

**Supplemental Materials to
Chris Wold, Sanford Gaines, & Greg Block, Trade and the Environment:
Law and Policy (2005)**

Chapter 5

The Environmental Exceptions

II. The Scope of Article XX

A. Who Has the Burden of Proof?

Replace the last paragraph of Section II.A on page 288 with the following:

Although it is clear that the responding party—the party invoking an exception, under Article XX—is required to show that the measure falls within the scope of an enumerated exception, such as paragraph (b) of Article XX, and that the measure is applied in a manner that is consistent with the chapeau of Article XX, the burden may change with respect to specific elements of an exception. For example, the Appellate Body in *US–Gambling* made the following observations:

310. [I]t is for a responding party to make a *prima facie* case that its measure is “necessary” by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be “weighed and balanced” in a given case. * * *
311. “If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed alternative is not, in fact, ‘reasonably available’. If a responding party demonstrates that the alternative is not ‘reasonably available’, in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be ‘necessary’ ...”

United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body, WT/DS285/AB/R (published April 7, 2005)(adopted April 20, 2005). This case has been cited approvingly in the Article XX(b) context by Panels, including in *Brazil–Retreaded Tyres*. Brazil–Measures Affecting Imports of Retreaded Tyres, Report of the Panel, paras. 7.155-7.156, WT/DS332/R (published June 12, 2007, not yet adopted).

III. The Application of Article XX(b)

Replace pages 298-310 with the following text.

B. The *Asbestos and Retreaded Tyre* Panel Reports: A Breakthrough?

The *EC–Asbestos* report, excerpted in Section B, “The *Asbestos* Panel Report: A Breakthrough?” (pp. 298-305), is an important dispute in that the Panel establishes a new scientific test for determining when a measure is “necessary” within the meaning of Article XX(b). However, the findings of *Asbestos* Panel and their affirmation by the Appellate Body have been embellished to such an extent that the report perhaps offers only a guidepost for the interpretations of “necessary” by subsequent panels. As can be seen from the excerpt below from *Brazil–Retreaded Tyres*, the most recent trade-environment dispute, the examination of “necessary” has become much more elaborate, but also much more nuanced. While the Panel has provided a more elaborate test for “necessary,” it appears to have increased the range of measures and circumstances that fall within the scope of Article XX and its grounds for finding the Brazilian measures were quite narrow.

The DSB has not yet adopted the Panel report because, although the Panel ruled that Brazil’s import ban on retreaded tires was inconsistent with the GATT and not justifiable under Article XX, the European Communities has appealed the decision. A summary of the European Communities, described in the Notes and Discussion below, suggests that the EU accepts the Panel’s synthesis of the Article XX(b) test from a range of decisions and that it is focusing on some of the conclusions of the Panel. As a synthesis of previous WTO jurisprudence, it appears that the *Brazil–Tyres* Panel Report provides the new basis from which to discuss “necessary” in the Article XX(b) context.

Subsequent to the *Tuna/Dolphin* decisions and other cases interpreting “necessary” within the context of Article XX(b) of the GATT and provisions of other WTO agreements exempting measures that are “necessary” for a specific purpose, the task of justifying a measure pursuant to Article XX(b) seemed insurmountable. Finally, when Canada challenged a French regulation prohibiting the importation of asbestos, a panel found an environmental measure to be “for the protection” of human, animal, or plant life or health and “necessary” for doing so. In *Brazil–Retreaded Tyres*, the Panel synthesized an approach taken by various panels and the Appellate Body for addressing these two elements of Article XX(b).

1. *EC–Asbestos*

European Communities–Measures Affecting Asbestos and Asbestos Containing Products, Report of the Panel, WT/DS135/R (Sept. 18, 2000), reprinted in 40 I.L.M. 258 (2001)

[To protect workers and consumers, French Decree No. 96-1133 banned the manufacture, processing, sale, import, and export of all varieties of asbestos fibres. Canada argued that France’s ban was not “necessary” to protect human life or health because high-density chrysotile (a particular kind of asbestos) products do not pose any detectable risk, especially once enclosed in cement. Moreover, it argued that controlled use constituted an alternative to a total ban that is significantly less restrictive for international trade.

8.184 In accordance with the approach defined by the Panel in *United States–Gasoline*, we must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health. As we have already pointed out, the use of the word “protection” implies the existence of a risk. Accordingly, we must begin by identifying a

risk for public health. In the light of the comments of the panel in *United States–Gasoline* and our own remarks in paragraph 8.182, we must also take into account the fact that it is a public health policy that we have to assess.

