

[S]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of the GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular Article XX(b).

7.731. In light of the above, the Panel considers that when the United States brings its measures into conformity with the SPS Agreement, any inconsistency with the GATT 1994 will also be addressed. Under the circumstances, we see no reason to disagree with the consistent approach of prior panels.

7.732. We recall our findings above that the United States' measures are inconsistent with Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Annex C(1)(a) and (b) of the SPS Agreement. Having made findings under the SPS claims, we conclude that it is not necessary to make findings under the GATT 1994 claims as they would not contribute to a positive resolution of the matter.¹⁷⁵⁶ Therefore, we consider it appropriate to exercise judicial economy over Argentina's claims under Articles I:1 and XI:1 of the GATT 1994 and the United States' defence under Article XX(b).

8 CONCLUSIONS AND RECOMMENDATION(S)

8.1. As described in greater detail above, the Panel finds in respect of Argentina's claims pursuant to the SPS Agreement that:

- a. The United States' measures (9 CFR 94.1, as amended by the 2001 Regulations, the application of 9 CFR 92.2 to Argentina's applications for authorization to import for fresh (chilled or frozen) beef from Northern Argentina, and FMD-susceptible animals and animal products from Patagonia, and Section 737) are SPS measures subject to the disciplines of the SPS Agreement.
- b. With respect to Article 8 and Annex C(1) the Panel finds that:
 - i. The application of the disciplines of 9 CFR 92.2 to Argentina's requests for authorization to import fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free falls within the scope of Article 8 and Annex C(1) of the SPS Agreement.
 - ii. That the United States has not undertaken and completed the procedure to review Argentina's request for imports of fresh (chilled or frozen) beef from Northern Argentina without undue delay and has therefore acted in a manner inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.
 - iii. That the United States has not undertaken and completed the review of Argentina's request for recognition of Patagonia as FMD-free without undue delay and it has thus acted inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement.
 - iv. Argentina's claims under Article 8 and the first and third requirements of Annex C(1)(b) are outside the Panel's terms of reference.
 - v. By failing to inform Argentina, upon request, of the stage of APHIS' review processes or to explain the delays incurred by such procedures, the United States acted inconsistently with Article 8 and the fifth requirement of Annex C(1)(b).
- c. The Panel finds that 9 CFR 94.1, as amended by the 2001 Regulations, is not based on the relevant provisions of the Terrestrial Code and is thus inconsistent with Article 3.1 of the SPS Agreement.

¹⁷⁵⁶ See e.g. Panel Reports, *US/Canada – Continued Suspension*, para. 7.853; *Japan – Apples*, para. 8.328; *Japan – Apples (Article 21.5 – US)*, paras. 8.202-8.203; *EC–Hormones (US)*, para. 8.272; *Australia – Salmon*, para. 8.185; and *EC – Approval and Marketing of Biotech Products*, para. 7.3429.

