

### VIII. Findings and Conclusions

736. For the reasons set out in this Report, the Appellate Body:

- (a) As regards the DSU:
- (i) finds that the Panel did not err in stating that proceedings under Article 21.5 of the DSU are open to not only the original complainant<sup>1484</sup>, because they may be initiated by original complainants and original respondents;
  - (ii) upholds the Panel's finding that "it has jurisdiction to consider the compatibility of the [European Communities'] implementing measure with the *SPS Agreement* as part of its review of the claim raised by the European Communities with respect to Article 22.8 of the DSU"<sup>1485</sup>;
  - (iii) because it has not been established that the measure found to be inconsistent with the *SPS Agreement* in the *EC – Hormones* dispute has been removed<sup>1486</sup>, upholds the Panel's finding that "the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU *as a result of a breach of Article 22.8*"<sup>1487</sup>;
  - (iv) reverses the Panel's finding that, "by maintaining its suspension of concessions even after the notification of [Directive 2003/74/EC]", Canada is "seeking redress of a violation with respect to [this Directive], within the meaning of Article 23.1 of the DSU"<sup>1488</sup>; and
  - (v) reverses the Panel's findings that Canada "made a 'determination' within the meaning of Article 23.2(a) in relation to Directive 2003/74/EC" on the basis of statements made at DSB meetings and the fact that the suspension of concessions continued subsequent to the notification of Directive 2003/74/EC<sup>1489</sup>, and that Canada "failed to make any such determination consistent with the findings contained in the panel or Appellate

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<sup>1484</sup>Panel Report, *Canada – Continued Suspension*, para. 7.353.

<sup>1485</sup>*Ibid.*, para. 7.376.

<sup>1486</sup>See subparagraphs (c) and (d) *infra*.

<sup>1487</sup>Panel Report, *Canada – Continued Suspension*, para. 7.842(b). (original emphasis)

<sup>1488</sup>*Ibid.*, para. 7.207. See also *ibid.*, para. 7.891(a).

<sup>1489</sup>Panel Report, *Canada – Continued Suspension*, para. 7.232. See also *ibid.*, para. 7.841(b).

Body report adopted by the DSB or an arbitration award rendered under the DSU", in breach of Article 23.2(a).<sup>1490</sup>

- (b) As regards the Panel's consultations with the scientific experts, finds that the Panel infringed the European Communities' due process rights, because the institutional affiliation of Drs. Boisseau and Boobis compromised their appointment and thereby the adjudicative independence and impartiality of the Panel. Accordingly, the Panel failed to comply with its duties under Article 11 of the DSU.
- (c) As regards the consistency with Article 5.1 of the *SPS Agreement* of the European Communities' import ban on meat from cattle treated with oestradiol-17 $\beta$  for growth-promotion purposes, which is applied pursuant to Directive 2003/74/EC:
- (i) finds that the Panel erred in its interpretation and application of Article 5.1 in relation to risks of misuse and abuse in the administration of hormones to cattle for growth-promotion purposes;
- (ii) finds that the Panel did not err in requiring the European Communities to evaluate specifically the risks arising from the presence of residues of oestradiol-17 $\beta$  in meat or meat products from cattle treated with the hormone for growth-promotion purposes;
- (iii) finds that the Panel did not err in its interpretation of Article 5.1 and paragraph 4 of Annex A of the *SPS Agreement* as regards quantification of risk;
- (iv) finds that the Panel erred in the allocation of the burden of proof in its assessment of the consistency of Directive 2003/74/EC with Article 5.1 of the *SPS Agreement*;
- (v) finds that the Panel applied an incorrect standard of review in examining whether the European Communities' risk assessment satisfied the requirements of Article 5.1 and paragraph 4 of Annex A of the *SPS Agreement*, and thereby failed to comply with its duties under Article 11 of the DSU; and
- (vi) reverses the Panel's finding that the European Communities' import ban relating to oestradiol-17 $\beta$  is not based on a risk assessment as required by

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<sup>1490</sup>*Ibid.*, para. 7.237. (emphasis omitted) See also *ibid.*, para. 7.841(b).

Article 5.1 of the *SPS Agreement*<sup>1491</sup>; however, the Appellate Body is unable to complete the analysis and therefore makes no findings as to the consistency or inconsistency of the import ban relating to oestradiol-17 $\beta$  with Article 5.1 of the *SPS Agreement*.

- (d) As regards the consistency with Article 5.7 of the *SPS Agreement* of the European Communities' provisional import ban on meat from cattle treated with testosterone, progesterone, trenbolone acetate, zeranol, and MGA, for growth-promotion purposes, which is applied pursuant to Directive 2003/74/EC:
- (i) reverses the Panel's finding that "the determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk must be disconnected from the intended level of protection"<sup>1492</sup>;
  - (ii) reverses the Panel's finding that, where international standards exist, "there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient"<sup>1493</sup>;
  - (iii) finds that the Panel erred in the allocation of the burden of proof in its examination of the consistency of Directive 2003/74/EC with Article 5.7 of the *SPS Agreement*;
  - (iv) finds that the Panel erred in its interpretation and application of Article 5.7 of the *SPS Agreement* by adopting an incorrect legal test in determining whether the relevant scientific evidence was "insufficient";
  - (v) does not find it necessary to address the European Communities' claim that the Panel acted inconsistently with Article 11 of the DSU; and
  - (vi) reverses the Panel's finding that the provisional import ban relating to testosterone, progesterone, trenbolone acetate, zeranol, and MGA does not meet the requirements of Article 5.7 of the *SPS Agreement*<sup>1494</sup>; however, the Appellate Body is unable to complete the analysis and therefore makes no

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<sup>1491</sup>Panel Report, *Canada – Continued Suspension*, paras. 7.541, 7.548 and 7.549.

<sup>1492</sup>*Ibid.*, para. 7.590.

<sup>1493</sup>*Ibid.*, para. 7.626. (original emphasis; footnote omitted)

<sup>1494</sup>Panel Report, *Canada – Continued Suspension*, paras. 7.821 and 7.822.

findings as to the consistency or inconsistency of the European Communities' provisional import ban with Article 5.7 of the *SPS Agreement*.

737. Because we have been unable to complete the analysis as to whether Directive 2003/74/EC has brought the European Communities into substantive compliance within the meaning of Article 22.8 of the DSU, the recommendations and rulings adopted by the DSB in *EC – Hormones* remain operative. In the light of the obligations arising under Article 22.8 of the DSU, we recommend that the Dispute Settlement Body request Canada and the European Communities to initiate Article 21.5 proceedings without delay in order to resolve their disagreement as to whether the European Communities has removed the measure found to be inconsistent in *EC – Hormones* and whether the application of the suspension of concessions by Canada remains legally valid.

Signed in the original in Geneva this 19th day of September 2008 by:

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David Unterhalter  
Presiding Member

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Georges Abi-Saab  
Member

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Lilia Bautista  
Member