8.185 First of all, we note that the EC argue that in prohibiting the placing on the market and use of asbestos and products containing it, the Decree seeks to halt the spread of the risks due to asbestos, particularly for those exposed occasionally and very often unwittingly to asbestos when working on asbestos-containing products. France considers that it can thereby reduce the number of deaths due to exposure to asbestos fibres among the French population, whether by asbestosis, lung cancer or mesothelioma.

8.186 In principle, a policy that seeks to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, insofar as a risk exists. * * *

8.187 Canada does not dispute that chrysotile asbestos causes lung cancer. However, Canada argues that the mechanism that could give rise to an increased risk of lung cancer has not yet been fully explained and that the link with chrysotile might only be indirect. This risk depends on the intensity and duration of the exposure. On the other hand, according to Canada, there is a great deal of scientific evidence to support the thesis according to which chrysotile does not cause mesotheliomas. In particular, the mesotheliomas linked to asbestos could be the result of exposure to low-density products containing amphiboles. It has not been established that, in their uses, chrysotile fibres pose the same risk as amphiboles, whose chemical composition, in particular, is different.

[The experts consulted by the Panel confirmed that chrysotile was carcinogenic, that the types of cancer concerned had a mortality rate of close to 100 per cent, and that there was a “serious carcinogenic risk associated with the inhalation of chrysotile fibres.” Regarding chrysotile-cement products, the scientific experts agreed that the risks of fibres being dispersed due to the degradation of chrysotile-cement were limited, but that working with such products might result in the dispersion of large quantities of fibres and that those fibres pose a definite health risk. While those risks might be lower than for production or processing workers, it concerned a much larger group, including do-it-yourself (DIY) enthusiasts. The scientists consulted by the Panel also considered that the existence of a threshold below which exposure does not present any risks had not been established for any of the diseases attributable to chrysotile, except perhaps for asbestosis.]

8.193 The Panel therefore considers that the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health rather than the opposite. Accordingly, a decision-maker responsible for taking public health measures might reasonably conclude that the presence of chrysotile-cement products posed a risk because of the risks involved in working with those products.

8.194 Accordingly, the Panel concludes that the EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. The Panel therefore considers that the EC have shown that the policy of

prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health. On the other hand, Canada has not succeeded in rebutting the presumption established on the basis of the evidence submitted by the EC and confirmed by the experts. The Panel concludes therefore that the French policy of prohibiting chrysotile asbestos falls within the range of policies designed to protect human life or health, within the meaning of Article XX(b) of the GATT 1994.

* * *

[The Panel then relied on the “necessary” test developed in Thailand–Cigarettes to (a) establish the scope of the health policy objectives pursued by France and (b) consider the existence of measures consistent, or less inconsistent, with the GATT 1994 that were reasonably available to France. Canada claimed that controlled use constituted an alternative that was reasonably available to France and that international standards contemplated controlled use. The Panel noted that the risks from chrysotile include lung cancers and mesotheliomas which are still difficult to cure or even incurable. Further, the populations potentially at risk in France are very numerous, since products containing chrysotile, in particular, chrysotile-cement, have many applications in industrial, commercial and residential buildings. The fields of activity concerned include building workers (several hundred thousand) and DIY enthusiasts. These are areas in which health controls are difficult to apply.

Moreover, it found that no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis. Consequently, the possibility remains that low exposure over a fairly long period of time could lead to lung cancer or mesothelioma. Similarly, high-level exposure over a short period could also result in lung cancer or mesothelioma. These two possibilities were confirmed by the experts. The Panel therefore concludes that even though some trades or the French population in general are only intermittently exposed to low levels of asbestos, a decision-maker responsible for public health policy might reasonably conclude that there was nevertheless a real risk for these categories.

Based on this information, the question for the Panel was whether controlled use constituted a reasonably available measure.]

8.207. * * * The term “reasonably” has not been defined as such by the panels that have referred to it in the context of Article XX. It suggests, however, that the availability of a measure should not be examined theoretically or in absolute terms. Nevertheless, in the light of the reasoning of these panels, we find the word “reasonably” should not be interpreted loosely either. The fact that, administratively, one measure may be easier to implement than another does not mean that the other measure is not reasonably available. We consider that the existence of a reasonably available measure must be assessed in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies. Thus, the Panel considers that it is legitimate to expect a country such as France with advanced labour legislation and specialized administrative services to deploy administrative resources proportionate to its public health objectives and to be prepared to incur the necessary expenditure.

