that some foods derived from GMOs – *e.g.*, highly refined rape seed oils in which neither DNA nor protein of GMO origin is detectable – are not subject to mandatory labelling under Regulation 258/97.

[187] It is also useful to recall in this context that Directive 2001/18 applies to various kinds of products containing, or consisting of, GMOs, including products not intended for human consumption, such as products for industrial use (*e.g.*, products for use as lubricants).

[188] Exhibits CDA-119 and ARG-53.

[189] EC response to Panel question No. 92(a). We note once more that the European Communities, in its comments on the interim reports, did not substantiate its assertion regarding the purpose of consumer information, and in particular pointed to no document in the record which would support its assertion.

> current provisions of the Directive do not allow the imposition of such labelling in the absence of any link to risk assessment. Specific provisions on labelling are, however, foreseen in product legislation.
>
> It will be essential to address this issue in order to take into account the need to inform consumers and to comply with the international obligations of the Community. The issue of labelling will be considered when preparing the amendment of Directive 90/220/EEC and the final provisions of other relevant product legislation will be taken into account."[190]

6.66 In the second of the two above-quoted paragraphs the Commission refers to the need for consumer information, although without explaining why consumers need to be informed.[191] Even if it were assumed that the Commission saw a need for "informing consumers" to ensure that consumers could make an informed choice and to preclude potential misleading of consumers as regards methods of production, it is important, in our view, to bear in mind the following elements. *First*, the Commission is not the Community legislator. Directive 2001/18 was adopted by the European Parliament and Council.[192] The views of the Commission do not necessarily reflect the views of the European Parliament and Council. Indeed, the Report of the Commission specifically mentions that controversy surrounded the issue of labelling and that member States took divergent views on the need for labelling to indicate the presence in a product of a GMO. *Secondly*, even disregarding the fact that the Commission is not the Community legislator, we note that the Commission Report is dated December 1996 and that Directive 2001/18 was not adopted until March 2001. In our view, it cannot simply be assumed that a statement made by the Commission more than four years before the date of adoption of Directive 2001/18 accurately reflects the purpose of the provision actually enacted on labelling. *Finally*, we recall that the phrase "inform consumers" did not find its way into the final text of Directive 2001/18. Given this, we think it is entirely conceivable that a deliberate choice was made by the Community legislator not to endorse this particular rationale for requiring labelling to indicate the presence in products of a GMO.[193] Certainly, the deliberate omission of the phrase "inform consumers" cannot lightly be assumed to have no substantive meaning when the same Community legislator (consisting of the European Parliament and Council) did use the phrase "inform the final consumer" in Regulation 258/97 and included very similar phrases in Regulations 1829/2003 and 1830/2003. The deliberate omission further seems significant in view of the fact that the same Community legislator in Article 26 of Directive 2001/18 imposed an identical requirement to indicate the presence of GMOs for GMOs that are not for placing on the market. As we have said, the Article 26 labelling requirement in our view is not imposed for "consumer information" purposes. For these reasons, we consider that the link between the 1996 Report of the Commission and the 2001 Directive of the European Parliament and Council is not sufficiently close and direct to allow us to conclude, without more, that the labelling requirement in Directive 2001/18 is applied, in part, for the purpose of consumer information.

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[190] Exhibits CDA-119 and ARG-53, p. 9.

[191] We recall that Regulation 258/97 and Regulations 1829/2003 and 1830/2003 explain why consumers, or users, need to be informed.

[192] The European Communities explained that Directive 2001/18 was adopted through the so-called "co-decision" procedure which involves several rounds of reading in the European Parliament and Council and, as a last resort, a reading in a conciliation committee. The European Communities told the Panel that the draft Directive 2001/18 went through all these stages before it was finally adopted on 12 March 2001. EC first written submission, para. 158.

[193] It is worth recalling once more that the Report of the Commission itself draws attention to the fact that the issue of labelling to indicate the presence in a product of a GMO had been the subject of controversy among member States.

6.67 Additionally, we note that in response to a question from the Panel, the European Communities referred to its 1998 proposal for a European Parliament and Council Directive amending Directive 90/220.[194] Consistent with what the Commission announced in its 1996 Report, the Commission proposal states that applications for approval are to contain a proposal for labelling which shall inform the consumer of GMOs in the relevant product(s) "whenever there is evidence that the product(s) contain(s) GMOs".[195] Thus, the 1998 Commission proposal proposes labelling to inform consumers about whether products contain or consist of GMOs. It does not propose labelling to help inform consumers about whether products which do *not* contain or consist of GMOs have nonetheless been produced from GMOs (*e.g.*, highly refined rape seed oils produced from GM rape seed). Regarding the link between the 1998 Commission proposal for an amended Directive and Directive 2001/18, we are of the view that the considerations we have put forward regarding the 1996 Report are valid, *mutatis mutandis*, also in the case of the 1998 proposal for an amended Directive. In particular, it must be recalled (i) that the Commission is not the Community legislator, and (ii) that the proposed phrase "inform the consumer" does not appear in the final, adopted text of Directive 2001/18. In respect of the last point, we again highlight the fact that the Community legislator did use the phrase "inform the final consumer" in Regulation 258/97 and that it used very similar phrases in Regulations 1829/2003 and 1830/2003. As we have said, the omission of the phrase "inform the consumer" further seems significant in view of the existence of Article 26 of Directive 2001/18. Accordingly, as with the 1996 Report of the Commission, we are of the view that the link between the 1996 Report of the Commission and the 2001 Directive of the European Parliament and Council is not sufficiently close and direct to allow us to conclude, without more, that the labelling requirement in Directive 2001/18 is applied, in part, for the purpose of consumer information.

6.68 In the light of the above elements and considerations, we are not convinced by, and therefore are unable to accept, the European Communities' unsubstantiated assertion in its comments on the old paragraph 7.381 of the interim reports that the relevant labelling requirement in Directive 2001/18 is applied, in part, for the purpose of consumer information.

6.69 The **European Communities** suggests a change to the wording of paragraph 7.383 to clarify what "otherwise" refers to.

6.70 **Canada** argues that the Panel should reject the European Communities' suggestion to change "otherwise" to "that there is no such rational relationship" in the second sentence. The suggested modification changes the meaning of the sentence, which Canada understands to be that nothing in the record suggests that the labelling requirement in Directive 2001/18 is related to any purpose other than protecting human health and the environment.

6.71 **Argentina** also does not consider this change to be appropriate. Regarding the replacement of the word "is", the suggestion by the European Communities undermines even more the findings of the Panel: for paragraph 7.381 the European Communities proposed "can be", and now it proposes "may be" for paragraph 7.383, which provides for an even lower level of certainty. Such a change would alter the Panel's reasoning to such an extent as to create confusion as to whether the objectives derived from Directive 2001/18 should be considered as "SPS-purposes" or not. The Panel has correctly found a clear and easy rationale, which links the labelling requirement in Directive 2001/18 with the purpose of protecting human health and environment. The European Communities is trying

[194] EC reply to Panel question No. 92(a). The European Communities did not submit this proposal, but in a footnote to its reply provided a reference to the Official Journal of the European Communities, where the proposal may be found.

[195] Article 11(2)(e) of the proposal.

to find an "open door" out of the *SPS Agreement*, even when the specific purpose of protecting human health and the environment was found and stated. For these reasons, Argentina considers that the word "is" should remain unchanged.

6.72 About the replacement of the word "otherwise", Argentina does not consider it acceptable either, because it also undermines the level of certainty. Should the EC proposal be accepted, the resulting text would suggest that the rational relationship of the labelling requirement with an SPS-purpose was found by the Panel simply "by exclusion". Consequently, Argentina considers that the original word "otherwise" should remain, because it clearly establishes that there is nothing which might lead the Panel to depart from its finding (and not that the Panel came to that finding because it had no other choice).

6.73 The **Panel** has made certain changes to paragraph 7.391 in response to the EC comment on the old paragraph 7.381. This change obviates the need for the change requested by the European Communities in relation to the old paragraph 7.383.

3. General EC moratorium

(a) Comments common to the United States, Canada and Argentina

6.74 The **Complaining Parties** individually request that the Panel issue a recommendation that the European Communities bring its general moratorium into conformity with its obligations under the *SPS Agreement*. The Complaining Parties assert that the Panel's analysis of this issue did not take account of all relevant factors and that the general moratorium which the Panel found to have existed in August 2003 did not cease to exist after August 2003. The Complaining Parties submit that the factors cited by the Panel as justifying the need for it to make findings in this case also justify the need for a recommendation. Furthermore, the Complaining Parties contend that the failure to make such a recommendation could be prejudicial to their interest as complaining parties. They argue that in the absence of a recommendation with regard to the general moratorium, the European Communities (should it fail to come into compliance) may try to argue that the Complaining Parties should be denied recourse to Article 21.5 of the DSU, and should be required to bring an entirely new case to examine a modified general moratorium. Canada notes that, in contrast, with regard to the product-specific measures and member State safeguard measures, Canada would (should the European Communities fail to come into compliance) have recourse to Article 21.5 of the DSU. According to Canada, this procedural bifurcation of the dispute would make it harder for the Parties to reach a positive resolution of the overall dispute. The Complaining Parties additionally argue that if the Panel were to add a recommendation to its finding that the general moratorium is inconsistent with the *SPS Agreement*, it would not add to the obligations, or diminish the rights, of the European Communities in any way. Canada points out in this regard that the Panel could recommend that the European Communities bring its measures into conformity with its WTO obligations "to the extent that it has not already done so".

6.75 The **European Communities** opposes the Complaining Parties' propositions, which, in its view, are unfounded and must be dismissed. More specifically, the European Communities notes that Canada accuses the Panel of having made a selective and limited assessment of the developments that have taken place after its establishment. The European Communities submits that what Canada is attacking, in reality, is that on the basis of the Panel's characterization of the measure, one fact – namely that of approvals being adopted – mattered more than any other for the question of a continued existence of the measure. Thus, fundamentally, Canada is challenging the Panel's characterization of the measure as a general "moratorium" affecting all decisions on biotech products. If that was not the measure that Canada intended to challenge, it should have made it clear in its

request for the establishment of a Panel and its submissions to the Panel. What Canada or the other Complaining Parties cannot seriously claim is that a situation in which decisions on GMO applications are adopted under the relevant legislation would be consistent with the continued existence of a general "moratorium".

6.76 The European Communities further notes that notably Argentina alleges that the Panel lacks jurisdiction to find that the supposed measure has ceased to exist. The European Communities points out that the question of whether a panel has jurisdiction to find whether the measure before it has ceased to exist, in practice, has not, generally speaking, been an issue in past disputes, since the parties, in most cases, actually agreed that the measure had ceased to exist. This said, in the case *US – Certain EC Products* the parties did disagree on the continued existence of the March 3 measure and the panel naturally assumed jurisdiction to rule that that measure had expired (while refusing to assume jurisdiction over the legally distinct measure of April 19th). More generally, however, the European Communities submits that the Panel has jurisdiction because it is its task to secure a positive solution to the dispute according to Article 3.7 of the DSU. It follows necessarily that the Panel cannot simply ignore subsequent developments that affect the existence of the measure identified in its terms of reference. If it did otherwise, it would leave open the fundamental question underlying these disputes and, as a result, the Panel would fail to produce a report that actually helps all the Parties to come closer to a final and positive solution.

6.77 In relation to the issue of whether there is a need for a recommendation, the European Communities observes at the outset that the Appellate Body's ruling in *US – Certain EC Products* regarding measures that have ceased to exist does not leave any open question. If a measure has been found to have ceased, no recommendation is to be made.[196] The European Communities notes that in contrast, the general gist of the Complaining Parties' arguments on this issue is to move all issues relating to subsequent developments regarding a challenged measure to the implementation stage and to treat them there as a question of whether or not a Member has brought itself into full conformity with its obligations. This approach ignores a panel's duty to secure a positive solution to the dispute, which obliges it not to refuse to rule on issues it has the ability to rule on. Furthermore, in basing their arguments on due process and on the necessity of preventing "moving target" situations, the Complaining Parties overlook that these considerations also apply to the responding party. Indeed, in trying to secure a positive solution to the dispute a panel needs to take into account either side's due process rights. In the present case, the absence of a recommendation on the alleged moratorium does not deprive the Complaining Parties of the possibility to react to possible problems in the processing of pending applications as they have findings and recommendations on individual product applications. A recommendation on a "general moratorium" that may or may not have ceased to exist, on the other hand, would inadmissibly require the European Communities to defend itself against the moving target of a measure that the Complaining Parties refuse to define.

6.78 On the basis of these considerations, the European Communities is of the view that the Panel should refuse the Complaining Parties' requests to change its finding that the "general moratorium" measure has ceased to exist and should not issue a recommendation.

6.79 The **Panel** found it acceptable to make a number of changes to its findings set out at paragraphs 7.1302 *et seq*. in response to the requests of the Complaining Parties. In particular, the Panel's final reports refrain from expressing a view on whether the general EC moratorium on approvals has ceased to exist subsequent to the date of establishment of the Panel. Furthermore, Section VIII of the final reports now offers a qualified recommendation in relation to the general EC

[196] The European Communities argues that this has been recognised by Canada in its third written submission at para. 197.

moratorium on approvals, except for DS293 (Argentina). The exception for DS293 is necessary because in DS293 the Panel concluded that Argentina had failed to establish that the European Communities breached its WTO obligations by applying a general moratorium between June 1999 and August 2003. Given this conclusion, it would not be appropriate for the Panel to accept Argentina's request that it recommend that the European Communities bring the general moratorium into conformity with its obligations of the *SPS Agreement*. Even a qualified recommendation would be inappropriate in these circumstances.

6.80 Regarding the European Communities' argument based on Article 3.7 of the DSU, the Panel agrees that a positive solution to a dispute is one that takes into account all disputing parties' rights and interests. In the present case, the Panel considers that a qualified recommendation in DS291 and DS292 safeguards and preserves the rights and interests of all Parties concerned and hence is consistent with the aim of securing a positive solution to the dispute referred to the Panel. The Panel is not convinced by the European Communities' argument that a qualified recommendation would "require the European Communities to defend itself against the moving target of a measure that the Complaining Parties refuse to define". In fact, the European Communities itself acknowledges that the Panel has defined the measure at issue[197]. Nor does making a qualified recommendation "leave open the fundamental question underlying these disputes".[198] Indeed, the Panel's findings and conclusions resolve the matter referred to it by the Complaining Parties in their requests for the establishment of a panel, namely, whether the European Communities was applying a general *de facto* moratorium on approvals as of the date of establishment of the Panel, and if so, whether this resulted in the European Communities acting inconsistently with its WTO obligations.

6.81 The Panel also sees no force in the EC argument that the provisions of Article 3.7 "oblige[] it not to refuse to rule on issues it has the ability to rule on".[199] The European Communities provides no support for this interpretation of Article 3.7. If, as the European Communities contends, panels were under an obligation to rule on all issues they have the ability to rule on, they would not be entitled to exercise judicial economy. Yet it is a well established point of WTO jurisprudence that, subject to certain limitations, panels are entitled to exercise judicial economy.[200]

6.82 Additionally, we observe that even if we were to accept that, in the present case, the issue of whether the general EC moratorium has ceased to exist subsequent to the date of establishment of the Panel is an issue we have the ability to rule on, we consider that in view of the findings and conclusions already offered by us a ruling on this issue would not be necessary to enable the DSB to make sufficiently precise recommendations to the European Communities.

6.83 The above-mentioned changes made by the Panel obviate the need for other changes requested by the Complaining Parties in their comments (*e.g.*, the United States' request that the Panel further clarify a finding that is no longer contained in the final reports).

(b) Comments by Canada

6.84 **Canada** submits that, at paragraph 7.460, the Panel appears to have omitted one manner in which the Commission could prevent or delay approvals. According to Canada, a third possible manner arises from the fact that the Commission could fail to adopt, or delay the adoption of a proposed decision to approve, an application following the failure of the Council, within 90 days of its

[197] EC comments on the Complaining Parties' comments, paras. 7 and 16.
[198] *Ibid*., para. 24.
[199] *Ibid*., para. 37.
[200] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

referral to the Council, either to adopt, or to indicate by a qualified majority that it opposes, the proposed decision. Canada argues that while this scenario might be less likely given that the Commission would have signalled its determination to push a product application to a final approval by putting it before the Council, a severely divided Council might influence the Commission's resolve to take the further step of approving the product itself in the face of the attendant political controversy.

6.85 The **European Communities** does not agree with Canada's comment on the alleged third manner in which the Commission could prevent or delay approvals. Apart from the fact that the approach described would be illegal under the relevant EC legislation, it is of no relevance in the present case. The Complaining Parties have not described, or put forward evidence of, any instance where it would have been employed to give effect to the alleged moratorium.

6.86 The **Panel** does not find it appropriate to make a change to its findings in response to Canada's comment. The Panel's findings clearly state, at paragraph 7.465, that the issue the Panel considers in the relevant sub-section is whether it was possible for EC member States and the Commission to prevent or delay approvals of biotech products "in the manner alleged by the Complaining Parties". Canada points to no portion of its submissions where it alleged that the Commission prevented or delayed approvals by not adopting a draft measure following a failure of the Council to act.[201] At any rate, the information on the record does not indicate that the situation described by Canada ever arose in any of the approval procedures at issue in this dispute.

6.87 **Canada** submits that at the old paragraph 7.1303, the date of August 2003 is incorrect. At that time, the Commission had not yet approved NK603 maize for animal feed and industrial processing. The Commission finally adopted a decision approving this application on 19 July 2004, following the refusal by the member States, both at the Regulatory Committee and Council levels, to support its approval. As far as Canada is aware, there is no record of the lead CA (Spain) issuing the letter of consent.

6.88 The **Panel** removed the relevant statement, but retained a modified version of paragraph 7.1303.

(c) Comments by Argentina

6.89 **Argentina** considers that the phrase "as described by Complaining Parties" at paragraph 7.448 does not reflect integrally the whole characterization set forth by the Complaining Parties when they described the measure at issue and that it would therefore be more accurate for the Panel to consider removing the aforementioned phrase. At the same time, Argentina notes that it is not objecting to the elements pointed out by the Panel.

6.90 The **Panel** has made appropriate changes to paragraph 7.456 in response to this comment.

(d) Comments by the European Communities

6.91 The **European Communities** argues that, the word "main" should be deleted in paragraph 7.448 as it could create confusion as it leaves open what other elements there might be. Alternatively, the Panel could state what the other elements are. Moreover, in the European Communities' view, different wording should be used in the last bullet point to reflect the fact that a final decision can also be negative in nature and does not necessarily have to lead to approval.

[201] Indeed, Canada makes no such allegation at para. 27 of its first oral statement, for instance.

6.92 **Argentina** disagrees with the first amendment proposed by the European Communities, namely, the deletion of the word "main", and recalls its comment on this paragraph. The deletion of the word "main" would imply a further move away from the description of the measure given by the Complaining Parties. Under the European Communities' proposal wording would be: "The elements which characterize the moratorium as described by the Complaining Parties are the following [...]". In other words, through this suggested wording there would be stated not only a closed set of elements which characterizes the moratorium, but also that this is a description supported by the Complaining Parties. In this sense, Argentina proposes that the Panel consider the following options: (a) the deletion of the terms "described by the Complaining Parties" as it was previously suggested; or (b) the deletion of "main" and "described by the Complaining Parties" plus the addition of a footnote to paragraph 7.448 clarifying the particular description supported by the Complaining Parties, in this case by Argentina.

6.93 The **Panel** has made appropriate changes to paragraph 7.456 in response to this EC comment. The Panel did not see a need to use different wording in the last bullet point.

6.94 The **European Communities** submits that, in paragraph 7.457, the first sentence, including the accompanying footnote, needs to be deleted as it does not accurately reflect the position of the European Communities. The sentence implies that the European Communities has taken a position on the issue of "ability to prevent approvals", which is not the case. The issue was never discussed as such. To the extent the European Communities took a position on the individual steps identified by the Panel, this was done not from a perspective of a so-called "ability to prevent" but to explain the different procedural steps set out in the legislation (which has not been challenged). The European Communities points out that the footnote is repeated almost verbatim in paragraph 7.462. The European Communities submits that a new footnote be added at the end of this paragraph in order to refer to the EC second submission where the argument on internal decision-making process is made.

6.95 The **United States** does not agree with the EC suggestion that the Panel should delete the first sentence of paragraph 7.457, which provides that "[t]he European Communities does not contest that it had the ability to prevent approvals of biotech products in the various ways identified by the Complaining Parties." To the contrary, this statement is important in the context of the dispute, and completely accurate. Even though the issue of whether the European Communities adopted a general moratorium on biotech approvals was central to the case, the European Communities in fact did not contest that EC member States and the Commission had the ability to block final decisions on biotech applications. Indeed, the European Communities provided no citation to any prior EC arguments where it did contest this proposition, nor is the United States aware of any such arguments in the European Communities' oral or written submissions. Instead, all the European Communities can do is to imply that it never conceded the issue. But, whether or not the European Communities affirmatively conceded the issue is beside the point: the first sentence of paragraph 7.457 is completely accurate in noting that the European Communities did not contest that the Commission and member States had the ability to block final decisions on biotech products.

6.96 **Canada** also disagrees with the EC suggestion. As Canada understands it, the Panel's point is not that the European Communities expressly admitted that it had the ability to prevent biotech approvals in the manner identified, but that the European Communities did not deny that it was possible under the EC regulatory system for biotech approvals to be prevented in the manner identified by the Complaining Parties.

6.97 **Argentina** likewise does not agree with the deletion of something that constitutes a finding by the Panel. In Argentina's view, it does not refer to any alleged position by the European Communities, but to the fact that the European Communities did not contest this issue.

6.98 The **Panel** has deleted the first sentence of paragraph 7.465 and the accompanying footnote, but sees no reason to add a new footnote at the end of the paragraph.

6.99 The **European Communities** considers that the last bullet point in paragraph 7.459 requires some clarification as the step identified therein does not exist under Regulation 258/97. Moreover, the second sentence in footnote 351 should be deleted, as it seems entirely unnecessary. At the same time, it would seem necessary to point out that these very same steps may be taken for wholly legitimate (scientifically justified) reasons.

6.100 **Canada** has no objection to the European Communities' proposed revision of the text of paragraph 7.459. However, in relation to the footnote, given the Panel's finding that "despite a clear legal obligation to give written consent […] France withheld its consent and thus did what was within its power to prevent these products from being approved",[202] it hardly seems inappropriate for the Panel to point out that the acts and omissions of the European Communities might be inconsistent with the European Communities' own internal law. Canada submits, in addition, that the suggested addition to footnote 351 is unnecessary and should be disregarded. The question is not whether any of the identified methods employed by the EC member States to give effect to the moratorium "necessarily" reflects an intention to prevent or delay final decision, but whether in this case EC member States employed these methods to prevent final approvals.

6.101 **Argentina** believes that the addition in footnote 351 proposed by the European Communities would be misleading and should not be accepted. The Panel is referring to situations in which the member States have the ability to prevent or delay, with no further reference to the intention of the member States. Furthermore, to say in footnote 351 that there "might be no intention" of delaying or preventing, as the European Communities suggests, is certainly contradictory with the Panel's statement in paragraph 7.459, especially since point (b) refers to "objections", point (c) refers to an acting "blocking minority", and point (d) refers to a "refusal" to give consent. All these points refer to situations in which member States do act on purpose, hardly "by accident" or "with no intention". The EC observation to footnote 351 would undermine the sense of paragraph 7.459 as correctly expressed by the Panel. Consequently, Argentina requests this suggested addition not to be accepted.

6.102 The **Panel** has made appropriate changes to paragraph 7.467 in response to this EC comment. The Panel has also deleted the second sentence of footnote 574, but does not find it appropriate to add the sentence suggested by the European Communities.

6.103 The **European Communities** considers that paragraph 7.462 requires some clarification as the scenario identified therein does not exist under Regulation 258/97.

6.104 The **Panel** has made appropriate changes to paragraph 7.470 in response to this comment.

6.105 The **European Communities** contends that the date referred to in paragraph 7.500 should be 31 August 2005 and not 1 September 2005 as the application concerning RR oilseed rape (EC-70) was approved on 31 August 2005.

6.106 The **Panel** has made appropriate changes to paragraph 7.508 in response to this comment, noting that it was the EC letter of 1 September 2005 which suggested the 1 September 2005 approval date.

[202] Interim Reports, paras. 7.1015 and 7.2197.

6.107 The **European Communities** submits that the last two sentences of paragraph 7.501 should be deleted as the Panel's assertion that the European Communities never submitted information on MON863 is not correct. Exhibit EC-106 is a status report on the application for MON863, which is actually a hybrid (MON863 x MON810). In the EC first written submission, at paragraph 335, the application was identified as Monsanto Maize with the right application number (C/DE/02/9), but unfortunately contained an erroneous reference to the hybrid event in question (MON810 x NK603 instead of MON863 x MON810). The Panel itself, in paragraph 7.542 seems to have correctly identified the application. Furthermore, from paragraph 7.543 it can be inferred that the Panel was fully aware of the fact that the application concerned MON863 x MON810.