- d. The Panel finds the United States did not seek to obtain additional information nor did it review the measures within a reasonable period of time. Therefore, the Panel finds that the measures do not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to the United States.
- e. With respect to Articles 5.1, 5.2, and 2.2 the Panel finds that:
- i. The June 2001 Interim Rule is a risk assessment "appropriate to the circumstances" within the meaning of Article 5.1, 5.2, 5.3 and Annex A(4). The Panel also finds that at the time the measures were adopted in 2001 they were based on that risk assessment. Therefore, at the time the measures were adopted they were consistent with Articles 5.1 and 5.2.
 - ii. The Panel also finds that the scientific evidence required a review or new risk assessment, which the United States had not completed as of the date of establishment of the Panel. Therefore, the Panel finds that the measures are not maintained based on a risk assessment as required by Article 5.1 of the SPS Agreement. Such failure cannot be justified by the fact that the risk assessment process was ongoing because the United States acted inconsistently with Article 8 and Annex C(1)(a) in the conduct of the risk assessment in that the process incurred undue delays. Therefore, the maintenance of the measures is inconsistent with Article 5.1. Having found that there was no risk assessment, the Panel finds no basis to move forward with an analysis under Article 5.2.
 - iii. As a consequence of the violation of Article 5.1, the Panel finds that the United States' measures are also inconsistent with Article 2.2.
- f. The Panel concludes that Article 5.4 does not impose a positive obligation on WTO Members. Even assuming, *arguendo*, that Argentina could raise a claim under Article 5.4, the Panel finds that it has not made a *prima facie* case of inconsistency.
- g. With respect to Article 5.6 the Panel finds that:
- i. The United States' prohibitions on imports of fresh (chilled or frozen) beef from Northern Argentina are more trade-restrictive than required to achieve the United States' ALOP, and thus are inconsistent with Article 5.6.
 - ii. The United States' prohibitions on imports of FMD-susceptible animals and animal products from Patagonia are more trade-restrictive than required to achieve the United States' ALOP, and thus are inconsistent with Article 5.6.
- h. With respect to Article 2.3 the Panel finds that:
- i. By allowing imports of fresh (chilled or frozen) beef from Uruguay under the protocols set forth in 9 CFR 94.22, while prohibiting imports of the same product from Northern Argentina, the United States arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, inconsistently with Article 2.3.
 - ii. The Panel exercises judicial economy on Argentina's claim that, by conducting a risk analysis and issuing a positive determination for Uruguay within a reasonable period of time, while maintaining its prohibition on imports from Northern Argentina without a risk assessment since 2001, the United States discriminated between the two regions in terms of access to APHIS' regulatory process.
 - iii. By recognizing Santa Catarina and Chile as FMD-free within the meaning of 9 CFR 94.1(a) and allowing imports of FMD-susceptible animals and animal products therefrom under the protocols in 9 CFR 94.11, while prohibiting imports of the same products from Patagonia, the United States arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, inconsistently with Article 2.3.

- iv. The Panel exercises judicial economy on Argentina's claim that, by conducting a risk analysis and issuing a positive determination for Santa Catarina within a reasonable period of time, while maintaining its prohibition on imports from Patagonia without a risk assessment since 2001, the United States discriminated between the two regions in terms of access to APHIS' regulatory process.
- v. Argentina failed to demonstrate that the United States' measures arbitrarily or unjustifiably discriminate between, on the one hand, Northern Argentina and Patagonia and, on the other hand, Japan and the United Kingdom.
- i. With respect to Article 6 the Panel finds that:
 - i. By failing to adapt its measures to the sanitary characteristics of Patagonia, the United States acted inconsistently with Article 6.1.
 - ii. The Panel exercises judicial economy on Argentina's claim that, by failing to recognize the concepts of FMD-free areas or areas of low disease prevalence, the United States acted inconsistently with Article 6.2.
- j. Argentina has not established that the United States acted inconsistently with its obligations under Article 10.1 by failing to take account of Argentina's special needs.
- k. Having found that the United States acted inconsistently with Article 8 and Annex C(1)(a) and (b), and Articles 5.1, 2.2, 5.6, 2.3, 6.1, and 1.1 of the SPS Agreement, the Panel finds that the United States has also acted inconsistently with Article 3.3.
- l. Having found that 9 CFR 94.1, as amended by the 2001 Regulations, is inconsistent with Articles 3.1, 3.3, 5.1, 2.2, 5.6, 2.3, and 6.1 of the SPS Agreement, we find that it is also inconsistent with Article 1.1 of the SPS Agreement.

8.2. In respect of the Argentina's claims under the GATT 1994, the Panel noted that it had already found that the United States' measures are inconsistent with Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Annex C(1)(a) and (b) of the SPS Agreement. Therefore, the Panel exercised judicial economy over Argentina's claims under Articles I:1 and XI:1 of the GATT 1994 and the United States' defence under Article XX(b) of the GATT 1994.

8.3. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with the specified provisions of the SPS Agreement, it has nullified or impaired benefits accruing to Argentina under that agreement.

8.4. Pursuant to Article 19.1 of the DSU, having found that the United States acted inconsistently with its obligations under Articles 1.1, 2.2, 2.3 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Annex C(1)(a) and (b) of the SPS Agreement, we recommend that the DSB request the United States to bring its measures into conformity with its obligations under the SPS Agreement.