8.208 After clarifying this point, we will now proceed to examine whether controlled use (a) is sufficiently effective in the light of France's health policy objectives and (b) whether it constitutes a reasonably available measure.

8.209 In relation to the first of these considerations, we note, first of all, that although controlled use is applied in some countries, such as the United States or Canada, and has also been applied by France, in general in certain sectors its efficacy still remains to be demonstrated. This is confirmed by a number of studies, as well as by the comments of the experts. Thus, even though it seems possible to apply controlled use successfully upstream (mining and manufacturing) or downstream (removal and destruction) of product use, it would seem to be much less easy to apply it in the building sector, which is one of the areas more particularly targeted by the measures contained in the Decree. The Panel therefore concludes that, in view of the difficulties of application of controlled use, an official in charge of public health policy might reasonably consider that controlled use did not provide protection that was adequate in relation to the policy objectives.

8.210 Moreover, Canada refers to the existence of international standards for the protection of workers in contact with chrysotile. First of all, we find that the international standards cover only the precautions to be taken if a worker has to handle asbestos. They contain neither a guarantee of free access for asbestos nor an incentive to use asbestos. On the contrary, the international conventions suggest that, as far as possible, asbestos should be replaced by less hazardous materials. Next, we note that the levels of protection obtained by following international standards, whether it be the ISO standard or the WHO Convention, are lower than those established by France, including those applicable before the introduction of the Decree. Considering the high level of risk identified, France's objective—which the Panel cannot question—justifies the adoption of exposure ceilings lower than those for which the international conventions provide. We therefore find that controlled use based on international standards would not seem to make it possible to achieve the level of protection sought by France.

8.211 The Panel is aware that in some sectors controlled or safe use could be envisaged with greater certainty that it would prove effective. However, as confirmed by the experts, the circumstances of use must be controllable. These circumstances are extremely varied and we note that the safety measures that would make possible results at least equivalent to the exposure level (0.1 f/ml) applied by France before the ban (restrictions on the number of workers and working areas and total containment of the product) exceed the requirements of the international standards and considerably limit the number of industrial sectors that could apply them. Even in these cases, according to one of the experts, the level of exposure is still high enough for there to be a significant residual risk of developing asbestos-related diseases. According to another, it is not possible to guarantee that fibre concentrations will never exceed 0.1 f/ml. In addition, we note that for the application of controlled use to satisfy France's public health objectives, mined or processed products should never be handled by anyone outside the mining and processing industries. If these products were subsequently to be handled by unprotected persons, the fact that they could be mined and processed and then destroyed using controlled use techniques would not be sufficient to meet those objectives. We therefore find that a decision-maker responsible for establishing a health policy might have reasonable doubts about the possibility of ensuring the achievement of France's health policy objectives by relying on controlled use, even in sectors which might lend themselves more readily to these practices.

8.212 *A fortiori* and for the following reasons, we consider that controlled use is not a reasonably available alternative in all the other sectors in which workers may be exposed to chrysotile.

[The Panel also concluded that, in light of France’s objective to halt the spread of the risks associated with chrysotile, it was irrelevant that controlled use in some sectors might be reasonable, because, at least as far as DIY enthusiasts are concerned, controlled use is not a reasonably available option. Further, products containing chrysotile may remain in place for very long periods of time. Thus, every time they are handled, the handler could be exposed. The continued marketing of products containing chrysotile asbestos multiplies the situations in which workers are routinely exposed and exposes them to concentrations of asbestos which have already been related to pathologies in humans.]

8.217 We therefore conclude that the European Communities have shown that controlled use is neither effective nor reasonably available, at least in the building sector and for DIY enthusiasts. Accordingly, controlled use does not constitute a reasonable alternative to the banning of chrysotile asbestos that might be chosen by a decision-maker responsible for developing public health measures, bearing in mind the objectives pursued by France.

Questions and Discussion

1. The Panel makes several important conclusions. First, the country imposing the measure can freely choose its desired level of protection. Second, in choosing that level of protection, France was not required to use international standards for setting its health protection standards. Even before the ban at issue in this case, France had a statutory exposure limit that was twice as stringent as the World Health Organization exposure limit. The Panel not only rejects Canada’s suggestion that an international standard should be applied (para. 8.205), but implicitly accepts that France can go beyond its already more stringent level in seeking to reduce health risks from asbestos exposure. This acceptance of national choice may seem inescapable under Article XX, which makes no reference to international standards. However, the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Sanitary and Phytosanitary Standards (SPS Agreement) both require WTO members to “base” their relevant standards on international standards. The trend in international trade law towards the use international standards rather than domestic standards is known as harmonization, and is discussed in more detail in Chapters 6 and 7.