6.108 **Canada** agrees with the European Communities that the confusion arising from the European Communities' mislabelling of the application for the maize hybrid MON863 x MON810 (C/DE/02/9) is indeed unfortunate. Canada also agrees that some information concerning MON863 maize was submitted to the Panel. Specifically, Canada submitted as evidence the scientific opinions conducted by the European Food Safety Authority (EFSA) for MON863 maize (resistance to certain coleopteran insects) and the hybrid product MON863 x MON810 (resistance to certain lepidopteran insects), dated 2 April 2004. Two opinions were issued, one under Directive 2001/18 and the other under Regulation 258/97, and were submitted as Exhibits CDA-35-O (2 April 2004) and CDA-35-P (2 April 2004), respectively. Canada also agrees with the European Communities that the Panel's discussion in paragraph 7.542 of the application for maize (Exhibit EC-106) and of the novel food application in paragraph 7.543 appears to relate to the applications submitted under Directive 2001/18 and Regulation 258/97 to the competent German authorities for MON863 maize and its hybrid MON863 x MON810. Furthermore, rather than deleting the text in paragraph 7.501 as proposed by the European Communities, Canada suggests modifying the text to reflect the Panel's conclusions in paragraphs 7.542 and 7.543 that the Panel does not consider that the information supplied by the European Communities in respect of these applications is sufficient to support the inference that no general moratorium on final approvals was in effect before or in August 2003.

6.109 The **Panel** is not convinced by the European Communities' assertion that the application concerning MON863 maize was actually an application concerning a hybrid product, namely, MON 863 x MON810 maize. The European Communities points to no evidence on the record in support of its assertion.[203] As we have noted, the European Communities itself distinguishes between the application concerning the parental line MON863 (*see* EC reply to Panel question No. 91) and the hybrid MON863 x MON810 (*see* EC first written submission, paragraph 335 and Exhibit EC-106). We note that in its submissions the European Communities mentioned the same reference C/DE/02/9 when referring to MON863 maize and MON863xMON810 maize. However, the European Communities does not argue that this constitutes conclusive proof that the products are one and the same. At any rate, it has never been suggested to us by any Party that under Directive 2001/18 it would not be possible to submit a single application covering two distinct, but related, biotech products. In the light of the foregoing considerations, the Panel declines the EC request to delete the last two sentences of paragraph 7.501. In response to Canada's comment, the Panel has added a reference to Exhibits CDA-35-O and -P in footnote 398 and made appropriate consequential changes to paragraph 7.509. The Panel does not agree with Canada, however, that paragraphs 7.550 and 7.551 relate, *inter alia*, to applications submitted under Directive 2001/18 and Regulation 258/97 concerning MON863 maize. These paragraphs relate to applications concerning the hybrid maize

[203] We note in passing that in relation to its comment on para. 7.500 regarding the correct approval date in the case of RR oilseed rape (EC-70), the European Communities indicated where in the Official Journal of the European Union the relevant Commission decision may be found. The European Communities did not give the corresponding reference to the Official Journal for the Commission decision concerning MON863 maize.

MON863 x MON810, which is consistent with the fact that both Exhibit EC-106 and paragraph 337 of the EC first written submission refer exclusively to the hybrid maize MON863 x MON810.

6.110 The **European Communities** identified incorrect sub-paragraph numbering in paragraphs 7.516 through 7.523.

6.111 The **European Communities** considers that the term "consistent with" in paragraph 7.544 should be qualified given that in the analysis then following the Panel identifies very diverse kinds of situations. Indeed, in some cases, such as for example in the case of the transgenic potato, the Panel discusses alternative explanations which it considers possible for a given act or omission, but then concludes anyway that the facts are consistent with the assertion that a moratorium existed. Such conclusions only make sense if "consistent with" can be read to mean "neither supports nor contradicts". The European Communities therefore suggests that the Panel add a new sentence to paragraph 7.544 to explain the meaning of the term "consistent with".

6.112 The **United States** does not agree with the EC suggestion that the Panel should add the following underlined sentence in the middle of paragraph 7.544:

> "In the remainder of this Subsection, the Panel will examine all other relevant applications with a view to determining whether they are consistent with the Complaining Parties' contention that during the relevant time period (October 1998 to August 2003) the European Communities applied a general moratorium on final approvals. By 'consistent with' we do not necessarily mean to say that the facts support the Complaining Parties' contention, but that they do not contradict it. The structure of this examination reflects the arguments of the Complaining Parties. More specifically, the Panel's examination is structured according to the acts and omissions through which, in the Complaining Parties' view, the European Communities gave effect to the alleged general moratorium on approvals. The Panel will first address applications submitted under Directives 90/220 and/or 2001/18. Thereafter, the Panel will address applications submitted under Regulation 258/97."

6.113 In the United States' view, the European Communities' suggested gloss on the term "consistent" reflects a misunderstanding of the Panel's mode of analysis. In the remainder of the subsection, the Panel shows how delays in processing individual applications were consistent with a moratorium, even though for certain applications other explanations for delays might have been possible. All such evidence indeed supports the Complaining Parties' contentions: in particular, it is cumulative with all of the other evidence submitted by the Complaining Parties showing the existence of a general moratorium, and it further shows that the European Communities was incorrect in asserting that the application histories proved that no such moratorium ever existed. Thus, the suggested addition is incorrect, and should not be included in the final report.

6.114 **Canada** also disagrees with the suggested qualification for "consistent with" in paragraph 7.544. The qualification changes the Panel's findings in relation to the facts and history of relevant applications. Canada recalls that, in this section of the interim report, the Panel examines whether the approval procedures for relevant applications "confirm" that certain member States and/or the Commission did in fact prevent the final approval of applications in the manner identified by the Complaining Parties.[204] The Panel examines whether the history of relevant applications supports (or "confirms") the Complaining Parties' claim that the European Communities imposed a general moratorium on final approvals or supports (or "confirms") the European Communities' opposing

[204] Interim Reports, para. 7.533.

assertion that "[t]he processing of individual applications continued without interruption, and applications were not systematically stalled."[205] Given that the very purpose of the examination is to determine which of the competing theories is supported by the facts, it would be nonsensical to specify "consistent with" as meaning "neither supports nor contradicts".

6.115 Canada submits, in addition, that the European Communities points to one example (transgenic potatoes, paragraphs 7.664 to 7.668) where the Panel does not categorically reject the European Communities' alternative explanation for the Commission's failure to forward a draft measure to the Regulatory Committee and yet still finds that facts are "consistent with" the Complaining Parties' claim that a moratorium had been put in place. This appears to be the only application history that could be "consistent with" both competing theories. In order to avoid any potential confusion, Canada invites the Panel to clarify that "consistent with" as used in paragraph 7.544 means "supports" or "confirms" and to clarify whether the transgenic potatoes application supports the Complaining Parties' claim, the European Communities' competing theory, or is inconclusive.

6.116 Although **Argentina** could agree that the words "whether they are consistent with" might be clarified, Argentina does not believe that the addition proposed by the European Communities will reflect what the Panel did analyse and conclude, as stated in paragraphs 7.548, 7.758 and 7.997, namely, the conduct of the Commission and the member States. When analysing these conducts, the Panel found, among others issues, that there was an interaction between the Commission and some member States[206], from which the Panel derived the "consistency" of the conducts with the Complaining Parties' assertion about a "*de facto*" moratorium.

6.117 Additionally, Argentina does not believe that the addition proposed by the European Communities would be clarifying. On the contrary, the expression "but that they do not contradict it" seems to be both soft and too incomplete. The consistency of the findings regarding the conduct of the Commission and of some member States does not simply "not contradict" the Complaining Parties' assertions, since they deal with calculated and intended acts, but, on the contrary, do support Argentina's assertion and it is in this sense that the Panel has made these findings. Consequently, Argentina considers that the European Communities' proposed addition will diminish the sense of the word "consistency", as used by the Panel in its findings.

6.118 The **Panel** considers that the phrase "consistent with" at paragraph 7.552 is sufficiently clear and therefore does not find it necessary or appropriate to add the sentence suggested by the European Communities. Nonetheless, for greater clarity, the Panel has included additional language at paragraph 7.552. In relation to the approval procedure concerning the Transgenic potato, the Panel has deleted the old paragraph 7.1921.

6.119 The **European Communities** requests that a footnote be added at the end of paragraph 7.547 to clarify that the Complaining Parties have not challenged the fact that in accordance with Article 35 of Directive 2001/18 an updated dossier had to be submitted which would re-start the approval procedure.

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[205] *Ibid*., para. 7.535.

[206] Argentina refers to, especially, paras. 7.567, 7.584, 7.598, 7.612, 7.629, 7.648, 7.661, 7.670, 7.681, 7.695, 7.711, 7.726, 7.737, and 7.754 of the Interim Reports, referring to the Commission's knowledge of the *explicit intention* of the "Group of Five" and these countries' capability to act as a "blocking minority"; and also paras. 7.768, 7.777, 7.784, 7.798, 7.812, 7.825, 7.856, 7.876, 7.891, 7.901, 7.921, 7.955, 7.969, 7.985, and 7.1015 of the Interim Reports, referring to the member States as either being part of the "Group of Five", or knowing of the *explicit intention* of the "Group of Five" and its capability to act as a "blocking minority").

6.120 **Argentina** opposes the additional footnote proposed by the European Communities. It has already been clearly established several times during the proceedings, and stated in the interim report, that the Complaining Parties are not challenging the EC legislation as such (including Article 35 of Directive 2001/18/EC). Argentina considers this clarification not to be necessary. Besides this, the proposed expression "any aspect of the EC approval legislation" is too broad and misleading, since it could be understood to include, for instance, the "non-application" of the EC approval legislation, which Argentina is indeed challenging.

6.121 The **Panel** has added an appropriate footnote at the end of the first sentence of paragraph 7.555 in response to this EC comment.

6.122 The **European Communities** points out that while it is correct that it only stated the fact, referred to at paragraph 7.841, that the application was withdrawn (*see* EC second written submission, paragraph 149, footnote 60), without providing any document, it is also true that that fact was never contested by the Complaining Parties. That alone should be a reason for the Panel to accept the EC statement as a given fact. Furthermore the Panel never asked for further clarifications or documents. The European Communities considers that this issue can still be clarified at interim stage and that there is no point in waiting for an eventual implementation phase to start producing the document that shows that and when the withdrawal took place. The withdrawal letter is therefore attached as Exhibit EC-167. Based on the letter, the European Communities requests that the Panel include in paragraph 7.841 the date of withdrawal.

6.123 The **United States** argues that the interim review stage of the proceeding is confined to a "review of precise aspects" of an interim report. It is not the place for a party to submit new factual evidence or exhibits concerning the measures at issue, nor does it permit making new findings based on such exhibits. The question of the status of new evidence introduced during the interim review stage of a dispute was discussed by the Appellate Body in its report in *European Communities – Trade Description of Sardines*. In that dispute, the European Communities had attempted to introduce new evidence (in the form of letters from European consumer associations) at the interim review stage. The panel declined to consider the new evidence, and the Appellate Body affirmed, explaining:

> "The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report.' At that time, the panel process is all but completed; it is only – in the words of Article 15 – 'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU."[207]

6.124 In addition, the United States notes that the European Communities' submission of new evidence on BXN cotton is inconsistent with the Panel's Working Procedures. Paragraph 12 of those procedures provides:

> "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for the purpose of rebutting

[207] Appellate Body Report, *EC – Sardines*, para. 301.

> answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, other parties shall be accorded a period of time for comment, as appropriate."

6.125 The United States points out that the European Communities' new exhibit on BXN cotton was not submitted in rebuttal or in response to a Panel question. In addition, the European Communities has not claimed or made a showing of good cause which might warrant an exception to the rule in Paragraph 12. In particular, no showing of "good cause" is possible because the purported withdrawal of the BXN cotton application in the period after the establishment of the Panel is not dispositive with regard to any issue in this dispute. As the United States has explained, under Article 7 of the DSU (establishing the Panel's terms of reference), the measures at issue in this dispute are the measures in existence when the panel was established. Accordingly, information on the withdrawal of BXN cotton after panel establishment is not pertinent to the existence and/or WTO-consistency of the measures at issue.

6.126 The United States further submits that, remarkably, the EC comments make the assertion that "there is no point in waiting for an eventual implementation phase to start producing the document that shows that and when the withdrawal took place." The United States is pleased that apparently the European Communities is predicting that the Panel's recommendations and rulings regarding the BXN cotton application, after a possible review by the Appellate Body, will be adopted by the Dispute Settlement Body and that the European Communities intends to comply with those recommendations and rulings when adopted. Nonetheless, the United States strongly disagrees with the notion that there is "no point" in not allowing the submission of new evidence during the interim review stage on implementation of a possible DSB recommendation and ruling. To the contrary, the consideration of the implementation of possible DSB recommendations and rulings during the interim review stage would be inconsistent with the DSU. As the Appellate Body explained in *EC – Sardines*, the purpose of the interim review stage is to consider "precise aspects" of the report, not to consider new evidence. Instead, the DSU provides other, separate mechanisms to address this situation. For instance, those issues could arise as part of the DSB's surveillance of implementation of the recommendations and rulings. (*See*, *e.g.*, Article 21.6 of the DSU: "The DSB shall keep under surveillance the implementation of adopted recommendations or rulings.") Should the DSB ultimately adopt the Panel's recommendations and rulings on BXN cotton, the European Communities would be free to claim that it has already complied with the recommendations and rulings, and the DSB in turn would be free to exercise its surveillance authority. Moreover, if there were disagreement about the European Communities' claim, the DSB could establish a panel pursuant to Article 21.5 of the DSU.

6.127 Furthermore, the United States maintains that if the Panel were to accept new evidence at this time, and in a matter not in accordance with the Panel's working procedures, the Complaining Parties would be confronted with precisely the type of unfair "moving target" that the Appellate Body decried in *Chile – Price Band System*.[208] If the European Communities were allowed to present new evidence on its measures at each and every stage of the proceeding – and in particular at this stage – this already lengthy dispute could last indefinitely, as the European Communities could continue to extend the proceedings by continually submitting new evidence, by inviting the Complaining Parties to respond to it, and by asking the Panel continually to revise its findings.

[208] As the Appellate Body explained in that dispute, "the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'." Appellate Body Report, *Chile – Price Band System*, para. 144.

6.128 For all of these reasons, the United States submits that the Panel should give no consideration to the new evidence the European Communities has attempted to introduce at the interim review stage in this dispute.

6.129 **Canada** opposes the European Communities' suggested modification for paragraph 7.841 of the Interim Report for two reasons. First, the European Communities appears to suggest that the mere assertion of a fact, apparently uncontested by a Complaining Party, should be "reason for the Panel to accept the EC statement as a given fact." Canada disagrees. It is a well settled principle that the party making an assertion has the burden to prove that assertion. The mere assertion of a fact that has not been specifically contested by an opposing party is not necessarily sufficient to discharge this burden.[209] The failure by the European Communities, in this case, to adduce evidence supporting its assertions exposes it to the risk that the Panel, in making an objective assessment of the facts, may not accept those assertions as fact. Indeed, in this dispute, the European Communities made many vague assertions unsupported by specific evidence. In the present case, the Panel is perfectly entitled, based on the evidence before it, to conclude as it did in paragraph 7.841.

6.130 Second, for the reasons stated below, Canada opposes the European Communities' attempt to supplement the factual record. Having failed to support its assertion with evidence during the course of these proceedings, the European Communities should not be permitted to adduce new evidence at the interim review stage, no matter how innocuous the evidence appears to be.

6.131 Canada objects to the European Communities' attempt at this very late stage of the process to supplement the factual record before the Panel by introducing three new exhibits, EC-167, -168 and -169.[210] The submission of additional evidence after the issuance of the interim report significantly alters the nature of the interim review stage and strains the demands of due process. The interim review stage is an opportunity for parties to "submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report" (Article 15.2 of the DSU); it is emphatically not an opportunity for a party to correct evidentiary oversights or reopen the factual record.

6.132 Canada notes that the European Communities suggests that the introduction of new evidence presents "no due process issue or prejudice" to the Complaining Parties because they have an opportunity to comment on the new evidence. However, this does not answer the broader due process problem of permitting only one party an opportunity to supplement the record. Permitting the introduction of selective evidence, without providing an opportunity for a fair hearing on all pertinent additional facts, violates due process. On this basis alone, the Panel should disregard these exhibits. The European Communities will have ample opportunity to submit this information during the implementation stage of the proceedings.

6.133 Canada argues that if the Panel is inclined to accept the additional evidence submitted by the European Communities, fairness dictates that the Complaining Parties should be accorded an equal opportunity to submit additional evidence to supplement the factual record. In this regard, the Complaining Parties should not be limited to responding to the evidence recently submitted by the European Communities, but should be free to submit additional evidence on any issue addressed in the Panel's interim report.

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[209] Canada notes that it stated in its submissions that the fact that it had not addressed explicitly any particular legal or factual assertions by the European Communities does not mean that it agrees with those assertions. Canada's second written submission, para. 11.

[210] Canada refers to paras. 53 and 68 of the EC comments.

6.134 The **Panel** notes that Exhibit EC-167 contains a letter dated 18 May 2004. The EC second written submission, in which the European Communities referred to the withdrawal of the application in question, dates from 19 July 2004. Thus, the European Communities could have provided the relevant letter already at the time it filed its second written submission, or at least shortly thereafter. We note that paragraph 12 of the Panel's Working Procedures states in pertinent part that "[p]arties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause." In this instance, the European Communities has not made a showing of good cause for submitting in March 2006 what it could have submitted already in May 2004. The fact that, in the European Communities' view, "there is no point in waiting for an eventual implementation phase to start producing the document" certainly does not amount to the requisite "good cause", since this argument provides no justification for submitting evidence that has been available for more than two years as late as the interim review stage. We also note that in *EC - Sardines* the Appellate Body stated in unqualified terms that "[t]he interim review stage is not an appropriate time to introduce new evidence".[211] For these reasons, the Panel declines to make the change requested by the European Communities.

6.135 The **European Communities** identified mistaken cross-references to Annex H in the Panel's findings, including in the old footnotes 683-684 and 688-689.

6.136 The **European Communities** requests that at paragraph 7.886 the Panel modify its description of what Dr. Andow said so that it is closer to what he stated literally and therefore more accurately reflects his views.

6.137 The **Panel** has made appropriate changes to paragraph 7.894 in response to this comment.

6.138 The **European Communities** requests that a sentence should be added in footnote 774 to paragraph 7.1028 stating that the only application that does not seem to have been submitted both under Regulation 258/97 and Directive 90/220 is the application for Transgenic green-hearted chicory (food use only).

6.139 The **Panel** notes that the European Communities points to no evidence in the record which would support its assertion that there is no application concerning Transgenic green-hearted chicory that was submitted and evaluated under Directive 90/220. The Panel is not convinced by the EC assertion. Indeed, the documents on the record do not support the EC assertion. Exhibit EC-98/At.11 relates to the application concerning the Transgenic green-hearted chicory (food). The Exhibit contains a letter which states "[e]nclosed you find the summary of the evaluation of potential risks to human health and the environment, carried out by the Netherlands competent authority for Directive 90/220/EEC". That summary in turn states that the application submitted under Directive 90/220 concerns "green hearted chicory (*Cichorium intybus* L.) [of] line GM-2-28." Exhibit EC-110/At.7 provides further confirmation, in its general introduction, of the fact that an application concerning the Transgenic green-hearted chicory was submitted under Directive 90/220 and Regulation 258/97 and that the Netherlands was the lead CA in both cases. The Panel therefore declines the EC request that it add a sentence to footnote 999.

6.140 The **European Communities** submits that an addition is required in the last sentence of paragraph 7.1031 to clarify that there were also labelling requirements for GMO-derived products under Regulation 258/97, albeit only for those products which still contained DNA traces (*see* Article

[211] Appellate Body Report, *EC – Sardines*, para. 301.

8 of Regulation 258/97 and Article 1 of Regulation 49/2000 amending Article 2(2) of Regulation 1139/98). Alternatively, the entire last sentence starting with "In particular…" could be taken out, as it does not seem to be of relevance to the issues in this dispute.

6.141 **Argentina** considers that the addition suggested by the European Communities is not clear and, consequently, objects to it, but Argentina supports the suggested deletion of the last sentence.

6.142 The **Panel** has made appropriate changes to para 7.1039 in response to this EC comment.

6.143 The **European Communities** requests that the last sentence of paragraph 7.1300 be deleted as it does not correctly reflect the European Communities' position. In fact, the European Communities has explicitly contested the Panel's authority to make such findings in its reply to Panel question No. 7 as well as in paragraph 151 of its second written submission.

6.144 **Argentina** submits, with regard to the EC reply to Panel question No. 7, that the European Communities stated in its answer that there has been no moratorium at all, when it stated that "[t]he approval procedures have never been suspended or stalled as alleged by the Complainants. In any event, even if certain delays that occurred in the application of Directive 90/220 were to be seen to constitute a 'moratorium', these must have ended with the application of Directive 2001/18." (paragraph 24 of the EC response) and that "[t]herefore, the European Communities respectfully requests the Panel to find that, with regard to applications withdrawn before the panel establishment and the alleged 'moratorium', the Complainants' case is without object and, hence, inadmissible *ab initio*" (paragraph 25 of the EC response). In Argentina's view, the European Communities did not contest the Panel's authority to rule on a measure that had ceased to exist, since the European Communities stated that the measure did not exist at all. Argentina further submits that paragraph 151 of the EC second written submission refers to the European Communities' answer to question No. 7, so the same observation applies here. Therefore, Argentina believes that the original wording in paragraph 7.1296 accurately reflects the EC position on a "measure that ceased to exist", and that the clarification requested by the European Communities should not be taken into account.

6.145 The **Panel** does not agree with how the European Communities describes its position as reflected in its second written submission and Panel question No. 7. Nevertheless, the Panel has added a footnote to paragraph 7.1308, to indicate what the European Communities stated before the Panel.

6.146 The **European Communities** suggests the deletion of a point made at paragraph 7.1303 regarding whether NK603 maize (food) could be marketed regardless of whether NK603 maize (for animal feed use) had obtained the lead CA's written consent. The European Communities submits that a market authorization under Regulation 258/97 is directly applicable and does not require any further consent from the lead CA. As there is no provision to this effect in the legislation nor any such condition in the market authorization itself, the use of this market authorization does not (and cannot legally) depend on the adoption of a market authorization for feed use under Directive 2001/18. This is different from the question of whether under Article 9 of Regulation 258/97 the assessment of environmental risks can be made dependent on a parallel assessment under Directive 90/220 (or Directive 2001/18). Furthermore, as regards NK603 maize (for use such as animal feed), the European Communities says that it would like to inform the Panel that final consent was given by the lead CA on 18 October 2004 (new Exhibit EC-168). Moreover, as regards MON863 maize, final consent was given by the lead CA on 13 February 2006 (new Exhibit EC-169). The European Communities would invite the Panel to take these facts into account and re-draft paragraph 7.1303 accordingly. In inviting the Panel to take these matters into consideration, the European Communities points out that the Complaining Parties have the opportunity to comment on

these comments, and thus the possibility to state if they contest the plain facts, duly evidenced, and if so, on what basis. There is thus no due process issue or prejudice *vis-à-vis* the Complaining Parties.

6.147 The **United States** recalls that it explained in the above discussion of the EC comment on BXN cotton that the DSU and the Panel's own working procedures do not permit a Panel to examine new evidence on the measures at issue submitted during the interim review stage. Accordingly, the United States submits that the Panel should not make the changes to paragraph 7.1303 of the interim report that the European Communities suggests.

6.148 **Canada** similarly states that for the reasons stated above, Canada opposes the EC attempt to reopen the factual record at the interim review stage. The European Communities will have an opportunity to introduce this new evidence during the implementation stage of the proceeding. In addition, Canada submits that Exhibit EC-169 is problematic for another reason; it is a document that has been submitted by the European Communities in the German language only. Canada reiterates its objection, first raised in its letter to the Panel, dated 29 June 2004, to the European Communities' practice of submitting evidence in a language other than one of the official WTO languages. In accordance with long-standing GATT and WTO practice, any document submitted as evidence in dispute settlement proceedings that is in a language other than an official WTO language must be accompanied by a version translated into one of the official languages.[212] The failure to submit a translation of Exhibit EC-169 means that the Panel should disregard this document.

6.149 **Argentina** acknowledges that the European Communities can make several more approvals from now on, and thus expect the Panel to continuously adjust the text of the interim report.. Despite this, we recall our argument in the sense that the matter of whether the "*de facto*" moratorium ceased to exist is not to be assessed, and that the approvals at this later stage should not have any influence on the matter.