A third important conclusion in the Panel’s analysis is that the chosen level of protection has an important relationship to whether a particular measure is “necessary.” As the Appellate Body stated, France “could not be reasonably expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to ‘halt.’ Such an alternative would, in effect, prevent France from achieving its chosen level of health protection.” European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R, para. 174 (Mar. 12, 2001). In affirming the Panel, the Appellate Body rejected Canada’s argument that an alternative measure was not reasonable only if it was impossible to implement. The Appellate Body concluded that controlled use was not impossible to implement, but it was unreasonable to implement in light of France’s goal to stop the spread of asbestos-related human health risks and the scientific consensus that controlled use could still result in health risks. Does *Asbestos* support the view that a

country could seek to prevent all risk from a product by banning it, even if the risk to human health from a product is very low?

2. The *Asbestos* Panel breaks new ground by introducing a scientific component to Article XX(b). In paragraph 8.170, the Panel analyzes whether or not France's goal to protect human health from chrysotile asbestos falls within the range of policies to protect human life or health. The Panel states that the words "policies designed to protect human health or life" imply the existence of a *health risk*" (emphasis in original). Thus, to determine whether or not a measure falls within the range of policies designed to protect human life or health, the Panel was required to determine if asbestos poses a risk to human life or health. This requires it to assess whether France's claim is scientifically valid. Is the Panel's ruling reasonable? Is the Panel's inquiry into science triggered by its preliminary determination under Article III that the French asbestos ban operated to discriminate impermissibly between (imported) asbestos and domestically-produced substitute materials, such as fibreglass?

3. Consider that France attempted to protect its citizens from any asbestos exposure through a complete ban, with very minor exceptions, on the domestic use and manufacture of asbestos products. Quite clearly, France is not attempting to protect domestic production or consumption—it has completely destroyed it. Despite destroying the market, the Panel demanded a rigorous scientific justification for the measure. Should a country be required to import products for which it completely prohibits the use and manufacture unless it has strong scientific evidence to support a total ban? What is the trade concern? Could such a ban still be protectionist? Consider hazardous waste. Hazardous waste can be disposed of safely, but expensive facilities are required to do so. Does *Asbestos* allow a country to prohibit the importation of hazardous waste? What must it show in order to do so? What if the country also bans the disposal of domestically-generated hazardous waste? Can a country ban disposal of domestically-generated waste? Does your answer differ from the U.S. Supreme Court's in *Philadelphia v. New Jersey*? See pages 255-257.

2. *Brazil–Retreaded Tyres*

In the aftermath of *EC-Asbestos* and *Korea–Beef* (page 298 at note 5), panels and the Appellate Body have elaborated a more detailed interpretation of "necessary" under at least three different exceptions using the term "necessary":

- Article XX(b) of the GATT for measures necessary to protect human, animal, or plant life or health;
- Article XX(d) of the GATT for measures necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of the GATT; and
- Article XIV(a) of the General Agreement on Trade in Services for measure necessary to protect public morals or to maintain public order.

These separate strands were synthesized very concisely in a recent environmental dispute between the European Communities (EC) and Brazil concerning Brazilian restrictions on retreaded tires. *Brazil–Measures Affecting Imports of Retreaded Tyres*, Report of the Panel, WT/DS332/R published June 12, 2007, not yet adopted).

Retreaded tires are produced by reconditioning used tires. The worn tread is stripped from a used tire's skeleton (casing) and replaced with a new tread and, sometimes, new material covering parts or all

of the sidewalls. Retreaded tires can be produced through a number of different methods all encompassed by the generic term “retreading.” There are different types of retreaded tires which correspond to the different types of casings used to produce them: passenger car retreaded tires, commercial vehicle retreaded tires, aircraft retreaded tires and others. Under international standards, passenger car tires may be retreaded only once. By contrast, commercial vehicle and aircraft tires may be retreaded more than once. In addition, for international trade purposes, retreaded tires differ from both used tires and new tires.