6.150 The **Panel** has made appropriate changes at paragraph 7.1303 in response to this EC comment. The Panel notes in this regard that it has accepted the European Communities' request that the Panel delete the latter part of the third sentence of the old paragraph 7.1303. After reviewing the remainder of the third sentence, the Panel has determined that there is no need to retain it. The Panel has therefore deleted the entire third sentence. In the light of this, it is not necessary to consider whether it would be appropriate to take into account Exhibits EC-168 and EC-169, which were submitted only at the interim review stage. In relation to Exhibit EC-169, we note that, in any event, the document is in German and that no translation into any of three official languages of the WTO was provided to the Panel and the other Parties.

6.151 The **European Communities** submits that, the wording of the old paragraph 7.1311 should be changed to "continuing existence of opposition to approvals amongst member States" because the phrase "continuing member State opposition" is too sweeping a statement as there is no such thing as a generalised opposition of member States to approvals. It also overlooks the reasons which explain the opposition of each individual member State in each specific procedure.

6.152 The **United States** considers that the two phrases have slightly different emphases – the phrase drafted by the Panel is clearer, and more accurately reflects the level of member State opposition. The European Communities wishes to soften the Panel finding, but the European Communities presents no valid basis for doing so. The Panel's findings on member State actions in support of the moratorium (*see*, *e.g.*, paragraph 7.1273) are more than sufficient to support the language currently used in paragraph 7.1311 of the interim report.

[212] Canada refers to Panel Report, *Korea –Dairy*, para. 7.16.

6.153 The **Panel** has made appropriate changes to paragraph 7.1311 in response to this EC comment.

6.154 The **European Communities** identified a missing reference to the year 1999 in paragraph 7.1543.

4. Product-specific measures

(a) Comments by Argentina

6.155 **Argentina** identified words included by oversight in paragraph 7.1873.

(b) Comments by the European Communities

6.156 The **European Communities** contends that the date referred to in paragraph 7.1634 and the accompanying footnote should be August 2005 and not September 2005 as the application concerning RR oilseed rape (EC-70) was approved on 31 August (*see* Official Journal of the European Union N°L 228 of 3 September 2005, at page 11). The European Communities also requests a reference to the application concerning MON863 maize in the relevant footnote.

6.157 The **Panel** has made appropriate changes to paragraph 7.1641 in response to this comment, noting again that it was the EC letter of 1 September 2005 which suggested the 1 September 2005 approval date. The Panel sees no need for referring, in a footnote relating exclusively to RR oilseed rape (EC-70), to the application concerning MON863 maize.

6.158 The **European Communities** requests changes to paragraph 7.1662 and footnote 1143. Specifically, the European Communities suggests the deletion of a point made in footnote 1143 regarding whether NK603 maize (food) could be marketed regardless of whether NK603 maize (for animal feed use) had obtained the lead CA's written consent. The European Communities has addressed this point in its comment on paragraph 7.1303. Furthermore, and as also already explained in the above comment on paragraph 7.1303, regarding NK603 maize (for use such as animal feed), the European Communities contends that final consent was given by the lead CA on 18 October 2004 (new Exhibit EC-168). Moreover, as regards MON863 maize, the European Communities contends that final consent was given by the lead CA on 13 February 2006 (new Exhibit EC-169). The European Communities would invite the Panel to take these facts into account and re-draft the footnote accordingly. In inviting the Panel to take these matters into consideration, the European Communities points out that the Complaining Parties have the opportunity to comment on these comments, and thus the possibility to state if they contest the plain facts, duly evidenced, and if so, on what basis. There is thus no due process issue or prejudice *vis-à-vis* the Complaining Parties.

6.159 The **United States** argues that as for paragraph 7.1303 above, the European Communities invites the Panel to make new findings, based on newly submitted exhibits, with regard to two approvals purportedly made after the establishment of the terms of reference. As the United States explained above, under the DSU and the Panel's working procedures, it would not be proper for the Panel to accept new exhibits on the measures at issue during the interim review stage, nor to make new findings to reflect the information in such exhibits.

6.160 **Canada** similarly states that for the reasons stated above, Canada opposes the EC attempt to reopen the factual record at the interim review stage. The European Communities will have an opportunity to introduce this new evidence during the implementation stage of the proceeding. In addition, Canada recalls that Exhibit EC-169 is problematic for another reason; it is a document that

has been submitted by the European Communities in the German language only. The failure to submit a translation of Exhibit EC-169 means that the Panel should disregard this document.

6.161 **Argentina** also disagrees with the suggested modifications. As Argentina stated before, the approvals in its view do not make any difference, since Argentina believes that the Panel should make no findings about the implication of these late approvals referring to any possible end of the "*de facto*" moratorium.

6.162 The **Panel** has made appropriate changes to paragraph 7.1669 and has deleted the relevant sentence in the footnote. However, the Panel declines the European Communities' invitation to take into account the information provided by the European Communities in the new Exhibits EC-168 and EC-169.

6.163 We first address Exhibit EC-168. Exhibit EC-168 contains a decision of the Spanish Ministry of the Environment dated 18 October 2004. In addressing this Exhibit, we recall the above-referenced provisions of paragraph 12 of the Panel's Working Procedures and observe that, in this instance, the European Communities has not made a showing of good cause for submitting in March 2006 what it could have submitted already in October 2004. Indeed, the European Communities provides no reason for the late filing. The European Communities merely argues that the Complaining Parties still have an opportunity to comment on the new exhibit. This argument is misconceived. Paragraph 12 of the Panel's Working Procedures states that "[p]arties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others", unless an exception is granted on a showing of good cause. The fact that paragraph 18 of the Panel's Working Procedures gives the Parties the opportunity within a time-period specified by the Panel to submit written comments on the other Parties' written requests for review does not excuse the European Communities from complying with the provisions of paragraph 12 of the Working Procedures. We also recall that in *EC - Sardines* the Appellate Body stated in unqualified terms that "[t]he interim review stage is not an appropriate time to introduce new evidence".[213]

6.164 Turning to Exhibit EC-169, we note that this exhibit apparently contains a decision of the German lead CA dated 13 February 2006. As an initial matter, we recall that the document is in German and that no translation into any of three official languages of the WTO was provided. Even disregarding this, the Panel considers that it would be inappropriate to refer to the application concerning MON863 maize in footnote 1365 given that that footnote concerns the product-specific measures challenged by the Complaining Parties. None of the product-specific measures challenged by the Complaining Parties concerns the application concerning MON863 maize.

6.165 The **European Communities** identified a missing reference to the year 1999 in paragraph 7.1809.

6.166 Like Argentina, the **European Communities** identified words included by oversight in paragraph 7.1873.

6.167 The **European Communities** submits that the wording of the third sentence of paragraph 7.2222 should be changed to provide further clarification as to what the issue exactly was.

6.168 The **Panel** has made appropriate changes to paragraph 7.2229 in response to this comment.

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[213] Appellate Body Report, *EC – Sardines*, para. 301.

6.169 The **European Communities** requests that a footnote reference be put in paragraph 7.2324 indicating where the arguments summarized in this paragraph have been made in the US submissions. The European Communities has been unable to identify the source of the arguments set out in that paragraph. If the arguments have not been made in the US submission they should of course be deleted from the summary.

6.170 The **United States** notes that the point that before the European Communities adopted its moratorium, all approval procedures under Directive 90/220 were undertaken and completed in less than three years is made in paragraph 138 of the US first written submission. The United States further notes that additional support for this assertion is provided in Annex II to the US reply to Panel question No. 75(c).

6.171 The **Panel** sees no need for adding a footnote and notes that its argument summary is based on arguments set out at paragraph 138 of the US first written submission which refers to, and should be read together with, Exhibit US-31. As noted by the United States, the United States' reply to Panel question No. 75(c) contains further relevant information. Nonetheless, in response to the EC comment the Panel has deleted the last sentence of paragraph 7.2331, and has modified paragraph 7.2332. Furthermore, in order to ensure consistency across Section VII.E, the Panel has made corresponding changes to all US argument summaries which relate to the other product-specific measures challenged by the United States. In reviewing its findings concerning the US argument about the period of time during which the relevant applications were pending, the Panel also noticed that a small portion of the findings had been inadvertently omitted from the interim reports, and so the Panel has added the missing portion at paragraph 7.1929. In view of this addition, a similar statement included at paragraph 7.2295 became redundant and was therefore deleted.

5. EC member State safeguard measures

(a) Comments common to Canada and Argentina

6.172 **Canada** and **Argentina** identified mistaken references to Argentina in paragraphs 7.3170-7.3171.

(b) Comments by Canada

6.173 **Canada** identified a typographical error at paragraph 7.2963.

6.174 **Canada** also recalls that at paragraph 7.3390, the Panel indicates that, in respect of Canada's claims under Article 2.2 of the *SPS Agreement*, the EC member State safeguard measures are inconsistent with both Articles 5.1 and 5.7, and therefore, by implication, are inconsistent with Article 2.2. Canada submits that the finding of a dual inconsistency with both Articles 5.1 and 5.7 seems to contradict the Panel's earlier reasoning on the issue of whether Articles 5.1 and 5.7 can apply at the same time. Canada understands the Panel's findings and conclusions with respect to Articles 5.1 and 5.7 to be that Article 5.7 does not apply because sufficient scientific evidence existed to complete a risk assessment at the time the safeguard measures were adopted. On that basis, Article 5.1, rather than Article 5.7, applies and the measures are inconsistent with Article 5.1 because they are not based on a risk assessment. Similarly, therefore, Article 2.2, rather than Article 5.7, would apply, and the measures would be inconsistent with it because they are not based on scientific principles, and are being maintained without sufficient scientific evidence. Canada requests the Panel to clarify this issue and make the appropriate changes in the final report.

6.175 The **European Communities** argues that Canada vaguely requests the Panel to "clarify this issue and make the appropriate changes in the final report." In the European Communities' view, this is hardly compatible with the requirement set out in Article 15.2 of the DSU to submit requests to review precise aspects of the interim report. Indeed, neither is it clear what the Panel is to do in order to accede to Canada's request, nor is it possible for the European Communities to make any meaningful comment in the absence of a precise suggestion. Canada's request should therefore be refused.

6.176 The **Panel** has made appropriate changes in Sections VII and VIII of the final reports to clarify the issue identified by Canada. The Panel also notes that it has used the concept of "consistency" in connection with Article 5.7 in view of the Appellate Body's use of that concept in the *Japan – Apples* and *Japan – Agricultural Products II* reports.[214]

6. Conclusions and recommendations

6.177 **Argentina** identified a mistaken reference to Canada at paragraph 8.57(c).

D. OTHER CHANGES TO THE INTERIM REPORTS

6.178 The **Panel** has also made a number of other changes, throughout the reports, which were not specifically requested by the Parties. The Panel has done so in an effort to eliminate typographical errors and edit its reports.

E. REQUEST FOR REDACTION OF PORTIONS DISCLOSING STRICTLY CONFIDENTIAL INFORMATION

6.179 As noted *infra*, at footnote 233, the Panel, at the request of the European Communities, put in place a special set of procedures for the protection of strictly confidential information ("SCI"), notably to protect sensitive company information submitted by the European Communities. The interim reports submitted to the Parties contained references to information designated by the European Communities as SCI, and the Panel identified them as such.

6.180 At the invitation of the Panel, the **European Communities** on 7 April 2006 submitted specific requests for bracketing/redaction of words, sentences and/or paragraphs in the interim reports which, in its view, disclose SCI. The European Communities stated that there was no information contained in the findings of the interim reports that directly constitutes SCI. In contrast, the European Communities identified certain references at paragraphs 271, 621, 622 and 623 of Annex H which it considered to disclose SCI and which it requested to be redacted from the public versions of the final reports.

6.181 The **Complaining Parties** on 18 April 2006 made use of the opportunity granted by the Panel to comment on the EC requests. They indicated that they had no objection to the removal of the SCI designation on information contained in the body of the interim reports or to the requests for redaction as set out in the EC letter of 7 April 2006.

6.182 Taking account of the views expressed by the Parties, the **Panel** made appropriate redactions at paragraphs 271, 621, 622 and 623 of Annex H. They are identified in Annex H as "[xxx]".

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[214] Appellate Body Reports, *Japan – Apples*, paras. 176 and 177; *Japan – Agricultural Products II*, para. 89.

F. PUBLIC DISCLOSURE OF THE PANEL'S CONFIDENTIAL INTERIM REPORTS

6.183 On 7 February 2006, the Panel provided paper and electronic copies of its confidential interim reports to the Parties. On 9 February 2006, the Panel sent a letter to the Parties to draw their attention to the fact that a commercial trade publication had posted on its website the conclusions and recommendations (Section VIII) of the Panel's confidential interim reports. The Panel noted that this was a matter of grave concern to it, recalling that it was critical to the functioning of the interim review process that all Parties maintained the confidentiality of the interim reports. The Panel further recalled that confidentiality at all stages of the process is an inherent part of the WTO dispute settlement system whose purpose is to secure a positive solution to a dispute. The Panel also observed that the maintenance of the confidentiality of the interim reports was particularly important in order to avoid that information contained in the reports and designated as SCI would be disclosed to unauthorized persons. The Panel requested the Parties to provide any information they had as to how the breach of confidentiality had occurred and urged all Parties to take all necessary steps to protect the confidentiality of the interim reports.

6.184 Subsequently, on 2 March 2006, the Panel sent another letter to the Parties to point out that Friends of the Earth (FOE) Europe had posted on its website the Panel's confidential interim reports in their entirety, *i.e.*, the descriptive part as well as the findings and conclusions. The Panel noted that in a statement made available on its web site, FOE claimed to have refrained from disclosing SCI in the version it had published, on the advice of its lawyers. The Panel stated that the leak in question was particularly serious, not just because it was far more comprehensive, but also because unlike the conclusions section of the interim reports which had been previously leaked, the findings section of these reports contained SCI.

6.185 The Panel recalled in this regard that FOE claimed that it did not disclose SCI in its published versions of the findings. In the Panel's view, however, even assuming that no SCI was in fact disclosed as a result of the action of FOE, FOE's action represented another serious incident which could damage the integrity of the WTO dispute settlement system as a whole. The Panel noted in this respect that it is very difficult to see why any private party would wish to provide panels, complaining parties and responding parties with strictly confidential information that is in its sole possession if it cannot have confidence that this information will not be disclosed without its permission during the interim review process.

6.186 The Panel again requested the Parties to provide any information they might have as to how the second breach of confidentiality occurred. The Parties responded to the Panel's letters as indicated below.

6.187 The **United States** observed that it shared the Panel's grave concerns. With regard to the first breach of confidentiality, the United States noted that pertinent information had been posted by the relevant publication that placed Section VIII on the internet. In particular, the website noted that the source for Section VIII was the "Institute for Agriculture and Trade Policy" (IATP). The United States pointed out that IATP is an NGO that, among other things, opposes the adoption of agricultural biotechnology. The United States stated that it was certain that no person provided by the United States with access to the interim reports had any contacts with IATP regarding those reports. Moreover, the United States noted that each person provided by the United States with access to the interim reports was aware of and respected the confidential nature of the interim reports. Thus, the United States contended that it had not been, nor would it be, the source of breaches of confidentiality regarding the interim reports.

6.188 Regarding the publication by "Friends of the Earth Europe" of a complete copy of the findings (Section VII) on the internet, the United States noted that the source of the leak appeared to be the same as the source of the 8 February leak of Section VIII of the interim reports. The United States submitted that the Friends of the Earth Europe website included a press release, datelined Geneva/Brussels 8 February 2006, stating that three NGOs – Institute for Agriculture and Trade Policy, Friends of the Earth Europe, and Greenpeace – jointly published Section VIII of the interim reports on the internet. Moreover, the United States asserted that in a separate briefing paper, Friends of the Earth Europe states: "Friends of the Earth has, on legal advice, deleted limited company-specific information from the interim report we are publishing in order to avoid legal action against us." According to the United States, this statement indicates that Friends of the Earth Europe has received a complete copy of Section VII, including SCI. Furthermore, the United States emphasized, the version of the report that Friends of the Earth Europe published on the internet in fact contained several pages, without any redactions, that the cover sheet of the reports indicated as containing SCI. The United States noted in this regard that it agreed with the Panel that a leak of material containing SCI was of extraordinary concern.

6.189 In respect of this second breach of confidentiality, the United States contended that it was not the source of the leak of the confidential interim reports. According to the United States, no person provided by it with access to the interim reports had any contacts with Friends of the Earth Europe regarding the interim reports. Moreover, in accordance with the Panel's strict rules governing SCI supplied by other Parties, the United States stated that it had tightly controlled distribution and use of any portion of the interim reports containing SCI. Furthermore, the United States asserted that it was apparent from the content of the "Briefing Paper" (entitled "Looking behind the US spin: WTO ruling does not prevent countries from restricting or banning GMOs") by Friends of the Earth Europe that no Complaining Party would have had reason to provide a copy of the findings to Friends of the Earth Europe.

6.190 In addition, the United States noted that the Panel's additional SCI procedures permitted at least one possible scenario under which provision of SCI to Friends of the Earth Europe would not have been a breach of those procedures. According to the United States, the Panel's SCI rules "do not apply to a party's treatment of its own SCI", and the European Communities was the only Party that had submitted SCI in this dispute.

6.191 **Canada** stated that as regards the "leak" of the findings and conclusions set out in the interim report it shared the Panel's concerns. Furthermore, Canada stated that it was in no way involved in these incidents, and deplored such breaches of confidentiality. Canada noted that, despite media demands for comments based on the leak, the Government of Canada had refused to make any public statement beyond acknowledging that it has received the interim report and was studying it. Finally, Canada remarked that should any information come to its knowledge as to how the breach of confidentiality occurred it would forward this information to the Panel and the Secretariat without delay.

6.192 **Argentina** stated that it was not involved in any way in the reported leaks referenced in the Panel's letters. Moreover, Argentina stated that it had no information to provide about how the breach of confidentiality had occurred. Argentina noted, finally, that should any information come to its knowledge regarding these regrettable incidents, it would forward this information to the Panel and the Secretariat without delay.

6.193 The **European Communities** stated that it was concerned by the serious breach of the confidentiality of Panel proceedings. With regard to the first breach of confidentiality, involving the disclosure of the conclusions of the interim reports, the European Communities pointed out that as far

as it could establish the leak first occurred via a United States based NGO, the Institute for Agriculture and Trade Policy, as the relevant document was posted on their website.

6.194 In respect of the second breach of confidentiality, which occurred via Friends of the Earth Europe, the European Communities said it would refrain from making groundless accusations or insinuations, or from speculating about which Party might or might not have profited from the public dissemination of the document. Instead, the European Communities said, it could confirm that it had no information about the source of the leak and no indication that there had been any breach of confidentiality attributable to the European Communities. On the contrary, the European Communities maintained, it had systematically ensured that all persons having access to the interim reports were informed of its confidentiality and the need to preserve it.

6.195 The **Panel** notes with satisfaction that all Parties deplored and condemned the serious breaches of the confidentiality of the interim reports which occurred in this case. The Panel further notes that each Party formally stated that it had no involvement in the leaks of the confidential interim findings and conclusions. It is plain to see that these statements cannot easily be reconciled with the fact that these leaks did occur. However, as is apparent from the above summary of the Parties' responses to the Panel's letters, the Panel was not provided sufficient reliable information to determine the origin(s) of the leaks. The Panel subsequently sent a letter to the Parties to inform them that it intended to take appropriate action to try to avoid further leaks of the reports upon issuance of the final reports (*see* the Panel's letter to the Parties contained in Annex K).

6.196 It should be noted, in addition, that the Institute for Agriculture and Trade Policy and Friends of the Earth submitted *amicus curiae* (friend-of-the-court) briefs, requesting the Panel to accept and consider their briefs.[215] The Panel acknowledged receipt of these briefs, shared them with the Parties and Third Parties, and accepted them as such.[216] In the light of this, it is surprising and disturbing that the same NGOs which claimed to act as *amici*, or friends, of the Panel when seeking to convince the Panel to accept their unsolicited briefs subsequently found it appropriate to disclose, on their own websites, interim findings and conclusions of the Panel which were clearly designated as confidential.

VII. FINDINGS

7.1 The Panel observes that the United States, Canada, Argentina and the European Communities (hereafter "the Parties") have used different terms to refer to the products at issue in this dispute. The separate requests for the establishment of a panel by the United States, Canada and Argentina (hereafter collectively referred to as "the Complaining Parties") all refer to measures affecting "biotech products".[217] The European Communities' legislation identified by all of the Parties as relevant to the case in hand refers to genetically modified organisms (hereafter "GMOs").[218] All of the Parties to the dispute agree that, technically, the specific products at issue in this case are plants (and the products thereof) developed through the use of recombinant DNA techniques.

[215] *See infra*, Section VII.A.2.
[216] *Ibid*.
[217] WT/DS291/23, WT/DS292/17 and WT/DS293/17.
[218] Council Directive 90/220/EEC "on the deliberate release into the environment of genetically modified organisms"; Regulation (EC) No 258/97 "concerning novel foods and novel food ingredients"; and Directive 2001/18/EC of the European Parliament and of the Council "on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC".

7.2 In its consideration of the matter before it, the Panel uses interchangeably the terms biotech products, GMOs, GM plants, GM crops or GM products, without prejudice to the views of the Parties to the dispute.

A. PROCEDURAL AND OTHER GENERAL MATTERS

7.3 In this opening section, we address a number of procedural and other general matters. First of all, we explain how in preparing this document we have taken account of the fact that the Complaining Parties in this dispute have brought legally separate complaints. Then we set out how we have dealt with the unsolicited *amicus curiae* briefs sent to the Panel. Next we address how we have reached and implemented our decision to consult individual scientific experts and international organizations. We then go on to explain that certain annexes to this document are available only on-line, and we offer some general remarks on the challenges faced by the Panel in conducting these proceedings. After that, we reproduce in full our preliminary ruling on whether the Complaining Parties' separate requests for the establishment of a panel are inconsistent with Article 6.2 of the DSU, as claimed by the European Communities. Finally, we address the issue of the relevance of non-WTO rules of international law to the interpretation of the WTO agreements at issue in this dispute.

1. Multiple complaints

7.4 The Complaining Parties in this dispute did not bring a joint complaint against the European Communities. Instead, they filed legally separate complaints, and separately requested the establishment of a panel. Since these requests for the establishment of a panel related to the same matter, the DSB, consistent with the procedures for multiple complaining parties provided for in Article 9.1 of the DSU, established a single panel to examine the three complaints.

7.5 Article 9.2 of the DSU provides that when a single panel is established to examine multiple complaints, the panel is to submit separate reports on the dispute concerned if one of the parties to the dispute so requests. We have sought the views of the Parties to this dispute on the question of separate panel reports. None of the Parties requested that we submit separate panel reports. Instead, as we understand it, all Parties effectively agreed that the Panel could issue a single document constituting three reports; that the introductory and descriptive parts could be common to all reports; that the findings could be common to the three reports, except where the claims presented and the evidence submitted by the Complaining Parties were different; and that the conclusions and recommendations should be different for each report.

7.6 The Panel saw no reason to disagree with the approach suggested by the Parties. Accordingly, we decided to prepare and issue one single document constituting three separate panel reports. This is why the present document bears the symbols and DS numbers of all three complaints, *i.e.*, DS291 for the complaint by the United States, DS292 for the complaint by Canada and DS293 for the complaint by Argentina. The present document comprises a common introductory part and some common annexes. The descriptive part and certain annexes contain separate sections for each Party. Thus, the description of, *e.g.*, the United States' arguments is part of the report concerning the United States' complaint. The description of the European Communities' arguments is basically relevant to all three reports, as the European Communities has provided an integrated defence in this case. However, some portions of the European Communities' arguments are relevant to only one report.

7.7 Regarding the findings section of the three reports, we have particularized the findings for each of the Complaining Parties only where we found it necessary to do so. Thus, many (although not all) of the legal interpretations developed by the Panel are common to all three reports. On the other hand, we have particularized the conclusions for each claim made by a Complaining Party. To

distinguish the complaint-specific conclusions, we use the appropriate DS numbers. Hence, a conclusion which is part of the report concerning the United States' complaint is preceded by the reference "DS291 (United States)". Where we have made findings, or relied on materials submitted as evidence[219], which are specific to one of the three complaints, we have indicated this by using the relevant DS number, if it was not otherwise clear from the relevant context. Also, in summarizing the Complaining Parties' arguments, we have provided separate summaries for each Complaining Party where the arguments were different; where the Complaining Parties' arguments were identical or very similar, we have generally prepared an integrated argument summary for all Complaining Parties.

7.8 With regard to the final section of this document, entitled "Conclusions and Recommendations", we note that the conclusions we reached and the recommendations we made have been particularized for each Complaining Party. Accordingly, this document contains three independent sets of conclusions and recommendations.

7.9 In our view, the approach outlined above satisfies the requirement contained in Article 9.2 that a single panel present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. We also consider that this approach is consistent with the approach followed in a similar situation by the panel in *US – Steel Safeguards*.[220]

2. *Amicus curiae* briefs

7.10 In the course of these proceedings, we received three unsolicited *amicus curiae* briefs: on 6 May 2004 we received an *amicus curiae* brief from a group of university professors[221]; on 27 May 2004 we received an *amicus curiae* brief from a group of non-governmental organizations[222] represented by the Foundation for International Environmental Law and Development (FIELD); and on 1 June 2004 we received an *amicus curiae* brief from a group of non-governmental organizations[223] represented by the Center for International Environmental Law (CIEL). These briefs were submitted to us prior to the first substantive meeting of the Panel with the Parties, and the Parties and Third Parties were given an opportunity to comment on these *amicus curiae* briefs.[224]

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[219] We note that the Complaining Parties have only partly submitted the same factual evidence in support of their claims. In some cases, the Complaining Parties have explicitly relied on evidence submitted by another Complaining Party, but no Complaining Party has stated that, for the purposes of its complaint, it wished to rely also on all evidence submitted by the other Complaining Parties.

[220] Panel Reports, *US – Steel Safeguards*, para. 10.725.

[221] Lawrence Busch (Michigan State University), Robin Grove-White (Lancaster University), Sheila Jasanoff (Harvard University), David Winickoff (Harvard University) and Brian Wynne (Lancaster University).

[222] Gene Watch, Foundation for International Environmental Law and Development (FIELD), Five Year Freeze, Royal Society for the Protection of Birds (RSPB)(UK), the Center for Food Safety (USA), Council of Canadians, Polaris Institute (Canada), Grupo de Reflexión Rural Argentina, Center for Human Rights and the Environment (CEDHA) (Argentina), Gene Campaign, Forum for Biotechnology and Food Security (India), Fundación Sociedades Sustentables (Chile), Greenpeace International (The Netherlands), Californians for GE-Free Agriculture, International Forum on Globalisation.

[223] Center for International Environmental Law (CIEL), Friends of the Earth – United States (FOE-US), Defenders of Wildlife, the Institute for Agriculture and Trade Policy (IATP), and the Organic Consumers Association (OCA).

[224] Only the United States and the European Communities referred to these briefs. The United States comments extensively on the arguments in the *amicus curiae* briefs in its second written submission, but concludes that the information provided in those briefs are of no assistance to the Panel in resolving this dispute. US second written submission, attachment III. The European Communities refers to the argument in the *amicus curiae* briefs in its first oral statement. The European Communities' first oral statement, para. 15.

7.11 We note that a panel has the discretionary authority either to accept and consider or to reject any information submitted to it, whether requested by a panel or not, or to make some other appropriate disposition thereof.[225] In this case, we accepted the information submitted by the *amici curiae* into the record. However, in rendering our decision, we did not find it necessary to take the *amicus curiae* briefs into account.

3. Consultation of individual scientific experts and international organizations

7.12 We now address the Panel's decision to consult individual scientific experts and certain international organizations. In this regard, Article 11.2 of the *SPS Agreement* provides that:

> "In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative."

7.13 Articles 14.2 and 14.3 of the *TBT Agreement* provides that:

> "14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.
>
> 14.3 Technical expert groups shall be governed by the procedures of Annex 2."

7.14 Finally, Article 13.1 of the DSU provides in relevant part:

> "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."

7.15 In light of the claims of the Complaining Parties that the measures at issue violated, *inter alia*, the *SPS Agreement* and/or the *TBT Agreement*, at the time of the organizational meeting the Panel established a deadline for the Parties to request the Panel to seek appropriate scientific and technical advice pursuant to the provisions of these agreements.

7.16 On 27 May 2004, the European Communities formally requested the Panel to seek advice from scientific and technical experts at an appropriate stage. In particular, the European Communities suggested that the Panel seek advice from the most relevant sources reflecting a representative spectrum of views, including individual experts and perhaps competent international organizations. Shortly thereafter, the European Communities submitted a proposal for the terms of reference for scientific and technical advice. The Complaining Parties expressed the view that they did not consider it necessary for the Panel to seek any scientific and technical advice, *inter alia* because they were not challenging the opinions or assessments of the EC scientific committees.

7.17 The Panel decided to take a decision regarding the need for expert advisers only in the light of the second written submissions by the Parties, and provided the Parties with a further opportunity to comment on the need for expert advice. The European Communities repeated its request for input from experts; the Complaining Parties continued to argue that no expert advice was necessary in the circumstances of this case.

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[225] Appellate Body Report, *US – Shrimp*, paras. 104 and 108.

7.18 On 4 August 2004, the Panel informed the Parties that it considered that certain aspects of the Parties' submissions raised scientific and/or technical issues in respect of which the Panel might benefit from expert advice. Accordingly, the Panel decided to consult individual experts to obtain their opinion on certain scientific and/or technical issues raised in the Parties' submissions.[226] In particular, the Panel indicated that it would seek expert advice on three categories of issues:

(a) for each product application, the scientific or technical grounds for: the comments and/or objections raised by EC member States, the requests for additional information, and the time taken to evaluate the additional information provided;

(b) for each product for which a safeguard measure was taken by one of the relevant EC member States, how the scientific or other documentation relied upon by these member States compares with various standards for risk assessment, and whether the documentation relied upon by these member States was sufficient to support the safeguard measures taken; and

(c) for each biotech product subject to the complaint, whether there are significant differences in the risks arising to human, plant or animal health, or to the environment, from the consumption and use of: products of biotechnology approved by the European Communities prior to October 1998; comparable novel non-biotech products; and foods produced with biotech processing aids.

7.19 Also on 4 August 2004, the Panel decided that it would seek information from certain international organizations which might assist the Panel in determining the meaning of selected terms and concepts. Most of these terms and concepts appear in the WTO agreements at issue in this dispute (*e.g.*, "pest"). We note in this regard that the European Communities argued that the Panel also needed to consult scientific experts on the meaning of the relevant terms. The Complaining Parties opposed the European Communities' request, arguing that the terms in question were terms appearing in WTO agreements and that, as such, the Panel needed to determine their meaning by applying the customary rules of interpretation of public international law, as required by Article 3.2 of the DSU.

(a) Consultation of individual experts

7.20 The Panel invited the Parties to suggest specific questions on the three issues it had identified. All of the Parties suggested specific questions on these issues. In addition, the European Communities suggested that the Panel seek the advice of at least two experts competent in at the least the following fields of expertise: agrobiodiversity, agronomy, allergology, animal husbandry, animal pathology, biochemistry, biological diversity, control and inspection methods, crop husbandry, DNA amplification, ecology, epidemiology, entomology, environmental impact monitoring methods, environmental sciences, food and feed safety, gene expression, gene sequencing, genetics, genetic modification detection methods, genomic stability, handling transport and packaging methods, herbicide chemistry, histopathology, immunology, malherberology and weed sciences, medicine, medical microbiology and antibiosis, molecular biology, nutrition, ornithology, phytopathology, plant breeding, plant development, plant-microbe interactions, plant protection and residues of plant protection products, plant reproduction and plant biology, population genetics, risk assessment and

[226] The Panel decided to seek advice from individual scientific and technical experts as no party formally requested that such information be sought from an expert group. The approach of the Panel is consistent with the approach followed by previous panels considering alleged violations of the *SPS Agreement* and the *TBT Agreement*.

risk analysis processes, sampling methods, soil chemistry and soil sciences, soil microbiology therapeutics, toxicology, and veterinary medicine.

7.21 On 19 August 2004, the Panel requested the assistance of the CBD, Codex, FAO, IPPC, OIE and WHO to identify appropriate experts to address the issues identified above. Thirty individuals were identified by these organizations, and each of these experts was contacted by the Secretariat. Those experts who were available and interested in providing advice to the Panel were requested to provide a curriculum vitae (hereafter "CV"). Nineteen experts responded positively and their CVs were provided to the Parties. The Parties were given the opportunity to comment on each expert and in particular to make known to the Panel any compelling objections they might have to the Panel's consulting that individual with respect to the case at hand. The Parties submitted their compelling objections with regard to many of the experts by pointing, for example, that: they were actually involved in the procedures at issue in this dispute; they were employees of either party to this dispute; and they had been involved in activities which might cast doubts on their impartiality.

7.22 The Parties were also invited to submit suggestions for experts with respect to the issues before the Panel. These experts were also contacted by the Secretariat, and those interested and available to assist the Panel were invited to submit a CV. These CVs were also provided to the Parties, who were again given the opportunity to comment on the experts suggested and to identify any compelling objections. Seventy additional experts were identified by the Parties, and CVs were received from 29 of these.

7.23 On 13 October 2004, the Panel informed the Parties of the names of the experts it had selected. Argentina had expressed objections to one of the experts subsequently selected by the Panel. The Panel reconsidered the qualifications of the individual concerned, as well as the information provided by the expert with respect to any potential conflicts of interest, and determined that the objections raised by Argentina did not provide compelling grounds for not selecting this expert.

7.24 According to the additional working procedures for the consultation of experts adopted by the Panel in consultation with the Parties, the experts were requested to act in their individual capacities and not as representatives of any organisation. They were not informed of the identities of the other experts advising the Panel, until such time as they were provided with the written responses to the Panel's questions from all of the experts.

7.25 The experts selected by the Panel were:

> Dr. David Andow, Department of Entomology, University of Minnesota, St. Paul, Minnesota, USA;
>
> Dr. Marilia Regini Nutti, Director, National Research Center for Food Technology, Brazilian Agricultural Research Corporation (EMBRAPA), Rio de Janeiro, Brazil;
>
> Dr. Allison Snow, Department of Evolution, Ecology & Organismal Biology, Ohio State University, Columbus, Ohio, USA; and
>
> Dr. Geoff Squire, Scottish Crop Research Institute, Dundee, United Kingdom.

One expert selected by the Panel, Dr. David J. Hill of the Department of Allergy, Royal Children's Hospital, Melbourne, Australia, subsequently informed the Panel that he was unable to assist the Panel.

7.26 The Parties were consulted with regard to the questions to be submitted to the experts in writing. The experts were provided with all relevant parts of the Parties' submissions (including exhibits and Strictly Confidential Information) on a confidential basis. Each selected expert was requested immediately to inform the Panel of those questions which he/she did not intend to answer because they did not consider that they had the appropriate expertise. Following clarification of some of its written questions, the Panel identified two issues on which the selected experts were not likely to provide advice: the molecular characterization of certain oilseed rape and starch potato products, and quantitative detection methods.

7.27 On 15 November 2004, the Panel invited the Parties to submit names of individuals with expertise on these two particular issues, preferably from among individuals who had previously indicated their willingness to advise the Panel, and to provide the CV for any new expert they wished to be considered by the Panel and the other Parties. A total of 22 individuals with expertise in one or both of these issues were identified by the Parties, including 13 new experts. The Parties were given an opportunity to comment on each of these experts and to make known any compelling objections to their selection as advisers to the Panel. The European Communities expressed objections to one of the additional experts selected by the Panel. The Panel reconsidered the qualifications of the individual concerned, as well as the information provided by the expert with respect to any potential conflicts of interest, and determined that the objections raised by European Communities did not provide compelling grounds for not selecting this expert to address the two issues identified. The Panel subsequently selected the following two additional experts to respond exclusively to questions concerning the aforementioned two issues:

> Dr. Marion Healy, Chief Scientist, Food Standards Australia New Zealand (FSANZ), ACT, Australia;
>
> Dr. John W Snape, Crop Genetics, John Innes Center, Norwich, United Kingdom.

7.28 The procedures described in paragraph 7.24 above were also followed with respect to Drs. Healy and Snape.

7.29 The Panel's 114 questions, and the written responses from the experts, are compiled in Annex H. The questions were sent to the experts on 22 October 2004, and additional questions were sent on 19 November 2004. The written responses from all of the experts to the questions by the Panel were received on 5 January 2005. The Parties were given an opportunity to comment on the replies by the experts, and subsequently to comment on the comments of the other Parties. The Parties' comments were also provided to the experts. On 17-18 February 2005, the Panel met with all of the experts; the Parties were invited to participate in this meeting. The experts were given the opportunity to provide further information regarding the questions of the Panel, to respond to the comments made by the Parties, and to respond to further questions from the Panel and the Parties. A transcript of the Panel's meeting with the experts is contained in Annex J.

7.30 The Panel wishes to record its appreciation of the experts and of their contributions to the resolution of this dispute. They provided detailed and comprehensive responses to a large number of questions from the Panel and the Parties, respecting the strict time constraints which had to be established by the Panel. They provided the necessary scientific input to assist the Panel in understanding the issues raised by the Parties and to resolve the trade dispute before it. The clarity of their explanations and their professionalism was particularly appreciated by the Panel.

(b) Consultation of international organizations

7.31 Regarding the Panel's decision to seek information from international organizations, it should be noted that the Parties were consulted both on the international organizations from which information would be sought and on the list of terms on which information would be sought. Taking into account the Parties' view, the Panel decided that it would seek information from the secretariats of the CBD, Codex, FAO, IPPC, OIE, UNEP and WHO. In December 2004, the Panel contacted these organizations and invited them to identify appropriate standard references (scientific or technical dictionaries, documents adopted or circulated by the relevant international organization, etc.) that would assist the Panel in ascertaining the meaning of certain terms and concepts. The Parties were given an opportunity to comment in writing on the materials provided to the Panel by the international organizations.

7.32 The Panel appreciates the assistance provided by the secretariats of the CBD, Codex, FAO, IPPC, OIE, UNEP and WHO with respect to its requests.

4. Annexes available on-line only

7.33 The Panel has consulted the Parties on the need of including in the panel reports: (i) the experts' replies to the Panel's questions; (ii) the Parties' comments on these replies and on each other's comments; (iii) the transcript of the expert meeting of 17-18 February 2005; and (iv) the Parties' replies to the Panel's and each others' questions. In the event the Parties saw a need for including these documents in the panel reports, the Panel also sought the views of the Parties on whether the aforementioned documents could be made available on-line only.

7.34 After consideration of the views expressed by the Parties, the Panel decided to annex the documents in question to the three reports. However, in order to limit the page number of the paper copies of the reports circulated to Members, the Panel also decided that, except for the Parties and Third Parties to this dispute, the relevant annexes would be available electronically only, that is to say, through the WTO's public web site. The annexes in question are available in the three official WTO languages and they form an integral part of the three panel reports.

7.35 For clarity, we list below the annexes which are available on-line only:

- Annex C: Replies by the Parties to Questions Posed by the Panel on 3 June 2004 (11 pages);
- Annex D: Replies by the Parties to Questions Posed by the Panel in the Context of the First Substantive Meeting (165 pages);
- Annex E: Replies by the Parties to Questions Posed by Other Parties in the Context of the First Substantive Meeting (15 pages);
- Annex F: Replies by the Parties to Questions Posed by the Panel and Comments by the Parties on the Other Parties' Replies in the Context of the Second Substantive Meeting (191 pages);
- Annex G: Replies by Third Parties to Questions Posed by the Panel and the Parties (16 pages);

– Annex H: Replies by the Scientific Experts Advising the Panel to Questions Posed by the Panel (238 pages);

– Annex I: Comments by the Parties on the Replies by the Scientific Experts to the Questions Posed by the Panel (391 pages); and

– Annex J: Transcript of the Panel's Joint Meeting with Scientific Experts of 17 and 18 February 2005 (171 pages).

– Annex K: Letter of the Panel to the Parties of 8 May 2006 (3 pages).

7.36 The above-mentioned annexes can be found on *Documents online* (http://docsonline.wto.org/) with the document symbols, WT/DS291/R, WT/DS292/R, WT/DS293/R, plus addenda.

5. Challenges faced by the Panel in the conduct of the proceedings

7.37 The Panel notes that completing the present proceedings and preparing the panel reports has, unfortunately, taken considerably longer than is the case for typical WTO panel proceedings. It is fair to say, however, that the present proceedings were quite different from typical panel proceedings, and not just because typical panel proceedings involve one complaint rather than three.

7.38 Four factors in particular have made the conduct of these proceedings a challenging task for the Panel and the small group of Secretariat officials assisting it, and have contributed to the delays that have occurred in the disposition of this case.[227] They are: (i) the volume of materials to be considered by the Panel, (ii) the need for additional fact-finding in the course of the panel proceedings, (iii) the procedural and substantive complexity of the case, and (iv) the limited co-ordination of the Complaining Parties' submissions to the Panel. It is useful to offer a few explanatory observations on each of these factors.

7.39 The volume of the materials to be considered by the Panel in this dispute was, quite simply, enormous.[228] A few facts and figures serve to illustrate this point. The Panel asked a total of 201 written questions of the Parties, and a total of 114 written questions of the six scientific experts advising it. The Parties posed a total of 22 written questions to each other. The Panel received an estimated 2580 pages of written submissions (including oral statements, comments relating to the expert consultation and replies to questions) from the four Parties. An estimated 292 pages were received from the scientific experts advising the Panel. The Third Parties submitted an additional 102 pages of written submissions (including oral statements and replies to questions).[229] The *amici curiae* filed briefs totalling 96 pages. Furthermore, the Parties submitted an estimated total of 3136 documents to the Panel in support of their claims and arguments.[230] While some of these documents are short, others extend over more than one hundred pages.

[227] It is well to recall in this connection that this Panel was established on 29 August 2003, but not composed until 4 March 2004. Thus, there was an initial delay of more than six months even before the beginning of the Panel's work.

[228] The scientific experts advising the Panel also expressed this sentiment.

[229] We note that Norway alone submitted a total of 53 pages of submissions to the Panel.

[230] Of the estimated 3136 documents submitted to the Panel, the Complaining Parties submitted 417 documents and the European Communities 2719 documents. We note that there is some double-counting involved in our estimate in that the Complaining Parties in part submitted the same exhibits. The 2719 documents submitted by the European Communities include the documents provided in response to the Panel's request for information.

7.40 Another characteristic of these proceedings was the fact that very substantial amounts of information were exchanged among the Parties, not before, but during the panel proceedings. What is more, most of that information was not provided to the Panel until after the first substantive meeting of the Panel with the Parties. More specifically, the European Communities indicated at the first substantive meeting that the Panel was still lacking certain important information which the European Communities alleged supported its position in this case. The European Communities stated that it was willing to provide that information, but noted that it was to a large extent in the possession of its member States. The European Communities told the Panel that a formal request for information from the Panel would assist it in obtaining the information from its member States. With the support of the Complaining Parties, the Panel then sought additional information of the European Communities pursuant to Article 13 of the DSU.

7.41 While much information was subsequently provided by the European Communities, the information submitted was in important respects incomplete, numerous documents had not been translated into an official WTO language, and the way the European Communities initially numbered its own exhibits was confusing. This led the Panel to request the missing information, translation of relevant documents and a more user-friendly system for numbering exhibits. The European Communities complied with the Panel's follow-up request. However, in view of the delayed provision of the information requested by the Panel, the Complaining Parties requested that the second substantive meeting be postponed for several months and that they be given an opportunity, prior to the second substantive meeting, to make further written submissions (hereafter "third written submissions") with regard to the new information provided by the European Communities. The Panel acceded to these two requests.[231]

7.42 The above-mentioned situation meant that the Panel and Complaining Parties did not have all the information requested of the European Communities until seven months after the Panel was composed, and that the second substantive meeting, which at the Parties' request was held back-to-back with the Panel's meeting with the experts, was not held until almost one year after the Panel was composed. It is clear that if the information provided by the European Communities in the course of the proceedings had been available to the Complaining Parties from the outset, the proceedings could have been conducted more efficiently and with a clearer focus.[232]

7.43 The third factor we have identified is the procedural and substantive complexity of the case. On the procedural side, we have already mentioned the extensive fact-finding which had to be undertaken in the course of the proceedings.[233] We have also mentioned the expert selection process

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[231] We note that the scheduling of the second substantive meeting was also linked to the Parties' request that that meeting be held immediately following the Panel's meeting with the experts. In order for the experts to be able to reply to the Panel's questions, the experts needed to be given sufficient time to familiarize themselves with the entirety of the information submitted to the Panel.

[232] As we do not have the facts to determine why more information was apparently not gathered or provided at an earlier stage in these dispute settlement proceedings, we can only re-emphasize what the Appellate Body stated in *India – Patents (US)*:

> All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. (Appellate Body Report, *India – Patents (US)*, para. 94.)

[233] As an aside, we note that in connection with this fact-finding process we put in place, in consultation with the Parties, a special set of procedures for the protection of strictly confidential information (hereafter "SCI"), notably because of sensitive company information submitted by the European Communities.

and the process through which we have identified the questions to be asked of the experts. In addition to this, a very large number of letters were exchanged between the Panel and the Parties on various other procedural and organizational matters. Thus, until the second substantive meeting with the Parties most of the Panel's time was spent either attending to the aforementioned procedural matters or studying the Parties' submissions. Regarding the substantive aspects of this case, we note that the Panel's work was made difficult not just because of the often technical and/or scientific nature of the material submitted to us, but also because the Parties' submissions raised a series of fundamental legal issues (*e.g.*, concerning the scope of the *SPS Agreement*) which required careful consideration.

7.44 The last factor to be explained is the limited co-ordination of the Complaining Parties' submissions to the Panel. By this we mean that, with few exceptions, the Complaining Parties did not put forward the same arguments or adopt each others' arguments. We recognize that since the Complaining Parties' brought three legally distinct complaints, they were under no obligation to co-ordinate their submissions to the Panel. We also recognize that the measures challenged and the claims presented by the Complaining Parties were not identical. However, there is a significant overlap among the three complaints. Given the complexity of this case and the vast amount of information to be taken into account, it would have alleviated our burden – and that of the Responding Party – if the Complaining Parties had been able more consistently to provide the same, or at least substantially the same, argumentation on common elements of their complaints.[234] Indeed, in view of the differences among the Complaining Parties' submissions, even simple tasks, like summarizing the Complaining Parties' arguments on a particular issue, required much time. Needless to say, the submission of different arguments by the Complaining Parties also meant that there were more arguments which the Panel needed to consider and address in its reports.

7.45 While the four foregoing factors have contributed to the successive delays in the disposition of this case, we furthermore note another factor which contributed to, at least, the last postponement of the deadline for our interim report: the reduced availability of some of the Secretariat staff assisting the Panel, notably because of the preparations for the Ministerial Conference in Hong Kong. Due to the need for familiarity with the case file it was not possible adequately to address this problem by assigning other staff to the case.

7.46 Having outlined some of the challenges faced by the Panel, we want to acknowledge that each of the Parties to this dispute, and perhaps Argentina in particular given its status as a developing country Member, has faced considerable difficulties of its own in coping with all the information put before the Panel, in responding to the claims and arguments presented by the other Parties and in meeting the generally tight deadlines imposed by the Panel. At the end of the second substantive meeting, the Panel expressed its appreciation for the Parties' co-operation and for their contributions, which had to be made under difficult circumstances.

6. Consistency of the Complaining Parties' panel requests with Article 6.2 of the DSU

7.47 On 8 April 2004, the Panel issued a preliminary ruling in response to a request by the European Communities that the separate requests for the establishment of a panel made by the United States, Canada and Argentina are inconsistent with the requirements of Article 6.2 of the DSU. The Panel's preliminary ruling is reproduced below as it was sent to the Parties, with original footnotes appearing as endnotes at the end of the reproduced ruling.

[234] We note in this regard that in the panel proceedings in *US – Steel Safeguards* the eight complaining parties at least in part divided among themselves the argumentation on common elements of their complaints. Panel Report, *US – Steel Safeguards*, para. 10.726.

"**1. Procedural background**

1. On 8 March 2004, the European Communities submitted to the Panel a request for a preliminary ruling. The European Communities requested that the Panel rule, as early as possible in the proceedings, that the separate requests for the establishment of a panel (hereafter "panel requests") made by the United States[1], Canada[2] and Argentina[3] are inconsistent with the requirements of Article 6.2 of the DSU.

2. After consultations with the parties regarding the procedural implications of the European Communities' preliminary ruling request, the Panel decided to issue a preliminary ruling before the due date of the Complaining Parties' first written submissions. The Panel gave an opportunity to the Complaining Parties to submit written comments on the European Communities' request and also invited the third parties to submit any written comments they might have in response to the views expressed by the parties.[4] The Complaining Parties filed their comments on 24 March 2004. The third parties' comments were due on 29 March 2004, but none were filed. The Panel also put a number of written questions to the parties. The parties provided written replies to these questions on 29 March 2004. The Panel issued its ruling to the parties and third parties on 8 April 2004.

2. The European Communities' request for a preliminary ruling

3. Article 6.2 of the DSU provides in relevant part:

> The request for the establishment of a panel shall […] identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4. In respect of Article 6.2 the Appellate Body observed that:

> […] compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.[5] […] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[6]

5. In its preliminary ruling request of 8 March 2004, the **European Communities** asserts that the Complaining Parties' panel requests fail to satisfy the requirements set out in Article 6.2 of the DSU, specifically, the requirement to identify the specific measures at issue, and the requirement to provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly. According to the European Communities, the requirement to identify the specific measures at issue is not met because the Complaining Parties' panel requests speak of two distinct measures – one being the "suspension of consideration of applications/approvals" and the other being the "failure to grant approvals" – but fail to describe what these measures consist of. Regarding the requirement to provide a

summary of the legal basis of the complaints, the European Communities further asserts that the Complaining Parties' panel requests do not meet this requirement because they merely list a large number of provisions and fail to indicate which provisions are alleged to be violated by which measures. In the European Communities' view, the Panel's jurisdiction cannot, therefore, be clearly defined and the European Communities has been prevented from properly preparing its defence.

6. The **Complaining Parties** all consider that the European Communities' preliminary ruling request lacks merit and that it should, therefore, be rejected. In particular, the Complaining Parties consider that their panel requests clearly specify the specific measures in dispute. According to the Complaining Parties, what the European Communities is asking in this case is that the Panel require the Complaining Parties to identify the evidence supporting the existence of the measures identified. The Complaining Parties further consider that, contrary to what the European Communities suggests, their panel requests do provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly. In the Complaining Parties' views, the European Communities' arguments in respect of the summary of the legal basis are based on a suggestion which has already been rejected by the Appellate Body, namely, that a complaining party must summarize its legal arguments in its panel request. Finally, the Complaining Parties argue that, in any event the European Communities has failed to establish its claim that its ability to defend itself has been prejudiced by the alleged lack of specificity in the Complaining Parties' panel requests.[7]

7. The **Panel** will first address the European Communities' assertion that the Complaining Parties' panel requests do not meet the requirement to identify the specific measures at issue. Thereafter, the Panel will examine the European Communities' assertion that the panel requests fail to satisfy the requirement to provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly. Should the Panel find that any of the panel requests falls short of either of the two aforementioned requirements, the Panel will proceed to address the issue of the prejudice, if any, suffered by the European Communities as a result of the allegedly defective panel request(s).

3. Identification of the specific measures at issue

(a) Relevant text of the panel requests at issue

(i) The United States' panel request

8. The United States' panel request describes the relevant EC measures as follows:[8]

> Since October 1998, the European Communities ("EC") has applied a moratorium on the approval of products of agricultural biotechnology ("biotech products"). Pursuant to the moratorium, the EC has suspended consideration of applications for, or granting of, approval of biotech products under the EC approval system. In particular, the EC has blocked in the approval process under EC legislation[9] all applications for placing biotech products on the market, and has not considered any application for final approval.

The approvals moratorium has restricted imports of agricultural and food products from the United States.

In addition, EC member States maintain a number of national marketing and import bans on biotech products even though those products have already been approved by the EC for import and marketing in the EC. The national marketing and import bans have restricted imports of agricultural and food products from the United States.

The measures affecting biotech products covered in this panel request are:

(1) as described above, the suspension by the EC of consideration of applications for, or granting of, approval of biotech products;

(2) as described above, the failure by the EC to consider for approval applications for the biotech products mentioned in Annexes I and II to this request; and

(3) national marketing and import bans maintained by member States, as described in Annex III to this request.

(ii) Canada's panel request

9. Canada's panel request describes the relevant EC measures as follows:[10]

Since October 1998, the European Communities ("EC") has maintained a moratorium on the approval of products of agricultural biotechnology, which are food or food ingredients that contain or consist of, or are produced from, genetically modified organisms, and genetically modified organisms intended for release into the environment ("biotech products"). The EC effectively has suspended the consideration of applications for approval of biotech products, and the granting of approvals for those products, under the relevant EC approvals processes.[11] Specific examples of such applications, and a brief description of the actions taken to block their consideration or approval, are set out in Annex I.

In addition to the moratorium, France, Greece, Austria and Italy maintain national measures prohibiting the importation, marketing or sale of biotech products that had already been approved, prior to October 1998, under the relevant EC approvals processes, for importation, marketing or sale in the EC. These national measures, and the products to which they apply, are identified in Annex II.

[…]

> The measures covered in this panel request are:
>
> 1. the general suspension by the EC of its own processes for the consideration of applications for, and the granting of, approval for biotech products;
>
> 2. the failure by the EC to consider or approve, without undue delay, applications for approval of the products identified in Annex I; and
>
> 3. the national measures identified in Annex II prohibiting the importation, marketing or sale of the specified EC-approved biotech products.

(iii) Argentina's panel request

10. Argentina's panel request describes the relevant EC measures as follows:[12]

> The European Communities has applied a *de facto* moratorium on the approval of agricultural biotechnology products since October 1998. This *de facto* moratorium[13] has led to the suspension of and failure to consider various applications for approval of agricultural biotechnology products as well as to undue delays in finalizing the processing of applications for the approval of such products under Community legislation.[14]
>
> Furthermore, several EC member States have introduced bans on a number of agricultural biotechnology products which have already been approved at Community level, thereby infringing both WTO rules and Community legislation.
>
> This action taken by the European Communities […] adversely affects agricultural biotechnology products from Argentina.
>
> The measures at issue and in relation to which the establishment of a panel is requested are as follows:
>
> (1) Suspension of consideration of and failure to consider various applications for endorsement or approval of agricultural biotechnology products;
>
> (2) undue delays in finalizing consideration of various applications for approval of agricultural biotechnology products; and
>
> (3) bans on agricultural biotechnology products introduced by EC member States[15] which infringe both WTO rules and Community legislation.

(b) Analysis

11. The **European Communities** notes that all three panel requests make an explicit distinction between, on the one hand, an alleged "suspension" of the approval process and, on the other hand, an alleged "failure" to act. The European Communities asserts that it is "in the dark" on the meaning of the reference to an alleged "suspension" because none of three panel requests contains any explanation or description of what the alleged "suspension" is as opposed to the "failure" to proceed in the approval process.

12. The European Communities argues that if the Complaining Parties intended to use the term "suspension" to refer to the action of blocking the approval process, then that action is not described anywhere. The European Communities notes in this regard that there is no indication in the panel requests whether there is some kind of executive or normative act (e.g., moratorium legislation) pursuant to which the European Communities would have proceeded to suspend the approval process. If, on the other hand, the Complaining Parties intended to use the term "suspension" to refer to a situation where "nothing is happening", then it would seem impossible to distinguish "suspension" from the alleged inaction – the failure to consider or grant approvals. In the European Communities' view, if a Member is supposed to defend itself against two distinct measures, what these are and how they differ from each other should be specified in the panel request.

13. Based on the foregoing, the European Communities requests the Panel to find that by speaking of two distinct measures, one being the suspension of consideration of applications, or of approvals, and the other being the failure to grant approvals, without describing what these two measures consist of, the panel requests do not "identify the specific measures at issue".

14. The **Panel** notes that the three panel requests use different wording to describe the measures at issue. Therefore, the Panel will consider the three panel requests separately.

15. Before proceeding to consider the three panel requests, it is useful to recall that the requirement to "identify the specific measures at issue" has recently been addressed by the panel in *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*. That panel found that "the ordinary meaning of the phrase 'identify the specific measures at issue' is 'to establish the identity of the precise measures at issue'".[16] The panel then went on to state the following:[17]

> In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 "depends […] upon whether they satisfy the purposes of [those] requirements".[18] We also find relevant the statement by the Appellate Body that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".

> […]
>
> We consider that in the absence of an explicit identification of a measure of general application by name, […] sufficient information must be provided in the request for establishment of a panel itself that effectively identifies the precise measures at issue. Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue.

16. The Panel agrees with this analysis and, accordingly, will follow it in this case.

(i) The United States' panel request

17. The **United States** argues that the European Communities does not and cannot explain how the United States' description of the measures at issue amounts to a failure to meet the requirement of Article 6.2 "to identify the specific measures issue". According to the United States, it is difficult to see how the concept of a "suspension" of the consideration and granting of approvals is at all ambiguous. The United States considers that in the light of statements by EC officials acknowledging the existence of a *de facto* moratorium, the European Communities' claim that the meaning of "suspension" is unclear is not credible. The United States further argues that the European Communities cannot profit from its own lack of transparency by arguing that the United States has not identified the moratorium with sufficient specificity.

18. The United States also asserts that, in the context of its panel request, the reason for using the phrases "the suspension of consideration" and "the failure to consider" is quite clear. The first phrase is used to describe the European Communities' "across-the-board moratorium affecting all biotech products". The second phrase is used to describe the European Communities' conduct as it affects the specific products identified in the annexes to the panel request. According to the United States, the two phrases are "simply two different wordings for the same concept", although the word "suspension" fits better with the European Communities' conduct as it affects all biotech applications, while the phrase "failure to consider" fits better with specific applications.

19. The **Panel** begins its analysis by recalling that the first measure referred to in the United States' panel request is described as follows:

> "(1) as described above, the suspension by the EC of consideration of applications for, or granting of, approval of biotech products".

20. The noun "suspension" is defined as "the action of suspending or the condition of being suspended".[19] In turn, the verb "to suspend" is defined as "to halt temporarily".[20] It is clear from these dictionary definitions that the measure the United States is complaining about is the "temporary halting" by the European

Communities of the consideration of applications for approval of biotech products and of the granting of approval for such products.

21. The introductory paragraph of the United States' panel request provides additional information on the first measure referred to in the panel request.[21] In particular, the introductory paragraph explains that the European Communities has suspended the consideration of applications and the granting of approvals of biotech products "pursuant to" an "approvals moratorium" which the European Communities has allegedly "applied" "[s]ince October 1998". In a footnote to the introductory paragraph, the United States also identifies relevant EC approval legislation by name and place and date of publication.

22. The European Communities has pointed out that the United States' panel request refers to an "approvals moratorium" without identifying, either by name or date of adoption, any executive decree or legislative act through which the moratorium has been implemented. In response, the United States notes that the moratorium in question is a "*de facto* measure"[22]. We recall in this connection that the panel in *Canada – Wheat Exports and Grain Imports* observed that a determination of whether a panel request contains sufficient information that effectively identifies the precise measures at issue must take into account, *inter alia*, "the specific circumstances of each case, including the type of measure that is at issue".[23] The panel in *Canada – Wheat Exports and Grain Imports* distinguished between measures of general application and particular actions taken pursuant to such measures.[24] We consider that another appropriate distinction is that between formal (*de iure*) governmental measures and informal (*de facto*) governmental measures.[25] In our view, the informal nature of a governmental measure may affect the degree of precision with which such a measure can be set out in a panel request. Notably, it will often not be possible to identify informal measures by their name, date of adoption and/or legal status.

23. In the present case, it is unclear whether the United States could have identified the alleged *de facto* moratorium with more specificity than it has. The United States alleges that the European Communities has not been sufficiently transparent with respect to the alleged moratorium. The United States notably asserts that, during the consultations prior to the establishment of the Panel, the European Communities denied that the moratorium even exists although EC officials had previously acknowledged its existence in public statements.[26] As indicated above, the European Communities mentions that the panel request does not describe whether there is "supposed to be a decision or some other kind of normative or executive act, perhaps a moratorium legislation of the kind New Zealand had".[27] However, the European Communities has adduced no evidence which would support the view that the United States could have described the alleged *de facto* moratorium with greater precision. We recall in this regard that, for the purposes of this preliminary ruling, it is the European Communities as the party claiming an inconsistency with Article 6.2 which bears the burden of proof.

24. Even assuming that the United States could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the introductory paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in

Article 6.2 of the DSU. In particular, the European Communities has not persuaded us that the information contained in the description of the first measure and the introductory paragraph does not allow the European Communities to "begin preparing its defence"[28] in a meaningful way.[29]

25. Before reaching a final conclusion, however, we need to consider the European Communities' argument that the reference to "suspension of consideration" in the description of the first measure covered in the United States' panel request is so similar to the reference to "failure to consider" in the description of the second measure that it is effectively impossible, in the absence of some explanation in the panel request, to know the difference between the first and second measure set out in the United States' panel request.

26. The United States submits that the phrases "suspension of consideration" in the description of the first measure and "failure to consider" in the description of the second measure are intended to express the same general idea.[30] But this does not mean that the first and second measure set out in the United States' panel request are essentially indistinguishable. As the United States has pointed out, the first measure concerns applications for approval of "biotech products", that is to say, applications for approval of any and all biotech products. In contrast, the second measure concerns applications for approval of "the biotech products mentioned in Annexes I and II to this request". Thus, it is clear to us from the descriptions of the two measures in the United States' panel request that the first measure has a broader product scope than the second measure.

27. In the light of this important difference in the description of the two measures in question, we do not agree with the European Communities that "by speaking of two distinct measures, one being the suspension of consideration of applications/of approvals, and the other being the failure to grant approvals"[31], the United States' panel request fails to identify the specific measures at issue.

28. In conclusion, we find that the European Communities has failed to establish that the United States' panel request, and in particular the reference to an alleged "suspension" of the approval processes, does not satisfy the requirement in Article 6.2 to identify the specific measures at issue.

(ii) Canada's panel request

29. **Canada** argues that the phrase "the general suspension by the EC of its own processes for consideration of applications for, and the granting of, approval of biotech products" sufficiently identifies the specific measure at issue. Canada submits that the aforementioned phrase is a more detailed description of the moratorium referred to in the introductory paragraph of Canada's panel request.[32] Canada further points out that, in Annex I, its panel request sets out specific examples of applications for approval of biotech products, including a brief description of the actions taken to block their consideration or approval. According to Canada, the repeated failures by the European Communities to consider or approve these applications are examples of the moratorium. Canada also notes that the moratorium has not been formally adopted. Canada submits that if the European Communities had adopted the moratorium as a formal measure and complied with various transparency requirements of the *WTO Agreement*, Canada would have been in a

position to identify the moratorium by name, date of adoption, etc. Canada argues that the European Communities cannot use its own lack of regulatory transparency as a shield against a WTO challenge. Canada observes, finally, that it is in any event difficult to understand that the European Communities is unable to identify the measure at issue. According to Canada, the existence of the moratorium has been widely recognized and discussed by EC officials.

30. Canada further submits that the phrases "the general suspension" and "the failure to consider or approve" are used to describe different aspects of the European Communities' conduct. Canada notes in this regard that the phrase "general suspension" is used to describe the European Communities' conduct in relation to the whole class of biotech products, while the phrase "failure to consider or approve" is used to describe the European Communities' conduct as it affects the four specific products identified in Annex I to the panel request.

31. The **Panel** recalls that the first measure referred to in Canada's panel request is described as follows:

> "1. the general suspension by the EC of its own processes for consideration of applications for, and the granting of, approval of biotech products".

32. As noted above[33], it is clear from the dictionary meanings of the word "suspension" that the measure Canada is complaining about is the general "temporary halting" by the European Communities of its own processes for the consideration of applications for approval of biotech products and for the granting of approval for such products.

33. The introductory paragraph of Canada's panel request provides additional information on the first measure referred to in the panel request. In particular, the introductory paragraph explains that "[s]ince October 1998", the European Communities has "maintained" a "moratorium" on the approval of biotech products and that the European Communities has "effectively" suspended the consideration of applications and the granting of approvals of biotech products under the relevant EC approval processes. In a footnote to the introductory paragraph, Canada identifies by name and place and date of publication EC legislation which sets out the relevant approval processes.

34. The European Communities has pointed out that Canada's panel request refers to a "moratorium" without identifying, either by name or date of adoption, any executive decree or legislative act through which the moratorium has been implemented. Canada notes in this regard that the moratorium has not been adopted as a formal legal measure. As we have noted above[34], in our view, the informal nature of a governmental measure may affect the degree of precision with which such a measure can be set out in a panel request. In the present case, it is unclear whether Canada could have identified the alleged *de facto* moratorium with more specificity than it has. Canada argues in this respect that the European Communities should not be allowed to profit from its own lack of regulatory transparency. In addition, Canada asserts that the existence of the moratorium has been recognized by EC officials in public statements.[35] As indicated above[36], the European Communities has

adduced no evidence which would support the view that Canada could have described the alleged *de facto* moratorium with greater precision.

35. Even assuming that Canada could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the introductory paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in Article 6.2 of the DSU. In particular, the European Communities has not persuaded us that the information contained in the description of the first measure and the introductory paragraph does not allow the European Communities to "begin preparing its defence"[37] in a meaningful way.[38]

36. Before reaching a final conclusion, however, we need to consider the European Communities' argument that the reference to "the general suspension" in the description of the first measure covered in Canada's panel request is so similar to the reference to "the failure to consider or approve" in the description of the second measure that it is effectively impossible, in the absence of some explanation in the panel request, to know the difference between the first and second measure set out in Canada's panel request.

37. We note Canada's explanation that the references to "the general suspension" in the description of the first measure and to "the failure to consider or approve" in the description of the second measure reflect the fact that the two measures concern different aspects of the European Communities' conduct. According to Canada, the reference to "the general suspension" is used because the first measure concerns applications for approval for "biotech products". In other words, as Canada puts it, the first measure concerns the European Communities' conduct in relation to the whole class of biotech products. Regarding the reference to "the failure to consider or approve", Canada notes that it was used because the second measure concerns the European Communities' conduct in relation to specific applications for approval of the four biotech products "identified in Annex I". In our view, Canada's explanation is consistent with a natural reading of the descriptions in question. That the first measure has a broader product scope than the second measure is further confirmed by the fact that Canada refers to the general suspension by the European Communities of "its own processes" for the consideration of applications for, and the granting of, approval of biotech products. The approval processes in question would appear to apply to all qualifying biotech products, not just the four identified in the annex to Canada's panel request.

38. In the light of this important difference in the description of the two measures in question, we do not agree with the European Communities that "by speaking of two distinct measures, one being the suspension of consideration of applications/of approvals, and the other being the failure to grant approvals"[39], Canada's panel request fails to identify the specific measures at issue.

39. In conclusion, we find that the European Communities has failed to establish that Canada's panel request, and in particular the reference to an alleged "general suspension" of the approval processes, does not satisfy the requirement in Article 6.2 to identify the specific measures at issue.

(iii) Argentina's panel request

40. **Argentina** argues that the word "suspension" can be easily understood by reading the relevant paragraph, which links the word suspension to the phrase "various applications for approval of agricultural biotechnology products". Argentina submits that it is clear that the measure at issue is the *de facto* suspension of consideration of various applications within the pipeline defined by the EC regulatory scheme. Argentina further notes that the second paragraph of its panel request makes clear that the action which led to the suspension of consideration of various applications is the *de facto* moratorium applied by the European Communities. According to Argentina, the type of measure at issue necessarily affects the extent and nature of information required to present a claim. Argentina recalls in this respect the informal nature of the EC moratorium which, Argentina says, is not contained in a particular legal act or executive order.

41. Regarding the distinction between the phrases "suspension of consideration" and "failure to consider", Argentina notes that "suspension of consideration" describes a situation where applications have been considered but where the consideration is suffering a delay, whereas "failure to consider" describes a situation where applications were submitted but there is a failure to consider them. Argentina points out that the status of various applications within the EC regulatory scheme is an issue that was discussed at length during consultations with the European Communities.

42. The **Panel** recalls that the first measure referred to in Argentina's panel request is described as follows:

> (1) Suspension of consideration of and failure to consider various applications for endorsement or approval of agricultural biotechnology products.

43. As noted above[40], it is clear from the dictionary meanings of the word "suspension" that what Argentina is complaining about is the "temporary halting" by the European Communities of the consideration of various applications for endorsement or approval of biotech products.

44. The second paragraph of Argentina's panel request provides additional information on the first measure referred to in the panel request.[41] In particular, the second paragraph explains that "[s]ince October 1998", the European Communities has "applied" a "*de facto* moratorium"[42] on the approval of biotech products, which has "led to the suspension of and failure to consider various applications for approval [...] under Community legislation". In a footnote to the second paragraph, Argentina also identifies relevant EC legislation by name and place and date of publication.

45. The European Communities has pointed out that Argentina's panel request refers to a "moratorium" without identifying, either by name or date of adoption, any executive decree or legislative act through which the moratorium has been implemented. Argentina responds that the nature of the measure in question, which in this case is a *de facto* measure, necessarily affects the extent and nature of the information that needs to be provided. As we have noted above[43], in our view, the informal nature of a governmental measure may affect the degree of precision with

which such a measure can be set out in a panel request. In the present case, it is unclear whether Argentina could have identified the alleged *de facto* moratorium with more specificity than it has. Argentina suggests that the Panel should resist what it considers is an effort by the European Communities to obtain a detailed factual description of the alleged moratorium. In Argentina's view, it is not necessary to provide a detailed factual description in a panel request, since this is a matter to be dealt with in the course of the panel proceedings. As indicated above[44], the European Communities has adduced no evidence which would support the view that Argentina could have described the alleged *de facto* moratorium with greater precision.

46. Even assuming that Argentina could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the second paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in Article 6.2 of the DSU. In particular, the European Communities has not persuaded us that the information contained in the description of the first measure and the second paragraph does not allow the European Communities to "begin preparing its defence"[45] in a meaningful way.[46]

47. Before reaching a final conclusion, however, we need to consider the European Communities' argument that the reference to "suspension of consideration" in Argentina's description of the first measure is so similar to the reference to "failure to consider" in the description of the same measure that it is effectively impossible, in the absence of some explanation in the panel request, to know the difference between these two aspects.

48. We note Argentina's explanation that the references to "suspension of consideration" and to "failure to consider" reflect the fact that various applications for approval have been affected by the *de facto* moratorium at different stages of the approval process. According to Argentina, some applications were considered and then the consideration was suspended, while others were submitted for consideration, but were not in fact considered. We have no difficulty accepting Argentina's explanation. We think Argentina's explanation is consistent with the ordinary meaning of the phrases "suspension of consideration" and "failure to consider"[47], and we do not, therefore, consider that it was necessary for Argentina's panel request to provide further explanation in this regard.

49. In the light of this, we do not agree with the European Communities that "by speaking of two distinct measures, one being the suspension of consideration of applications/of approvals, and the other being the failure to grant approvals"[48], Argentina's panel request does not properly identify the specific measures at issue.

50. In conclusion, we find that the European Communities has failed to establish that Argentina's panel request, and in particular the reference to an alleged "suspension" of the approval processes, does not satisfy the requirement in Article 6.2 to identify the specific measures at issue.

4. Provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly

51. The Panel next turns to examine the European Communities' assertion that the Complaining Parties' panel requests do not provide a brief summary of the legal basis of the complaints sufficient to present the problem clearly.

(a) Relevant text of the panel requests at issue

(i) The United States' panel request

52. The United States' panel request summarizes the legal basis of the United States' complaint as follows:[49]

> These measures appear to be inconsistent with the following provisions of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Agriculture* ("Agriculture Agreement"), and the *Agreement on Technical Barriers to Trade* ("TBT Agreement"):
>
> (1) SPS Agreement, Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 7 and 8, and Annexes B(1), B(2), B(5), C(1)(a), C(1)(b), and C(1)(e);
>
> (2) GATT 1994, Articles I:1, III:4, X:1, and XI:1;
>
> (3) Agriculture Agreement, Article 4.2; and
>
> (4) TBT Agreement, Articles 2.1, 2.2, 2.8, 2.9, 2.11, 2.12, 5.1.1, 5.1.2, 5.2.1, 5.2.2, 5.6 and 5.8.
>
> The EC's measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

(ii) Canada's panel request

53. Canada's panel request summarizes the legal basis of Canada's complaint as follows:[50]

> These measures are inconsistent with the obligations of the EC under the SPS Agreement, the TBT Agreement, the Agreement on Agriculture and the GATT 1994. In particular, the measures violate the following provisions of these agreements:
>
> - Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 7, 8, and paragraphs 1, 2 and 5 of Annex B, and paragraphs 1(a), 1(b), 1(c), and 1(e) of Annex C of the SPS Agreement;

- Articles 2.1, 2.2, 2.8, 2.9, 2.11, 2.12, 5.1, 5.2.1, 5.2.2, 5.2.3, 5.6 and 5.8 of the TBT Agreement;

- Articles I:1, III:4, X:1 and XI:1 of the GATT 1994;

- Article 4.2 of the Agreement on Agriculture.

These violations nullify or impair the benefits accruing to Canada under these agreements. In addition, the measures nullify and impair the benefits accruing to Canada in the sense of Article XXIII:1(b) of the GATT 1994.

(iii) Argentina's panel request

54. Argentina's panel request summarizes the legal basis of Argentina's complaint as follows:[51]

> The measures in question taken by the European Communities and several of its member States infringe the following provisions of the WTO Agreements:
>
> (a) Articles 2.2, 2.3, 5.1, 5.2, 5.5, 5.6, 7, 8 and 10.1 and Annexes B(1) and (5) and C(1)(a), (b), (c), (d) and (e) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement);
>
> (b) Article 4.2 of the Agreement on Agriculture (AoA);
>
> (c) Articles I.1, III.4, X.1, X.3(a) and XI.1 of the GATT 1994;
>
> (d) Articles 2.1, 2.2, 2.8, 2.9, 2.11, 5.1, 5.2.1, 5.2.2, 5.2.3, 5.2.4, 5.6, 5.8 and 12 of the Agreement on Technical Barriers to Trade (TBT Agreement).
>
> The measures at issue nullify or impair the benefits accruing to Argentina under these Agreements.

(b) Analysis

55. The **European Communities** asserts that none of the Complaining Parties' panel requests provides a brief summary of the legal basis of the complaints sufficient to present the problem clearly. Specifically, the three panel requests do not make it clear (1) which obligations are alleged to be violated and (2) which measures are in violation of which obligations.

56. The **Panel** will address the two issues identified by the European Communities separately.

57. Before going further, it is useful briefly to set out relevant Appellate Body jurisprudence. Thus, in *Thailand – H-Beams*, the Appellate Body observed that:[52]

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party.[53] A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.[54] Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.

58. In Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, the Appellate Body stated that:[55]

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[56] But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.

59. Finally, in *US – Carbon Steel*, the Appellate Body clarified that:[57]

> […] whether […] a listing [of the treaty provisions allegedly violated] is *sufficient* to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.[58]

(i) Listing of provisions

60. The **European Communities** asserts that the mere listing of treaty provisions is not sufficient in this case. The European Communities notes in this regard that several of the treaty provisions identified in the panel requests contain multiple obligations. Specifically, the European Communities refers to Articles 2.2, 2.3, 5.5, 7, 8, Annex B(5) and Annex C(1)(b) of the *SPS Agreement* as well as Articles 2.9, 5.2.2, 5.6 and 12 of the *TBT Agreement*. The European Communities submits that the mere listing of the aforementioned provisions makes it impossible to know the obligations that are alleged to have been violated.

61. The European Communities further notes that several of the provisions listed are either mutually exclusive (such as those contained in the *SPS Agreement* and in the *TBT Agreement*) or subordinated (such as those of the GATT 1994 in relation to the ones contained in the other WTO agreements at issue). The European Communities notes that the panel requests do not explain how the claims would be articulated. For instance, they do not explain whether all provisions apply simultaneously to different aspects of the measures, or whether some are listed only subsidiarily.

62. The **United States** notes that it has applied the following method in citing provisions. Where an article consisted of more than one paragraph, the paragraph has been identified. Where an article has sub-paragraphs, in most cases, sub-paragraphs have been identified. The United States notes that there are three exceptions, namely, Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement*. According to the United States, these three exceptions contain several sub-paragraphs establishing related transparency obligations. The United States did not identify specific sub-paragraphs because it considers that the EC measures at issue are inconsistent with each of the sub-paragraphs.

63. The United States also notes that it was required to cite provisions of the *SPS Agreement* and the *TBT Agreement* because the European Communities has refused to acknowledge that the alleged moratorium falls within the scope of the *SPS Agreement*. According to the United States, it is difficult to understand, therefore, how the European Communities could claim any confusion or prejudice from citing provisions of both agreements.

64. **Canada** argues that the it has adequately identified the obligations at issue. Canada notes that it has applied the following method in citing provisions in its panel request. Where a provision contains more than one discrete obligation, Canada listed the specific obligation that it believes has been violated by referring to the paragraph or sub-paragraph in the article pertaining to the violated obligation. Canada notes that there are two exceptions to this rule. *First*, where a provision contains more than one obligation and Canada considers that the measures at issue are inconsistent with all of them, Canada did not specify sub-paragraphs, but cited the provision as a whole. *Second*, in the case of Article 5.5 of the *SPS Agreement*, Canada argues that it is clear that Canada did not mean to challenge the European Communities with respect to its obligation to cooperate in the development of guidelines to further the implementation of Article 5.5.

65. Canada further notes that neither the DSU nor WTO jurisprudence suggest that in cases where a large number of provisions are listed more details need to be provided regarding the obligations at issue than in cases where few provisions are listed.

66. **Argentina** notes that its panel request is much more precise than its consultation request and argues that the panel request sufficiently details, at the paragraph or sub-paragraph level, the obligations at issue. Argentina also recalls that there are panels which have accepted the citation of general provisions only, without requiring specifications of paragraphs. Argentina further argues that not all of the provisions referred to by the European Communities set forth different obligations. According to Argentina, some of these provisions, such as Article 2.2 of the

SPS Agreement, rather set forth different conditions that must be met to fulfil one obligation.

Listing of provisions containing multiple obligations

67. The **Panel** notes that with one exception – Article 12 of the *TBT Agreement*, which is referred to only by Argentina – the panel requests cite the relevant provisions not just at the article level, but at the paragraph level. In some cases, the provisions are cited at the sub-paragraph level. The European Communities nevertheless considers that, in some specified instances, this falls short of the requirement in Article 6.2 to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. More specifically, the European Communities considers that the following references in the Complaining Parties' panel requests are insufficient:[59]

- Articles 2.2, 2.3, 5.5, 7, 8, Annex B(5) and Annex C(1)(b) of the *SPS Agreement*; and

- Articles 2.9, 5.2.2, 5.6 and 12 of the *TBT Agreement.*

68. We find it convenient, for analytical purposes, to place the aforementioned provisions into two categories. The *first* category encompasses Annex B(5) of the *SPS Agreement* and Articles 2.9, 5.6 and 12 of the *TBT Agreement*. The structure of these provisions would, in principle, have allowed for a more precise citation than the Complaining Parties chose to adopt. For instance, Article 2.9 of the *TBT Agreement* contains four sub-paragraphs, yet the Complaining Parties did not specify any of the sub-paragraphs in their panel requests. The *second* category encompasses Articles 2.2, 2.3, 5.5, 7, 8 and Annex C(1)(b) of the *SPS Agreement* and Article 5.2.2 of the *TBT Agreement*. These provisions contain two or more distinct obligations under a single article, paragraph or sub-paragraph number. But these particular provisions do not contain any paragraphs (Articles 7 and 8 of the *SPS Agreement*), sub-paragraphs (Articles 2.2, 2.3 and 5.5 of the *SPS Agreement*) or further sub-division (Annex C(1)(b) of the *SPS Agreement* and Article 5.2.2 of the *TBT Agreement*).

69. We will now analyse the two above-mentioned categories separately.

(a) Annex B(5) of the SPS Agreement and Articles 2.9, 5.6 and 12 of the TBT Agreement

70. In examining the first category of provisions, we note as an initial matter that we do not understand the Appellate Body report in *Korea – Dairy* to have established that the identification of particular paragraph numbers would, *ipso facto*, be sufficient to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2. In our view, whether specification of particular paragraph numbers is sufficient, will depend on the circumstances of each case, and in particular on the extent to which specification of particular paragraph numbers sheds light on the nature of the obligation at issue.[60]

71. It is useful to examine Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* together. They all contain four sub-paragraphs which establish separate obligations. The United States and Canada have confirmed that in

their respective panel requests they did not identify particular sub-paragraphs because they consider that the specific measures at issue are inconsistent with each of the four sub-paragraphs.[61] The United States and Canada argue that this is consistent with their overall approach to the listing of provisions in their panel requests. Essentially, the United States and Canada argue that they have generally cited provisions as precisely as their structure allowed, i.e., at the paragraph or sub-paragraph level, except in cases such as Annex B(5) of the *SPS Agreement* where they wished to allege a violation of all sub-paragraphs. A review of the provisions listed in the United States' and Canada's panel requests supports this interpretation.[62] We therefore accept that, in the specific context of the United States' and Canada's panel requests, the references to Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* are sufficient, as such, to give notice to the European Communities that violations are being alleged of each of the sub-paragraphs of these provisions. In reaching this conclusion, we also attach importance to two additional circumstances. *Firstly*, we note that the provisions in question set forth "notice and comment" obligations which, by definition, are interrelated. *Secondly*, we note that none of the sub-paragraphs of the provisions in question appears to be obviously irrelevant to the complaints at hand.

72. Unlike the United States and Canada, Argentina has not explicitly indicated whether it considers the specific measures at issue to be inconsistent with each of the four sub-paragraphs of Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement*. Argentina has merely said that it has identified the relevant paragraph numbers in its panel request and that there is no requirement to go further and identify sub-paragraph numbers as well.[63] As we have noted above, we do not think that identification of paragraph numbers is automatically sufficient to meet the minimum requirements of Article 6.2. We also note, however, that in *Thailand – H-Beams*, the Appellate Body made the following statement:[64]

> With respect to Article 5 [of the *Anti-Dumping Agreement*], Poland stated that "Thai authorities initiated and conducted this investigation in violation of the procedural ... requirements of Article VI of GATT 1994 and Article 5 ... of the Antidumping Agreement". Article 5 sets out various but closely related procedural steps that investigating authorities must comply with in initiating and conducting an anti-dumping investigation. In view of the interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to "the procedural ... requirements" of Article 5 was sufficient to meet the minimum requirements of Article 6.2 of the DSU.[65]

73. In our view, like the procedural obligations in Article 5 of the *Anti-Dumping Agreement*, the "notice and comment" obligations contained in Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* are "closely related" and "interlinked". For example, sub-paragraph (d) of Annex B(5) of *SPS Agreement* requires Members to allow a reasonable time for other Members to make comments in writing on a proposed regulation. If this proposed regulation has not been published at an early stage, as required in sub-paragraph (a) of Annex B(5) and brought to the attention of other Members through the notification required in sub-paragraph (b) of Annex B(5), and copies provided upon request as established in sub-paragraph (c) of Annex B(5), it is difficult to imagine how an interested Member

would gain sufficient knowledge of the content fo the proposed regulation to be able to avail itself of the opportunity to submit comments as foreseen in sub-paragraph (d) of Annex B(5). Therefore, we consider that the fact that Argentina's panel request identifies the relevant article and paragraph numbers sheds sufficient light on "the nature of the obligation at issue"[66] to meet the minimum requirements of Article 6.2.

74. We now turn to Article 12 of the *TBT Agreement*, which is listed only in Argentina's panel request. Article 12 is entitled "Special and Differential Treatment of Developing Country Members". It contains ten separate paragraphs. Nevertheless, in response to a question by the Panel, Argentina asserted that Article 12 does not contain multiple obligations, but rather a single obligation to provide differential and more favourable treatment to developing country Members "through several requirements that should be fulfilled"[67]. In support of this view, Argentina points to Article 12.1, which states that "Members shall provide differential and more favourable treatment to developing country Members [...] through the following provisions as well as through the relevant provisions of other Articles of this Agreement".

75. We do not consider that the text of Article 12.1 supports Argentina's view that Article 12 contains a single obligation as opposed to a number of separate obligations. For instance, Article 12.3 requires that in preparing and applying technical regulations, standards and conformity assessment procedures, Members take account of the special needs of developing country Members. This obligation is clearly very different from the obligation set forth in Article 12.10, which requires the Committee on Technical Barriers to Trade to examine periodically the special and differential treatment granted to developing country Members on national and international levels, for instance.

76. Argentina's panel request refers to Article 12, but does not specify particular paragraph numbers. We recall that the Appellate Body has made it quite clear that it is important for panel requests to be precise in identifying the legal basis of the relevant complaint.[68] We have asked Argentina to indicate why it referred to Article 12 without specifying any paragraph numbers. Argentina replied that this is because during the consultations the European Communities failed to answer a question by Argentina "related to the general obligation embodied in Article 12 [...] regarding the behaviour due by the EC to Argentina in the treatment and approval of agricultural biotech products"[69]. We acknowledge that failure by a responding party to co-operate promptly may affect the clarity with which a complaining party can set out its claims in a panel request.[70] However, Argentina has adduced no evidence which would enable us to determine whether the European Communities failed to answer Argentina's question. Nor is it clear to us from Argentina's reply precisely how the alleged lack of co-operation by the European Communities affected the precision with which Argentina identified the obligations at issue.

77. We note that the European Communities recognizes that of the various obligations set out in Article 12, four are potentially relevant to Argentina's complaint.[71] In our view, the potentially relevant obligations are those contained in Articles 12.1, 12.2, 12.3 and 12.7.[72] Article 12.1 is relevant whenever there is a violation of one of the other provisions of Article 12, such as Articles 12.2, 12.3 or 12.7. Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the *TBT Agreement* at

the national level. As regards Article 12.7, however, it becomes clear, upon closer inspection, that that provision cannot reasonably be considered to be applicable in this dispute. Article 12.7 requires the European Communities to provide technical assistance to developing country Members. But Argentina's panel request does not challenge the European Communities with respect to a failure to provide technical assistance. The request only refers to an alleged failure by the European Communities to consider applications for approval of biotech products. In the light of the above elements, and in particular the fact that Articles 12.4 to 12.10 are not applicable in this dispute, the above-noted substantive similarity between Articles 12.2 and 12.3 and the fact that Article 12.1 incorporates the obligations set out in Articles 12.2 and 12.3 by reference, we consider that Argentina's reference to Article 12 sheds sufficient light on "the nature of the obligation at issue"[73] to allow the European Communities to begin preparing its defence. We, therefore, find that, in the specific circumstances of this case, the reference to Article 12 is sufficient to meet the minimum requirements of Article 6.2.

(b) Articles 2.2, 2.3, 5.5, 7, 8 and Annex C(1)(b) of the SPS Agreement and Article 5.2.2 of the TBT Agreement

78. We now address the second category of provisions. It will be recalled that this category consists of provisions which contain two or more distinct obligations under a single article, paragraph or sub-paragraph number, but which do not contain any paragraphs, sub-paragraphs or further sub-division. Argentina argues, without much elaboration, that, in such cases, there is no requirement to identify specific clauses or sub-clauses within an article, paragraph or sub-paragraph. The United States notes in this regard that it is unaware of any panel or Appellate Body report faulting a panel request for not citing to specific clauses or sub-clauses within an article, paragraph or sub-paragraph.

79. We do not consider that, for the purposes of an Article 6.2 inquiry, the structure of the provisions contained in the WTO agreements constitutes some kind of "safe haven", such that it would always be sufficient to specify sub-paragraph numbers in cases where a provision has several sub-paragraphs, etc. In our view, whether a particular manner of citing provisions is sufficient will depend on the circumstances of each case, and in particular on the extent to which the particular citation sheds light on the nature of the obligation at issue. Having said this, we think that the fact that two or more distinct obligations are set out, e.g., in one and the same sub-paragraph may provide a strong indication that those obligations are very similar in nature. In such cases, specification of the relevant sub-paragraph number may shed sufficient light on the nature of the obligation at issue to meet the minimum standard of precision required under Article 6.2.

80. In the present case, the European Communities has identified a number of provisions where it considers that citation in keeping with the maximum level of precision envisaged in the structure of the relevant agreement is not sufficient. In view of this assertion, we find it appropriate to do a provision-by-provision analysis.

81. We begin our analysis with Annex C(1)(b) of the *SPS Agreement* and Article 5.2.2 of the *TBT Agreement*. We analyse these provisions together, since they have almost identical wording. Both provisions contain a number of sub-clauses which set out certain procedural obligations that Members must observe in the

operation of approval or conformity assessment procedures. The United States and Canada argue that in their respective panel requests they did not identify particular sub-clauses because they consider that the specific measures at issue are inconsistent with each of the sub-clauses of the provisions in question.[74] Argentina has not explicitly indicated whether it considers the specific measures at issue to be inconsistent with each of the sub-clauses of Annex C(1)(b) and Article 5.2.2. Argentina has merely said that it has identified the relevant paragraph numbers in its panel request and that there is no requirement to go further and identify particular sub-clauses as well.[75] In our view, in much the same way as the "notice and comment" obligations contained in Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement*, the various procedural obligations set out in Annex C(1)(b) and Article 5.2.2 are closely related and interlinked. Therefore, we consider that the fact that the Complaining Parties' panel requests identify the relevant article and paragraph numbers sheds sufficient light on "the nature of the obligation at issue"[76] to meet the minimum requirements of Article 6.2.

82. Article 2.2 of the *SPS Agreement* appears to set out three different "basic" obligations: (1) that SPS measures must be applied only "to the extent necessary" to protect life or health, (2) that they must be "based on scientific principles" and (3) that they must not be "maintained without sufficient scientific evidence". The three obligations contained in Article 2.2 are further spelt out and applied in different provisions of the *SPS Agreement*, namely, Articles 5.1, 5.2 and 5.6.[77] We note that all Complaining Parties have listed Articles 5.1, 5.2 and 5.6 in their panel requests as separate legal bases. In the light of this, we consider that it is sufficiently clear from the Complaining Parties' panel requests that each of the obligations contained in Article 2.2 is at issue in the three complaints. Accordingly, we find that, in the circumstances of this case, referring to Article 2.2 is sufficient to meet the minimum requirements of Article 6.2.

83. Article 2.3 of the *SPS Agreement* stipulates that SPS measures must not arbitrarily or unjustifiably discriminate between Members and that they must not be used in a manner which would constitute a disguised restriction on trade. In addressing the sufficiency of a listing of Article 2.3, we find relevant the fact that all Complaining Parties have also listed Articles I:1, III:4 and XI:1 of the GATT 1994 as legal bases of their complaints. Articles I:1 and III:4 of the GATT 1994 prohibit certain forms of discrimination against foreign products, whereas Article XI:1 of the GATT 1994 prohibits quantitative import restrictions. We think it can be inferred from the references to these GATT 1994 provisions that both obligations set out in Article 2.3 – i.e., the obligation to avoid arbitrary or unjustifiable discrimination and the obligation not to apply SPS measures in a manner which would constitute a disguised restriction on trade – are at issue in the three complaints. We therefore find that, in the circumstances of this case, referring to Article 2.3 is sufficient to meet the minimum requirements of Article 6.2.

84. Article 5.5 of the *SPS Agreement* obligates Members (1) to avoid arbitrary or unjustifiable distinctions in the levels of sanitary or phytosanitary protection which they consider to be appropriate in different situations and (2) to co-operate in the Committee on Sanitary and Phytosanitary Measures to develop guidelines to further the practical implementation of that article. None of the three panel requests suggests that the European Communities is being challenged in respect of a failure to co-operate with a view to developing certain guidelines. Indeed, as noted by Canada,

Members have already discharged their collective obligation to develop appropriate guidelines.[78] Thus, it is clear that the obligation at issue in the three panel requests is the obligation to avoid arbitrary or unjustifiable distinctions in the levels of sanitary or phytosanitary protection. Therefore, we consider that the reference in the Complaining Parties' panel requests to Article 5.5 is sufficient to meet the minimum requirements of Article 6.2.

85. Article 7 of the *SPS Agreement* imposes an obligation on Members to notify changes in SPS measures and to provide information on SPS measures in accordance with the provisions of Annex B of the *SPS Agreement*. Regarding the obligation to "provide information" on SPS measures, we note that the Complaining Parties have specified in their panel requests which particular provisions of Annex B they consider to have been violated. We therefore think it is clear that the reference to Article 7 cannot be taken as an indication that the Complaining Parties are alleging violations of *all* provisions of Annex B. Regarding the obligation to "notify changes" in SPS measures, we note that it is not necessary, for the purposes of our preliminary ruling, to determine whether that obligation is, or is not, further elaborated in Annex B. We consider that that obligation is very similar in nature to the other obligation set out in Article 7, that is to say, the obligation to "provide information" on SPS measures in accordance with Annex B. As a result, it is our view that the reference in the Complaining Parties' panel requests to Article 7 sheds sufficient light on "the nature of the obligation at issue"[79] to meet the minimum requirements of Article 6.2.

86. Article 8 of the *SPS Agreement* requires Members to observe the provisions of Annex C in the operation of control, inspection and approval procedures and to otherwise ensure that their procedures are not inconsistent with the *SPS Agreement*. Here, too, it seems clear that the Complaining Parties cannot be understood to allege violations of *all* provisions of Annex C, given that they have specified particular provisions of Annex C which they consider to have been violated. Regarding the obligation to "otherwise ensure" compliance with the *SPS Agreement*, we consider that in view of the very similar nature of this obligation and the obligation to observe the provisions of Annex C, the reference in the Complaining Parties' panel requests to Article 7 is sufficient to meet the minimum requirements of Article 6.2.

Listing of provisions which are mutually exclusive or subject to other provisions

87. We note that another concern expressed by the European Communities relates to the fact that the Complaining Parties' panel requests list certain provisions which are mutually exclusive (such as those contained in the *SPS Agreement* and in the *TBT Agreement*) or otherwise in a clearly defined relationship with one another (such as the provisions of the GATT 1994 in relation to the provisions contained in the other WTO agreements at issue). According to the European Communities, it is unclear, due to the mere listing of these provisions, whether these provisions are alleged to apply to different aspects of the same measure, or whether some of these provisions are alleged to apply only if the Panel determines that other listed provisions are not applicable.

88. We recall that in accordance with Article 6.2 a panel request is to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Thus, the requirement is to state clearly what is the alleged legal basis of a complaint.[80] Neither the text of Article 6.2 nor relevant jurisprudence suggests that a

complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party's written submissions and oral statements.[81] Accordingly, we do not consider that the Complaining Parties' panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions. Nor do we consider that the panel requests are defective because they do not make it clear whether all of the provisions listed are alleged to apply to the same aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure. It is sufficient to recall in this regard that a panel request need not set out arguments "as to which specific aspects of the measures at issue relate to which specific provisions of [the] agreements [alleged to have been violated]"[82].

(ii) Indication of which measures violate which provisions

89. The **European Communities** argues that where a panel request covers several measures, it should indicate which provisions may be relevant for the examination of each measure, possibly describing the substantive aspects or the effects of the measures which are allegedly in breach of those provisions. The European Communities argues that the panel requests do not provide the slightest explanation in this regard. According to the European Communities, it is completely in the dark about which provisions are alleged to have been violated by which measures.

90. The European Communities further asserts that the fact that over sixty obligations have been listed means that, in total, there could be more than three thousand possible claims in respect of which the European Communities might have to prepare a defence. The European Communities considers that it has a right to know what case it will have to defend. In the European Communities' view, the panel request must contain the necessary information.

91. The **United States** argues that its panel request clearly alleges that each of the listed EC measures violates each of the provisions cited in the panel request. According to the United States, the language used – "These measures appear to be inconsistent with the following provisions […]" – is clear in tying the covered measures to the claimed violations.

92. The United States further argues that the European Communities overstates the number of obligations covered in the United States' panel request. The United States also contends that Article 6.2 does not impose an entirely different standard on a panel request on the basis that the responding party has engaged in violations of numerous WTO provisions. Finally, the United States expects that during the course of the panel proceeding, not all violations of the provisions in its panel request will receive the same level of attention.

93. **Canada** recalls that its panel request indicates that "[t]hese measures are inconsistent with the obligations of the EC" and then goes on to specify which provisions are being violated. Canada also notes that the listing of the specific provisions alleged to be violated must be read in the overall context of the panel request. According to Canada, some provisions are obviously relevant to some

claims, and just as obviously irrelevant to other claims. Specifically, Canada argues that those provisions establishing procedural obligations for the approval procedures and conformity assessment procedures (Article 8 and Annex C(1)(a), C(1)(b), C(1)(c), and C(1)(e) of the *SPS Agreement* and Articles 5.1, 5.2.1, 5.2.2, 5.2.3, 5.6 and 5.8 of the *TBT Agreement*) are not relevant to the national measures by EC member States which ban products that have already been approved by the European Communities. Canada submits that they are relevant only to those measures which concern the functioning of the European Communities' pre-marketing approval processes.

94. Canada further argues that the European Communities is incorrect in suggesting that Canada's panel request "should indicate which provisions may be relevant for the examination of each measure, possibly describing the substantive aspects or the effects of the measures which are allegedly in breach of those provisions". Canada submits that what the European Communities is complaining about here is that Canada has not provided an indication as to the legal arguments it intends to pursue, which, according to the jurisprudence, Canada is not required to do in its panel request.

95. **Argentina** maintains that its panel request is clear in relation to the link between the provisions alleged to be violated and the measures at issue. Argentina also maintains that the way in which the listed provisions are violated is a matter to be developed in Argentina's first written submission and subsequent statements.

96. The **Panel** notes that the panel in *Canada – Wheat Exports and Grain Imports* also confronted the issue whether a particular panel request made it clear which measures were alleged to violate which provisions. The panel in that case reached the following conclusion:

> We do not agree with Canada's assertion that the panel request does not make it clear which laws, regulations or actions are inconsistent with which obligation. The panel request states that "the laws, regulations *and* actions of the Government of Canada and the CWB related to exports of wheat appear to be […] inconsistent with paragraph 1(b) of Article XVII of the GATT 1994 […]" (emphasis added). This wording suggests to us – and we consider that it should suggest to Canada and the third parties as well – that the United States may have wished to claim before us that each of the three categories of measures identified – laws, regulations and actions – is inconsistent with both obligations of Article XVII:1(b). This way of presenting the Article XVII claim does not, in our view, have as a consequence that Canada does not know what case it has to answer and so cannot begin to prepare its defence, or that the third parties are uninformed as to the legal basis of the complaint and thus lack an opportunity effectively to respond to the United States' complaint.[83]

97. In the present case, the three panel requests each set out the three different EC measures at issue[84] and then go on to state:

> (a) "These measures appear to be inconsistent with the following provisions [...]" (United States' panel request)[85];

(b) "The measures violate the following provisions [...]" (Canada's panel request)[86]; and

(c) "The measures in question taken by the European Communities and several of its member States infringe the following provisions [...]" (Argentina's panel request)[87].

98. Thus, similar to the situation in *Canada – Wheat Exports and Grain Imports*, the wording of the panel requests in the present case suggests that each of the measures at issue in the three requests is inconsistent with each of the provisions identified in the three requests.

99. Referring to its own request, Canada points out, however, that the provisions establishing procedural obligations for approval procedures and conformity assessment procedures are "obviously irrelevant" to the third EC measure identified in its panel request, namely, the marketing and import bans allegedly maintained by certain EC member States, because these member State measures ban biotech product that have already been approved by the European Communities.[88] Neither the United States nor Argentina have expressed the view that the procedural provisions referred to by Canada are "obviously irrelevant" to the alleged member State marketing and import bans which they are also challenging in their respective requests. But the United States has noted that it "*currently* does not intend to pursue its claims that the procedures used in the adoption of national marketing and import bans violate the EC's WTO obligations" (emphasis added).[89] This statement suggests that, originally, the United States may have wished to pursue such claims. It also suggests that the irrelevance of the procedural provisions in question to the third EC measure covered in the three panel requests is perhaps not as obvious as Canada makes it out to be.

100. As noted by us above, the three panel requests as worded indicate that each of the measures at issue in these requests is alleged to violate each of the provisions identified. We consider, therefore, that the claims that may be pursued are "sufficiently identified in the panel request[s]"[90] and that the European Communities knows what case it may have to answer and that it can begin to prepare its defence based on that knowledge. If Canada never intended to claim that the marketing and import bans allegedly maintained by certain EC member States violate the provisions establishing procedural obligations for approval procedures and conformity assessment procedures, its panel request could arguably have stated that intention more clearly. As currently worded, Canada's panel request leaves little doubt that Canada may have wished to pursue such a claim.

101. The European Communities has noted that if the panel requests are read to mean that each of the measures identified is alleged to violate each of the provisions listed, the European Communities might have to begin to prepare a defence against a large number of claims. We agree.[91] However, we do not think that this fact supports a different reading of the panel requests. Nor do we think that this means that the legal standard of clarity against which these panel requests must be measured is higher than it would have been had the panel requests identified fewer claims. Having said this, we certainly share the European Communities' view that where a panel request sets forth a large number of claims it is particularly important that a complaining party identify the claims it may wish to pursue with as much clarity as possible.

102. The European Communities also suggests that the panel requests should have described and explained "the substantive aspects or the effects of the measures which are allegedly in breach of those provisions". Here again, we agree that it is desirable for a complaining party to provide this type of information in its panel request. However, we recall that the Appellate Body in *EC – Bananas III* agreed with the panel in that case that a panel request need not set out arguments "as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".[92]

(iii) Conclusion

103. In the light of the above considerations[93], the Panel concludes that the European Communities has failed to establish that any of the Complaining Parties' panel requests falls short of the requirement in Article 6.2 that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5. Overall conclusion

104. In view of our conclusions in Sections 4 and 5 above, there is no need to examine the issue of the prejudice, if any, sustained by the European Communities as a result of the allegedly defective panel request(s).

105. Overall, we thus conclude that the European Communities has failed to establish that any of the Complaining Parties' panel requests, when examined on its face and in the light of the attendant circumstances, is inconsistent with Article 6.2 of the DSU. Accordingly, we decline the European Communities' request that we issue a preliminary ruling to the effect that the Complaining Parties' panel requests do not meet the requirements of Article 6.2 of the DSU.

ANNEX

Provisions of the *SPS* And *TBT Agreements* referred to by the European Communities

(a) SPS Agreement

(i) Article 2.2

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

(ii) Article 2.3

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members

where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

(iii) Article 5.5

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

(iv) Article 7

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

(v) Article 8

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

(vi) Annex B(5)

Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief

indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

(vii) Annex C(1)(b)

Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that: [...] the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(b) TBT Agreement

(i) Article 2.9

Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage,

when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

(ii) Article 5.2.2

When implementing the provisions of paragraph 1, Members shall ensure that: [...] the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(iii) Article 5.6

Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

(iv) Article 12

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment

are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels."

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[1] WT/DS291/23.
[2] WT/DS292/17.
[3] WT/DS293/17.
[4] None of the parties requested a preliminary hearing on the issues raised in the European Communities' request of 8 March 2004.
[5] (original footnote) *Ibid*., para. 143.
[6] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel* "), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 127 (footnotes omitted).
[7] The United States has further argued that, in addition to being groundless, the European Communities' objections to the United States' panel request are also untimely and that the Panel should reject the European Communities' preliminary ruling request also on that basis. See United States' comments on the European Communities' preliminary ruling request, para. 38. The issue of the timeliness of the European Communities' objections needs to be addressed only if the Panel concludes that the European Communities has failed to establish that the United States' panel request does not meet the requirements of Article 6.2 of the DSU.
[8] WT/DS291/23, paras. 1-3.
[9] (original footnote) Directive 2001/18, O.J. L 106 17.4.2001, p. 1 (and its predecessor, Directive 90/220, O.J. L 117, 8.5.1990, p. 15, as amended by Directive 94/15, O.J. L 103, 22.4.1994, p. 20 and Directive 97/35, O.J. L 169, 27.6.1997, p. 72); and Regulation 258/97, O.J. L 043, 14.2.1997, p. 1.
[10] WT/DS292/17, paras. 1, 2 and 5.
[11] (original footnote) As set out in EC Directive No. 2001/18 of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EC ([2001] O.J. L 106/1) (and its predecessor, EEC Directive No. 90/220 of 23 April 1990 on the deliberate release into the environment of genetically modified organisms ([1990] O.J. L117/15), EC Regulation No. 258/97 of 27 January 1997 concerning novel foods and novel food ingredients ([1997] O.J. L 43/1), and related legislative instruments specifically referred to in them.
[12] WT/DS293/17, paras. 2-5.
[13] (original footnote) See Annex I.
[14] (original footnote) EC legislation on biotech product approval includes Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001, published in Official Journal No. 106 of 17 April 2001, pages 0001-0039 (and its predecessor Council Directive 90/220/EEC of 23 April 1990, published in Official Journal No. 117 of 8 May 1990 and amended by Directive 94/15, published in Official Journal No. 103 of 22 April 1994, and by Directive 97/35, published in Official Journal No. 169 of 27 June 1997), and Regulation (EC) No. 258/1997 of the European Parliament and of the Council of 27 January 1997, published in Official Journal No. 043 of 14 February 1997.
[15] (original footnote) See Annex II.

[16] Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, dated 6 April 2004, not yet adopted, para. 6.10, Article 6.2 ruling para. 14.
[17] *Ibid*, Article 6.2 ruling paras. 17 and 20.
[18] Appellate Body Report, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment* "), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 69.
[19] *The Concise Oxford Dictionary*, 10th ed., J. Pearsall (ed.) (Clarendon Press, 1999), p. 1443.
[20] *Ibid*.
[21] For the text of the introductory paragraph, see, *supra*, para. 8.
[22] United States' comments on the European Communities' preliminary ruling request, para. 4. The United States' panel request does not explicitly refer to a "*de facto*" moratorium. However, at the first DSB meeting at which the United States' panel request was discussed, the United States confirmed the *de facto* nature of the moratorium, saying that "[t]he existence of the moratorium [is] indisputable: the EC [has] not considered a biotech product for approval in nearly five years, and high-level EC officials [have] acknowledged its existence in public statements". See WT/DSB/M/154, p. 6.
[23] Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling para. 20.
[24] *Ibid*., Article 6.2 ruling paras. 20 and 27.
[25] We note that this distinction has played a role in a number of GATT/WTO dispute settlement proceedings. See, notably, Panel Report, *Japan – Trade in Semi-Conductors* ("*Japan – Semi-Conductors* "), adopted 4 May 1988, BISD 35S/116, paras. 110-117.
[26] United States' comments on the European Communities' preliminary ruling request, paras. 4, 5 and 16; Exhibits US-1 and US-2.
[27] European Communities' preliminary ruling request, para. 22.
[28] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams* "), WT/DS122/AB/R, adopted 5 April 2001, para. 88.
[29] We consider that the United States' panel request also adequately informs the third parties of the specific measure that is being challenged. We note in this regard that none of the third parties has offered any comments on the European Communities' objections to the United States' panel request.
[30] United States' comments on the European Communities' preliminary ruling request, para. 18.
[31] European Communities' preliminary ruling request, para. 25.
[32] For the text of the introductory paragraph, see, *supra*, para. 9.
[33] See, *supra*, para. 20.
[34] See, *supra*, para. 22.
[35] Canada's comments on the European Communities' preliminary ruling request, paras. 18-19; Exhibits CDA-4 and CDA-5.
[36] See, *supra*, para. 23.
[37] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[38] We consider that Canada's panel request also adequately informs the third parties of the specific measure that is being challenged. We note in this regard that none of the third parties has offered any comments on the European Communities' objections to Canada's panel request.
[39] European Communities' preliminary ruling request, para. 25.
[40] See, *supra*, para. 20.
[41] For the text of the second paragraph, see, *supra*, para. 10.
[42] It appears that Argentina intends to illustrate the "*de facto* moratorium" by referring to Annex I of its panel request, which sets out specific biotech products and the status of the corresponding applications for approval.
[43] See, *supra*, para. 22.
[44] See, *supra*, para. 23.
[45] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[46] We consider that Argentina's panel request also adequately informs the third parties of the specific measure that is being challenged. We note in this regard that none of the third parties has offered any comments on the European Communities' objections to Argentina's panel request.
[47] We note that at the first meeting of the DSB at which Argentina's panel request was discussed, Argentina similarly explained that "[t]he measures at issue include[...], depending on the case, failure to consider *or* the

suspension of consideration of applications for the endorsement or approval of agricultural biotechnology products [...]" (emphasis added). See WT/DSB/M/154, p. 7.
[48] European Communities' preliminary ruling request, para. 25.
[49] WT/DS291/23, para. 4.
[50] WT/DS292/17, paras. 6-7.
[51] WT/DS293/17, paras. 5-6.
[52] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[53] (original footnote) *Ibid*., para. 123.
[54] (original footnote) While arguments will be further clarified in the first written submission, and in subsequent documents, there is, as we [the Appellate Body] said in *European Communities – Bananas*, a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims. See Appellate Body Report, *supra*, footnote 30, para. 142.
[55] Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy* "), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 124.
[56] (original footnote) See Appellate Body Report, *Brazil – Desiccated Coconut*, *supra*, footnote 21, p. 22; Appellate Body Report, *European Communities – Bananas*, *supra*, footnote 13, paras. 145 and 147; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, paras. 89, 92 and 93.
[57] Appellate Body Report, *US – Carbon Steel*, para. 130.
[58] (original footnote) Appellate Body Report, *Korea – Dairy*, para. 124.
[59] We set out the text of these provisions in the Annex to the present preliminary ruling. While the European Communities appears to suggest that it has identified these particular provisions merely by way of "illustration" (European Communities' request for a preliminary ruling, para. 38), it is for the European Communities to indicate precisely how and why the Complaining Parties' panel requests are deficient. The Panel will therefore limit its analysis to those provisions which have been specified by the European Communities.
[60] See Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, at para. 54.
[61] United States' comments on the European Communities' preliminary ruling request, note 15; Canada's reply to Panel question No. 5.
[62] We note that there appears to be one inconsistency in the United States' panel request, in that the United States did not cite Article 5.1 of the *TBT Agreement* as a whole, but instead specified both of its two sub-paragraphs. However, this inconsistency does not detract from our view that, when all of the provisions listed in the United States' panel request are considered together, the United States' failure to specify sub-paragraph numbers in referring to Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* suggests that it wished to allege violations of each of the sub-paragraphs.
[63] Argentina's reply to Panel question No. 9.
[64] Appellate Body Report, *Thailand – H-Beams*, para. 93.
[65] (original footnote) See also Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, para. 111.
[66] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[67] Argentina's reply to Panel question No. 8.
[68] Specifically, the Appellate Body noted that "[i]n view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint". Appellate Body Report, *Thailand – H-Beams*, para. 97.
[69] Argentina's reply to Panel question No. 8.
[70] See Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling para. 43.
[71] European Communities' preliminary ruling request, para. 38. The European Communities does not indicate the paragraph numbers which contain these four obligations.
[72] Article 12.4 deals with measures taken by developing country Members. Articles 12.5 and 12.6 relate to Members' obligations in connection with the work of international standardizing bodies. Article 12.8 concerns the problems faced by developing country Members in discharging their obligations under the *TBT Agreement* and the possibility of obtaining time-limited exceptions from obligations under the *TBT Agreement*. Article 12.9 relates to "consultations" in a situation where a developing country Member is "formulating and implementing" standards, technical regulations or conformity assessment procedures. However, Argentina's panel request nowhere suggests that the European Communities failed to comply with its obligations during

consultations between Argentina and the European Communities. Also, Argentina's complaint plainly is not about the formulation and implementation of its own standards, technical regulations or conformity assessment procedures. Article 12.10 sets out a requirement to be satisfied by the Committee on Technical Barriers to Trade.
[73] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[74] United States' reply to Panel question No. 3; Canada's reply to Panel question No. 5.
[75] Argentina's reply to Panel question No. 9.
[76] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[77] See Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon* "), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 138; Panel Report, *EC Measures Concerning Meat and Meat Products* (*Hormones*) *– Complaint by Canada* ("*EC – Hormones* (*Canada*)"), WT/DS48/R/CAN, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235, para. 8.99.
[78] See G/SPS/15.
[79] Appellate Body Report, *US – Carbon Steel*, para. 130, quoted, *supra*, para. 54.
[80] See, e.g., Appellate Body Report, *US – Carbon Steel*, para. 172.
[81] See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III* "), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, para. 141.
[82] *Ibid.*
[83] Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling para. 29.
[84] See, *supra*, paras. 8, 9 and 10. It is important to note that in listing the three EC measures, all three panel requests use the separator "and".
[85] WT/DS291/23.
[86] WT/DS292/17.
[87] WT/DS293/17.
[88] Canada's comments on the European Communities preliminary ruling request, para. 33; Canada's reply to Panel question No. 6. For a list of the relevant provisions, see, *supra*, para. 93.
[89] United States' reply to Panel question No. 2, note 1.
[90] Appellate Body Report, *US – Carbon Steel*, para. 173.
[91] We are not convinced, however, that the European Communities might potentially have to defend itself against more than three thousands claims. In particular, we note that the European Communities itself is of the view that some of the provisions cited in the panel requests are mutually exclusive or subject to other provisions. European Communities' preliminary ruling request, para. 40.
[92] Appellate Body Report, *EC – Bananas III*, para. 141.
[93] We note, in addition, that just like we do not consider that the summaries of the legal basis of the complaints provided in the Complaining Parties' panel requests result in the European Communities not knowing what case it has to answer and hence being unable to begin preparing its defence, so also we do not consider that those summaries result in the third parties being uninformed as to the legal basis of the Complaining Parties' complaints and thus unable effectively to respond to these complaints. We recall in this regard that none of the third parties has offered any comments on the European Communities' objections to the Complaining Parties' panel requests.

7.48 In relation to the above preliminary ruling, we note that in *US – Gambling*, the Appellate Body found that "without demonstrating the source of the prohibition, a complaining party may not challenge a 'total prohibition' as a "measure", *per se*, in dispute settlement proceedings under the GATS".[235] This statement relates to a measure which was different in nature from the first measure challenged by the Complaining Parties in this case (the alleged general EC moratorium). Indeed, in *US – Gambling*, the Appellate Body's conclusion was based on the argument that without knowing the precise source of the "total prohibition", the responding party in that case was not in a position to prepare adequately its defence, particularly because it had been alleged that numerous federal and

[235] Appellate Body Report, *US – Gambling*, para. 126.

state laws underlay the "total prohibition".[236] In the present case, there is no allegation that numerous EC laws and regulations underlie the first measure challenged by the Complaining Parties. The Complaining Parties are alleging the very opposite, namely, that there are no formal laws or regulations underlying the first measure and that, as a result, no such laws or regulations could have been identified. In the light of this, we see no inconsistency between our approach and that of the Appellate Body in *US – Gambling*.[237] In any event, we have determined above that the description of the first measure covered in the Complaining Parties' respective panel requests, when read together with other information provided in those requests, adequately identifies the specific measure that is being challenged, and that the European Communities has failed to persuade us that the information contained in the Complaining Parties' respective descriptions of the first measure did not allow the European Communities to prepare adequately its defence.

7. Relevance of other rules of international law to the interpretation of the WTO agreements at issue in this dispute

7.49 The **European Communities** argues that in *US – Gasoline* the Appellate Body stated that "the General Agreement is not to be read in clinical isolation from public international law". More specifically, the European Communities notes that the WTO agreements – including the *SPS Agreement*, the *TBT Agreement* and the GATT 1994 – must be interpreted and applied by reference to relevant rules of international law arising outside the WTO context, as reflected in international agreements and declarations. The European Communities notes that notwithstanding the aforementioned statement by the Appellate Body, the Complaining Parties in these proceedings treat the legal issues concerning the authorization and international trade of GMOs as though they are regulated exclusively by WTO rules, and make no reference whatsoever to the relevant rules of public international law which have been adopted to regulate the concerns and requirements which arise from the particular characteristics of GMOs.

7.50 In view of the European Communities' argument, the **Panel** now turns to address the issue of the relevance of other rules of international law to the interpretation of the WTO agreements at issue in this dispute.

(a) Other applicable rules of international law as an interpretative element to be taken into account together with the "context" (Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*)

7.51 In approaching this issue, we first consider whether there are other applicable rules of international law which we are required to take into account in interpreting the WTO agreements at issue in this dispute.

7.52 The **European Communities** asserts that the Panel is required to interpret the relevant rules of WTO law consistently with other rules of international law that may be relevant to these proceedings. The European Communities notes in this regard that the customary rules of interpretation of public international law are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (hereafter "the *Vienna Convention*") and they include the requirement to take into account other relevant rules of international law, in addition to the context of the treaty itself. The European Communities notes in this regard that the Appellate Body has interpreted WTO rules by reference to treaties which are not binding on all parties to the proceedings. More specifically, the European Communities refers to treaties invoked by the Appellate Body in the *US – Shrimp* case – in

[236] *Ibid*., para. 125.
[237] For our approach, *see* Preliminary Ruling, paras. 22-24, 34-35 and 45-46.

support of arguments made by the United States – treaties which that country had not signed or had signed but not ratified. The European Communities asserts that the Panel is bound to follow the approach set forth in *US – Shrimp.*

7.53 The European Communities considers that the binding international law instruments relevant to this case are the *1992 Convention on Biological Diversity* (hereafter "the *Convention on Biological Diversity*") and the *2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (hereafter "the *Biosafety Protocol*"). According to the European Communities, the *Convention on Biological Diversity* is binding on the European Communities, Argentina and Canada and has been signed by the United States. Regarding the *Biosafety Protocol*, the European Communities points out that the *Protocol* is binding on the European Communities (which has obligations under it *vis-à-vis* third parties) and has been signed by Argentina and Canada. Regarding the United States, the European Communities indicates that the United States is participating in the *Protocol's* Clearing-House Mechanism (under Articles 11 and 20) and must therefore be taken to have no objection to the approach required by the *Protocol*. More generally, the European Communities argues that under Article 18 of the *Vienna Convention* (which, according to the European Communities, reflects customary international law) a State which has signed a treaty is bound to "refrain from acts which would defeat [its] object and purpose".

7.54 The European Communities argues that the *Biosafety Protocol* is the international agreement which is most directly relevant to the matters raised by the present proceedings. The relationship between the *Protocol* and other international agreements, including trade agreements, is addressed by the last three recitals of the Preamble. They recall the concept of mutual supportiveness between trade and environment agreements; they furthermore affirm that the *Protocol* shall not be interpreted as implying a change in the rights and obligations of Parties under any other existing international agreement, but recall that such statement shall not mean that the *Protocol* is subordinated to other international agreements. The European Communities submits that the Complaining Parties ignore the rules of international law reflected in the *Biosafety Protocol* on the precautionary principle and on risk assessment.

7.55 The European Communities argues that although the *Biosafety Protocol* has not been invoked in previous WTO dispute settlement proceedings, there is ample authority to support the proposition that the *Biosafety Protocol* and the *SPS Agreement* (as well as the *TBT Agreement* and GATT 1994) are so closely connected that they should be interpreted and applied consistently with each other, to the extent that is possible (as is the case in this dispute). The European Communities indicates in this regard that there is no *a priori* inconsistency between the WTO agreements (*SPS Agreement*, *TBT Agreement*, GATT 1994) and the *Biosafety Protocol*; that the two instruments are complementary; and that the Protocol's provisions on precaution and risk assessment inform the meaning and effect of the relevant provisions of the WTO agreements. Furthermore, the European Communities submits that the negotiators of the *Biosafety Protocol* were acutely aware of its relationship with WTO agreements and cannot have intended that there should be an inconsistency of approach. Reasonable governments have concluded that the authorization of GMOs (including import requirements) requires a particular approach, and they can hardly have intended that approach to be inconsistent with WTO rules. The European Communities argues, finally, that the application of its internal measures is fully consistent with the WTO agreements, and that this is confirmed by the requirements of the *Biosafety Protocol*.

7.56 The **United States** argues that there are no binding international law instruments of relevance to this dispute, other than the *WTO Agreement*. Furthermore, the United States notes that under the DSU, the Panel's terms of reference are to examine the matter at issue "in light of the relevant provisions [...] in the covered agreements cited by the parties to the dispute". The matter is *not* to be

considered in light of the provisions of the *Biosafety Protocol*, nor of other sources of international law.

7.57 The United States argues that the only way other sources of international law could be pertinent to this dispute is if, under Article 3.2 of the DSU, those other sources of law would assist the Panel in "clarifying the existing provisions of the [covered] agreements in accordance with customary rules of interpretation of public international law". As pertinent here, customary rules of interpretation of public international law are reflected in Article 31 of the *Vienna Convention*. This provision states that the terms of a treaty must be interpreted "in accordance with [their] ordinary meaning [...] in their context and in the light of [the treaty's] object and purpose". The United States notes that international law other than the *WTO Agreement* is only pertinent in so far as it would assist the Panel in interpreting the particular terms of the covered agreements at issue in this dispute.

7.58 The United States disagrees with any notion that the *Biosafety Protocol* is a rule of international law for the purposes of interpreting the *WTO Agreement* in accordance with the principles in Article 31(3) of the *Vienna Convention.* Under Article 31(3), the international rule must be "applicable in the relations between the parties". The United States notes that in this case, the *Biosafety Protocol* is not applicable to relations between the United States and the European Communities, because the United States is not a party to the *Biosafety Protocol*. The United States indicates that the European Communities' argument to the contrary is entirely without merit. The European Communities notes that the United States participates in the *Biosafety Protocol* Clearing-House Mechanism, and from this the European Communities leaps to the conclusion that the United States must thus have no objection to the "approach" required by the *Biosafety Protocol*. The United States argues that its good-faith effort to share information regarding living modified organisms that have completed regulatory review in the United States is in no way an endorsement of the *Protocol* itself.

7.59 Moreover, the United States does not agree that the Panel would need to look to the *Biosafety Protocol* in interpreting the *WTO Agreement* even in a dispute between WTO Members that were both parties to the *Biosafety Protocol*. The United States submits that the European Communities itself acknowledges that the *Protocol* explicitly provides that parties may not disregard their existing international obligations in their implementation of the *Biosafety Protocol*. The United States submits that the *Biosafety Protocol* has a clear and unequivocal statement that the *Protocol* does not change the rights and obligations under any existing international agreement. In addition, the United States notes that in this dispute, the European Communities has not identified how the *Biosafety Protocol* or a "precautionary principle" would be of relevance to interpreting any particular provision of the *WTO Agreement*. Moreover, the United States notes that the European Communities does not argue that any provision of the *Protocol* is in any way inconsistent with the European Communities' full compliance with its WTO obligations. According to the United States, the *Biosafety Protocol* foresees a functioning regulatory system in each Party country – a system that works in a predictable manner to make informed decisions on imports of "living modified organisms" within a specified timeframe. Nowhere does the *Protocol* require or even condone the adoption of moratoria on decision-making, or undue delays in such decision-making.

7.60 **Canada** argues that with the possible exception of the 1979 *International Plant Protection Convention*, there are no binding international law instruments relevant to this case. In relation to the *Biosafety Protocol*, Canada notes that the only possible relevance of the *Protocol* to this dispute could be for interpretive purposes. Initially, Canada submitted in this regard that in view of the fact that the Complaining Parties to this dispute are not parties to the *Biosafety Protocol*, the *Biosafety Protocol* is not a "relevant rule[] of international law applicable in the relations between the parties" (Article 31(3)(c) of the *Vienna Convention*). However, at a later stage Canada argued that the

reference to "parties" in Article 31(3)(c) is a reference to the parties to the treaty that is being interpreted. On that basis, Canada submitted that in the case of the *WTO Agreement*, the rules of international law in question would have to be applicable in the relations among all the WTO members.

7.61 Canada further argues that, in any event, the *Biosafety Protocol* should not be taken into account in the interpretation of the obligations under the *WTO Agreement*, given that the *Protocol*'s own terms emphasize that "this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements." Furthermore, Canada notes that the European Communities has offered no explanation for how the *Biosafety Protocol* might assist it. In particular, the *Biosafety Protocol* does not entitle the European Communities to take measures that disregard the conclusions of its scientific risk assessments or suspend the working of its risk assessment process. According to Canada there is no inconsistency between the obligations of the *Biosafety Protocol* and the WTO obligations relevant to this dispute. The *Biosafety Protocol* is premised on transparent, scientifically-sound risk assessment as the basis for decisions regarding the importation of the products to which it applies. Canada argues that the European Communities' measures – its moratorium, its product-specific marketing bans and its member State bans – are stark refutations of this premise. Also, the scope of the *Biosafety Protocol* is limited to "living modified organisms" or LMOs. The European Communities repeatedly attempts to equate the term LMOs with GMOs. As the *Biosafety Protocol* is concerned with the impact of LMOs on biodiversity, even under the European Communities' theory, the *Protocol* is of no relevance to the risk assessment of biotech products for food use under Regulation 258/97. Canada submits that, for all these reasons, the European Communities will find no justification for its measures under the *WTO Agreement* by appealing to other international agreements.

7.62 **Argentina** argues that according to Article 3.2 of the DSU, as interpreted by the Appellate Body, any treaty interpreter must resort to the *Vienna Convention* in order to interpret the covered agreements. Argentina indicates that in this case, with respect to the "extra-WTO" rules invoked by the European Communities, it is necessary to resort to Article 31 of the *Vienna Convention.*

7.63 Furthermore, Argentina argues that the rules of international law referred to by the European Communities are clearly not an agreement "relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of Article 31(2)(a) of the *Vienna Convention*. Nor are they an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of Article 31(2)(b) of the *Vienna Convention*. Moreover, Argentina submits that the rules cited by the European Communities are not a "subsequent agreement between the parties regarding the interpretation of the treaty or the applications of its provisions" within the meaning of Article 31.3(a). In addition, Argentina asserts that the *Biosafety Protocol* cannot be regarded as "any relevant rule of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the *Vienna Convention*, since the European Communities is the only party in this WTO dispute bound by the provisions of the *Biosafety Protocol*.

7.64 The **Panel** begins its analysis by offering some general observations before considering the relevance of the rules of international law which the European Communities claims should have a bearing on our interpretation of WTO provisions.

(i) General

7.65 Pursuant to Article 3.2 of the DSU, we are to interpret the WTO agreements "in accordance with customary rules of interpretation of public international law". These customary rules are reflected, in part, in Article 31 of the *Vienna Convention*.[238]

7.66 Article 31 provides in relevant part:

> Article 31
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

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

[238] Appellate Body Report, *US – Carbon Steel*, paras. 61-62.

taken into account in the interpretation of WTO provisions.[239] As we mention further below, the European Communities considers that the principle of precaution is a "general principle of international law". Based on the Appellate Body report on *US – Shrimp*, we would agree that if the precautionary principle is a general principle of international law, it could be considered a "rule of international law" within the meaning of Article 31(3)(c).

7.68 Furthermore, and importantly, Article 31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term "the parties". In considering this issue, we note that Article 31(3)(c) does not refer to "one or more parties".[240] Nor does it refer to "the parties to a dispute".[241] We further note that Article 2.1(g) of the *Vienna Convention* defines the meaning of the term "party" for the purposes of the *Vienna Convention*. Thus, "party" means "a State which has consented to be bound by the treaty and for which the treaty is in force". It may be inferred from these elements that the rules of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force.[242] This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members.[243]

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[239] Appellate Body Report, *US – Shrimp*, para. 158 and footnote 157. The Appellate Body found in that case that the principle of good faith was at once a general principle of law and a general principle of international law.

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

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

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

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

[243] We find further support for this view in the provisions of Article 31(3)(b). Article 31(3)(b), which is part of the immediate context of Article 31(3)(c), provides that a treaty interpreter must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Like Article 31(3)(c), this provision makes reference to "the parties". In *EC – Chicken Cuts*, the Appellate Body appeared to agree with the panel in that case that the term "the parties" in Article 31(3)(b) means the parties to a treaty and in the WTO context must be understood as meaning the WTO Members. Appellate Body Report, *EC – Chicken Cuts*, paras. 272 (referring to "a treaty party" and agreement with a practice by "other WTO Members") and 273 (referring to the "issue of how to establish the agreement by

7.69 It is important to note that Article 31(3)(c) mandates a treaty interpreter to take into account other rules of international law ("[t]here shall be taken into account"); it does not merely give a treaty interpreter the option of doing so.[244] It is true that the obligation is to "take account" of such rules, and thus no particular outcome is prescribed. However, Article 31(1) makes clear that a treaty is to be interpreted "in good faith". Thus, where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter following the instructions of Article 31(3)(c) in good faith would in our view need to settle for that interpretation which is more in accord with other applicable rules of international law.[245]

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

7.71 The European Communities appears to suggest that we must interpret the WTO agreements at issue in this dispute in the light of other rules of international law even if these rules are not binding on all Parties to this dispute.[246] In addressing this argument, we first recall our view that Article 31(3)(c) should be interpreted to mandate consideration of rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted.[247] The parties to a dispute over compliance with a particular treaty are, of course, parties to that treaty. In relation to the present dispute it can thus be said that if a rule of international law is not applicable to one of the four WTO Members which are parties to the present dispute, the rule is not applicable in the relations

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Members that have not engaged in a practice"). *See also* Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13 (referring to "the agreement of the parties [to a treaty] regarding its interpretation"). It is true that the Appellate Body found that "the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties, including those that have not actually engaged in such practice". Appellate Body Report, *EC – Chicken Cuts*, para. 273. But it also found that it is necessary "to establish agreement of those that have not engaged in a practice". Appellate Body Report, *EC – Chicken Cuts* , para. 271. Thus, our interpretation of the term "the parties" in Article 31(3)(c) is consistent with, and indeed supported by, the Appellate Body's interpretation of the same term in Article 31(3)(b). In our view, it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law which are not applicable in the relations between all parties to the treaty, but not by a subsequent practice which does not establish the agreement of all parties to the treaty regarding the meaning of that treaty.

[244] This view is confirmed by the negotiating history of Article 31(3). The International Law Commission, in its commentary to Article 27 of the draft *Vienna Convention*, which contained language identical to the current Article 31 of the *Vienna Convention*, stated that "the three elements [the three sub-paragraphs of what is now Article 31(3)] are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them". *Yearbook of the International Law Commission* (1966), Vol. II, p. 220, para. 9.

[245] We are not suggesting that other applicable rules of international law invariably or exclusively serve as a kind of "tie-breaker" in the interpretative process.

[246] The European Communities considers that the Appellate Body report on *US – Shrimp* supports its view. We do not agree. In our view, that report does not stand for the proposition that panels are required to interpret WTO agreements in the light of other rules of international law even if they are not applicable to all parties to a dispute. We further address the Appellate Body report on *US – Shrimp*, and in particular how we understand it, in the next sub-section.

[247] We recall that we have reached this view after determining that the text and context of Article 31(3)(c) do not support interpreting the term "the parties" as meaning "the parties to a dispute".

between all WTO Members. Accordingly, based on our interpretation of Article 31(3)(c), we do not consider that in interpreting the relevant WTO agreements we are required to take into account other rules of international law which are not applicable to one of the Parties to this dispute. But even independently of our own interpretation, we think Article 31(3)(c) cannot reasonably be interpreted as the European Communities suggests. Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.[248]

7.72 Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.

(ii) Convention on Biological Diversity and Biosafety Protocol

7.73 With the foregoing observations in mind, we now consider whether the multilateral treaties identified by the European Communities are "relevant rules of international law applicable in the relations between the parties". The European Communities has identified two multilateral treaties, the *Convention on Biological Diversity* and the *Biosafety Protocol*. We first address the *Convention on Biological Diversity*.

7.74 We note that like most other WTO Members, Argentina, Canada and the European Communities have ratified the *Convention on Biological Diversity* and are thus parties to it.[249] The United States has signed it in 1993, but has not ratified it since.[250] Thus, the United States is not a party to the *Convention on Biological Diversity*, and so for the United States the *Convention* is not in force. In other words, the *Convention on Biological Diversity* is not "applicable" in the relations between the United States and all other WTO Members. The mere fact that the United States has signed the *Convention on Biological Diversity* does not mean that the *Convention* is applicable to it.[251] Nor does it mean that the United States will ratify it, or that it is under an obligation to do so. We

[248] It is useful to recall that there are several ways in which a sovereign State can decide not to accept other rules of international law. Thus, in the case of other rules of international law embodied in a treaty, a State may have decided not to participate in the negotiation of the treaty; it may have decided not to sign the final text of the treaty in question; or the legislature of a State may have decided not to ratify the treaty after it had been signed by its executive branch. There are also cases of ratifications with objections/exceptions. In the case of customary rules of international law, a State may have persistently objected to such a rule during its formation.

[249] The *Convention on Biological Diversity* entered into force on 29 December 1993.

[250] We have no information on whether the United States has ever made its intentions clear after 1993 as to whether it still wished to become a party to the 1992 Convention.

[251] We note that pursuant to Article 18 of the *Vienna Convention* a State which has signed a treaty must refrain from acts which would defeat the object and purpose of that treaty, at least until it has made its intention clear not to become a party. Initially, we note that there is an issue whether the provisions of Article 18 reflect customary international law. Even disregarding this issue, we note that Article 18 refers to "acts" which rise to the level of "defeat[ing] the object and purpose" of a treaty, not to acts which are inconsistent with specific terms of that treaty. It does not follow from Article 18 that a State which has signed a treaty has obligations pursuant to the specific terms of that treaty and that the treaty is applicable to it as such. In any event, Article 31(3)(c) refers to applicable "rules" of international law. We think the "object and purpose" of a treaty cannot be reasonably considered to constitute a "rule" of international law.

have said that if a rule of international law is not applicable to one of the Parties to this dispute, it is not applicable in the relations between all WTO Members. Therefore, in view of the fact that the United States is not a party to the *Convention on Biological Diversity*, we do not agree with the European Communities that we are required to take into account the *Convention on Biological Diversity* in interpreting the multilateral WTO agreements at issue in this dispute.

7.75 Turning to the *Biosafety Protocol*, we note that it entered into force only on 11 September 2003, *i.e.*, after this Panel was established by the DSB. Among the WTO Members parties to the *Biosafety Protocol* is the European Communities. Argentina and Canada have signed the *Biosafety Protocol*, but have not ratified it since.[252] Hence, they are not parties to it. The United States has not signed the *Biosafety Protocol*. While this does not preclude the United States from ratifying the *Protocol*, the United States has so far not done so.[253] Accordingly, it, too, is not a party to the *Biosafety Protocol*. We do not consider that the rules of the *Biosafety Protocol* can be deemed to be applicable to the United States merely because the United States participates in the Protocol's Clearing-House Mechanism. It follows that the *Biosafety Protocol* is not in force for Argentina, Canada or the United States.[254] We deduce from this that the *Biosafety Protocol* is not "applicable" in the relations between these WTO Members and all other WTO Members. As we have said above, in our view, the mere fact that WTO Members like Argentina and Canada have signed the *Biosafety Protocol* does not mean that the *Protocol* is applicable to them. In view of the fact that several WTO Members, including the Complaining Parties to this dispute, are not parties to the *Biosafety Protocol*, we do not agree with the European Communities that we are required to take into account the *Biosafety Protocol* in interpreting the multilateral WTO agreements at issue in this dispute.

(iii) Precautionary principle

7.76 We have stated earlier that, in our view, the relevant rules of international law to be taken into account include general principles of law. The European Communities contends that the so-called "precautionary principle" is a relevant principle of this kind, and so we address this issue below, after summarizing the Parties' arguments.

7.77 The **European Communities** states that certain GMOs present potential threats to human health and the environment. The European Communities submits that the existence of a potential threat justifies the assessment of risks on a case-by-case basis and special measures of protection based on the precautionary principle.

7.78 The European Communities asserts that the precautionary principle has by now become a fully-fledged and general principle of international law. According to the European Communities, the precautionary principle was first recognised in the *World Charter for Nature*, adopted by the UN General Assembly in 1982, and was subsequently incorporated into various international conventions on the protection of the environment. Furthermore, the *Rio Declaration* that concluded the 1992 Rio Conference on the Environment and Development codified an application of this principle in its Principle 15[255]. Since then, the *United Nations Framework Convention on Climate Change and the Convention of Biological Diversity* have referred to the precautionary principle. More recently, in the

[252] We have no information on whether Argentina and Canada have made their intentions clear after signing the 2000 Protocol as to whether they still wished to become a party to the 2000 Protocol.

[253] We have no information on whether the United States has made its intentions clear as to whether it wishes to become a party to the 2000 Protocol.

[254] We note that it is also not in force for several third parties to this dispute, including Australia, Chile, Honduras, Thailand and Uruguay. *See* http://www.biodiv.org/world/parties.asp.

[255] For the text of Principle 15 of the *Rio Declaration*, *see infra* footnote 263.

specific field of GMOs, the *Biosafety Protocol* has confirmed the key function of the precautionary principle in the decision to restrict or prohibit imports of GMOs in the face of scientific uncertainty.

7.79 The European Communities further points out that in many countries approval systems are based on the need to take precautionary action. As examples, the European Communities cites the Australian Gene Technology Act (2000), the Swiss GMO legislation and the New Zealand Hazardous Substances and New Organisms Act. Additionally, the European Communities notes that the precautionary principle is one of the "salutary principles which govern the law of the environment" in India and has been applied by the Indian Supreme Court.[256]

7.80 The **United States** argues that the European Communities has not identified how a "precautionary principle" would be of relevance to interpreting any particular provision of the *WTO Agreement*. Moreover, the United States notes that in the *EC – Hormones* dispute, the Appellate Body examined at length nearly identical arguments presented by the European Communities regarding the relationship between a purported "precautionary principle" and the *SPS Agreement*. The European Communities has not presented, and cannot argue, that any different results should apply here. The United States considers that as the Appellate Body found it unnecessary and imprudent in the *EC – Hormones* case to make a finding on the status of the precautionary principle in international law, the Panel should have no need to address this theoretical issue.

7.81 The United States nonetheless notes that it strongly disagrees that "precaution" has become a rule of international law. According to the United States, the "precautionary principle" cannot be considered a general principle or norm of international law because it does not have a single, agreed formulation. The United States notes in this regard that, on the contrary, the concept of precaution has many permutations across a number of different factors. Thus, the United States considers precaution to be an "approach", rather than a "principle" of international law.

7.82 Furthermore, the United States submits that if precaution is not a principle of international law, then it is *a fortiori* not a rule of customary international law. The United States submits that precaution does not fulfil any of the requirements to become a rule of customary international law for the following reasons: (i) it cannot be considered a "rule" because it has no clear content and therefore cannot be said to provide any authoritative guide for a State's conduct; (ii) it cannot be said to reflect the practice of States, as it cannot even be uniformly defined by those who espouse it; and (iii) given that precaution cannot be defined and, therefore, could not possibly be a legal norm, one could not argue that States follow it from a sense of legal obligation.

7.83 Finally, the United States argues that even if a precautionary principle were considered a relevant rule of international law under Article 31(3) of the *Vienna Convention*, it would be useful only for interpreting particular treaty terms, and could not override any part of the of the *SPS Agreement*.

7.84 **Canada** argues that while the *Biosafety Protocol* may reflect the "precautionary approach contained in Principle 15 of the *Rio Declaration*", the precautionary principle "finds reflection" in several provisions of the *SPS Agreement*, including Article 5.7. Canada notes that the Appellate Body in *EC – Hormones* has previously held that the precautionary principle cannot be invoked as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of the *SPS Agreement*.

[256] *See T.N. Godavarman Thirumalpad v. Union of India* (2002) 10 SCC 606.

7.85 **Argentina** states that the Appellate Body has addressed the status of this so-called "principle" of precaution in *EC – Hormones*.

7.86 The **Panel** notes the European Communities' contention that the precautionary principle has "by now" become a fully-fledged and general principle of international law. The European Communities has not explained exactly what it means by the term "general principle of international law". We note that this term may be understood as encompassing either rules of customary law or the recognized general principles of law or both.[257] Given this, we are prepared to consider whether the precautionary principle fits within either of these categories. This approach is consistent with the position taken by the European Communities in *EC – Hormones* where the European Communities contended on appeal that the precautionary principle was a general customary rule of international law or at least a general principle of law.[258]

7.87 In its report on *EC – Hormones*, the Appellate Body had this to say in response to the aforementioned contention by the European Communities:[259]

> "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.[260] We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[261]

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[257] *See, e.g.*, Ian Brierly, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1998), pp. 18-19.

[258] Appellate Body Report, *EC – Hormones*, para. 121.

[259] *Ibid*., paras. 123-124.

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

[261] (*original footnote*) In *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice recognized that in the field of environmental protection "... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight ...". However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also

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

7.88 The Appellate Body made this statement in January 1998. It appears to us from the Parties' arguments and other available materials that the legal debate over whether the precautionary principle constitutes a recognized principle of general or customary international law is still ongoing. Notably, there has, to date, been no authoritative decision by an international court or tribunal which recognizes the precautionary principle as a principle of general or customary international law.[262] It is correct that provisions explicitly or implicitly applying the precautionary principle have been incorporated into numerous international conventions and declarations, although, for the most part, they are environmental conventions and declarations.[263] Also, the principle has been referred to and applied

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declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabcíkovo/Nagymaros System of Locks. See, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Judgement, 25 September 1997, paras. 140, 111-114.

[262] We note that in the *Southern Bluefin Tuna Cases* brought before the International Tribunal for the Law of the Sea, two judges referred to the precautionary principle in their separate opinions. Judge Treves indicated understanding for "the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law", noting also that "[o]ther courts and tribunals, recently confronted with this question, have avoided to give an answer". Judge Laing considered that it was "not possible, on the basis of the materials available and arguments presented [...], to determine whether [...] customary international law recognizes a precautionary principle", adding that "treaties and formal instruments use different language of obligation; the notion is stated variously (as a principle, approach, concept, measures, action); no authoritative judicial decision unequivocally supports the notion; doctrine is indecisive; and domestic juridical materials are uncertain or evolving". International Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases* (*New Zealand v. Japan*; *Australia v. Japan*) *(Requests for Provisional Measures)*, 1999, para. 9 (Separate Opinion of Judge Treves) and para. 16 (Separate Opinion of Judge Laing).

[263] We note, by way of example, Principle 15 of the 1992 *Rio Declaration on Environment and Development*:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

by States at the domestic level, again mostly in domestic environmental law.[264] On the other hand, there remain questions regarding the precise definition and content of the precautionary principle.[265] Finally, regarding doctrine, we note that many authors have expressed the view that the precautionary principle exists as a general principle in international law.[266] At the same time, as already noted by the Appellate Body, others have expressed scepticism and consider that the precautionary principle has not yet attained the status of a general principle in international law.[267]

7.89 Since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so. Our analysis below makes clear that for the purposes of

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> We also note preambular paragraph 9 of the *Convention on Biological Diversity*, which states:
>
> Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.
>
> Finally, we note the *Biosafety Protocol*, which states in Article 1:
>
> In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.
>
> Furthermore, Article 10(6) of the *Protocol* states:
>
> Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.

[264] We note, for instance, the European Communities' reference to a decision of the Indian Supreme Court. Another example is provided by Article 1(6) of Colombia's Law 99 of 1993, which provides that "[i]n formulating environmental policy, account shall be taken of the results of the scientific investigation process. However, the environmental authorities and individuals shall apply the precautionary principle according to which, where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Panel's translation from Spanish).

[265] This point was made, for instance, by Judge Laing in his previously mentioned separate opinion in the *Southern Bluefin Tuna Cases*.

[266] *See, e.g.*, O. McIntyre/T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law", *Journal of Environmental Law* 9 (1997), pp. 222-223; J. Cameron/W. Wade-Gery/J. Abouchar, "Precautionary Principle and Future Generations" in E. Agius *et al*. (eds.), *Future Generations and International Law*, London, 1998, p. 96; P. Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge University Press, 2003), p. 279.

[267] *See, e.g.*, L. M. Jurgielewicz, *Global Environmental Change and International Law* (Lanham, 1996), p. 64; P.-M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?", *Revue Générale de Droit International Public* 4 (1997), pp. 889-890; J. O. McGinnis, "The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO", *Virginia Journal of International Law* 44 (2003), pp. 260-261.

disposing of the legal claims before us, we need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law. Therefore, we refrain from expressing a view on this issue.

(b) Other rules of international law as evidence of the ordinary meaning of terms used in a treaty

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

7.91 The **European Communities** notes in this regard that in *US – Shrimp* the Appellate Body interpreted WTO rules by reference to treaties which were not binding on all parties to the proceedings. More specifically, the European Communities points out that the Appellate Body in that case invoked treaties in support of arguments made by the United States, even though the United States had either not signed or not ratified these treaties. The European Communities notes that one such treaty was the *Convention on Biological Diversity*.

7.92 The **Panel** recalls that pursuant to Article 31(1) of the *Vienna Convention*, the terms of a treaty must be interpreted in accordance with the "ordinary meaning" to be given to these terms in their context and in the light of its object and purpose. The ordinary meaning of treaty terms is often determined on the basis of dictionaries. We think that, in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used.[268] Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do.[269] They would be considered for their informative character. It follows that when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it.

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

7.94 This approach is consistent with the Appellate Body's approach in *US – Shrimp*, as we understand it. In that case, the Appellate Body had to interpret the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. The Appellate Body found that this term was by definition evolutionary and therefore found it "pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-

[268] It is useful to note in this context that the Appellate Body has stated that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents". Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248.

[269] A treaty interpreter would have to keep in mind, of course, that other rules of international law may be negotiated rules and, as such, may assign meanings to particular terms which may not be reflective of the ordinary meaning of those terms. We note that this possibility is recognized in Article 31(4) of the *Vienna Convention*, which states that "[a] special meaning shall be given to a term if it is established that the parties so intended".

living resources".[270] Thus, as we understand it, the Appellate Body drew on other rules of international law because it considered that they were informative and aided it in establishing the meaning and scope of the term "exhaustible natural resources".[271] The European Communities correctly points out that the Appellate Body referred to conventions which were not applicable to all disputing parties. However, the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted.[272]

7.95 In the present case, in response to a question from the Panel[273], the European Communities has identified a number of provisions of the *Convention on Biological Diversity* and of the *Biosafety Protocol* which it considers must be taken into account by the Panel.[274] The European Communities has not explained how these provisions are relevant to the interpretation of the WTO agreements at issue in this dispute. We have carefully considered the provisions referred to by the European Communities. Ultimately, however, we did not find it necessary or appropriate to rely on these particular provisions in interpreting the WTO agreements at issue in this dispute.

7.96 Furthermore, we recall that after consulting the Parties, we have requested several international organizations (Codex, FAO, the IPPC Secretariat, WHO, OIE, the CBD Secretariat and UNEP) to identify materials (reference works, glossaries, official documents of the relevant international organizations, including conventions, standards and guidelines, etc.) that might aid us in determining the ordinary meaning of certain terms used in the definitions provided in Annex A to the *SPS Agreement*. The materials we have obtained in this way have been taken into account by us, as appropriate.

B. OVERVIEW OF MEASURES AT ISSUE

7.97 In this section, we provide an overview of the measures at issue in this dispute. We have pointed out earlier that the three Complaining Parties in this dispute have filed legally separate complaints, but that each of these complaints relates to the same matter and that the DSB therefore decided to have them examined by a single panel.

7.98 The specific measures which are being contested in each complaint are indeed quite similar. As the case name suggests, the measures at issue in all three complaints are certain EC measures affecting the approval and marketing of biotech products. More specifically, the Complaining Parties are each challenging three identical categories of EC measures. The categories in question are:

(i) the alleged general EC moratorium on approvals of biotech products (hereafter the "general EC moratorium");

(ii) various product-specific EC measures affecting the approval of specific biotech products (hereafter the "product-specific EC measures"); and

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[270] Appellate Body Report, *US – Shrimp*, para. 130.

[271] We note that the Appellate Body did not suggest that it was looking to other rules of international law because it was required to do so pursuant to the provisions of Article 31(3)(c) of the *Vienna Convention*. Indeed, the Appellate Body did not even mention Article 31(3)(c).

[272] Equally, in a case where all disputing parties are parties to a convention, this fact would not necessarily render reliance on that convention appropriate.

[273] Panel question No. 4.

[274] The European Communities refers to the Preamble and Article 8(g) of the *Convention on Biological Diversity* and Articles 1, 8, 10, 11, 15, 23, 26 and Annex III of the *Biosafety Protocol.*