Brazil claimed that it imposed a number of restrictions, most notably a ban on the issuance of import licenses for retreaded tires, to protect human, animal and plant life from the effects of dengue, yellow fever, malaria and other diseases spread by mosquitoes that breed in pools of water that collect in discarded tires. It also claimed that the accumulation of waste tires creates a risk of tire fires and toxic leaching and that this risk has substantial adverse effects on human health and the environment. The EC, however, believed that Brazil’s restrictions were designed to protect domestic retreading industries from foreign competition. It noted that since the Brazilian restrictions were imposed in 2000, exports of retreaded tires to Brazil dropped to zero whereas exports of used tires increased from 5,000 metric tons to 70,000 tons in 2005. Imports of used tires increased presumably because Brazilian companies imported them to manufacture retreaded tires.

In particular, the EC claimed that Brazil’s ban on the issuance of import licenses for retreaded tires constituted an import ban on retreaded tires within the meaning of Article XI:1 of the GATT. The panel agreed that the law, known as Portaria SECEX 14/2004 operated so as to prohibit the importation of retreaded tires and, thus, constituted a prohibition on importation in violation of Article XI:1. Indeed, Brazil did not contest the allegation. The EC also claimed, and the Panel agreed, that a Brazilian law known as DECEX 8, which banned the importation of used consumer goods, including used tires, also violated Article XI:1. The Panel similarly concluded that Law 12.114 of 5 July 2004 of the Brazilian State of Rio Grande do Sul, which prohibits the sale of used tires that have been manufactured outside of Brazil from the casings of used tires and imported into Brazil, violated Article XI:1.

The Panel also agreed with the EC that Brazil’s imposition of a fine of 400 Brazilian Reis per unit on the importation, as well as the marketing, transportation, storage, keeping or keeping in deposit or warehouses of imported, but not of domestic retreaded tires, violated Article III of the GATT. Moreover, because the fine greatly exceeded the value of a used tire, the Panel declared the fine a restriction on the importation of used tires in violation of Article XI:1 of the GATT.

Lastly, the EC claimed that Brazil’s exemption of retreaded tires imported from countries participating in MERCOSUR, (a customs union called the Mercado Común del Sur, or Southern Common Market), from the import ban and from the above-mentioned financial penalties, violated Article XI:1. Brazil implemented the exception after Uruguay successfully challenged Brazil’s ban on the issuance of import licenses in a MERCOSUR dispute. Having previously found a number of measures to be in violation of the GATT, the Panel concluded that, for reasons of judicial economy, it need not address this issue.

a. Is There a Risk?

The Panel then asked whether these measures were justified pursuant to Article XX(b) of the GATT. Consistent with *EC–Asbestos*, the Panel began by examining whether a risk exists to human or animal or plant life or health.

The European Communities did not dispute the existence of health risks to humans from mosquito-borne diseases, but argued that Brazil had not demonstrated a specific link between the spread of mosquito-borne diseases or the harmful effects of tire fires and the accumulation of waste tires. The European Communities also argued that only incorrectly managed waste tires cause health risks.

The Panel first cited with approval the Appellate Body's observation, in the context of the SPS Agreement in *EC–Hormones*, that the risk being addressed encompasses "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world, where people live and work and die." Consequently, it dispensed with the EC's argument by noting that that there is indeed a correlation between the spread of mosquito borne diseases and the accumulation of waste tires and that:

7.67 * * * [I]t may be that health risks associated with waste tyres can be significantly reduced with proper management of waste tyres. However, that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil.

7.68 Moreover, the evidence before the Panel does not suggest that only illegally dumped or mismanaged waste tyres can cause mosquito-borne diseases. The risk of mosquito-borne diseases, albeit to different extents, seems to exist in relation to all types of accumulated waste tyres. Indeed, this situation does not appear to be limited to Brazil, as some of the evidence presented to the Panel makes clear. * * *

7.71 Therefore, the **Panel** finds that Brazil has demonstrated that risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transportation of waste tyres.

Concerning toxic emissions from tire fires, the Panel concluded that Brazil had demonstrated that highly toxic and mutagenic emissions produced by tire fires result in a number of health problems, including, inter alia, the loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, and that a noxious plume comprising dioxins emitted by tire fires produces significant short- and long-term health hazards, including inter alia, cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems.

Nonetheless, the European Communities' argued that Brazil had not met its burden of proof because it had not demonstrated the existence of any risks posed by tire fires *within* Brazil. The Panel disagreed with the EC's statement as a factual matter—Brazil had submitted such information—but also rejected the EC's legal argument concerning Brazil's burden:

7.77 The question before us therefore is whether Brazil was required to present more detailed information on tyre fires in Brazil such as their location, causes, dimension and duration as suggested by the European Communities as well as specific evidence of the actual negative health effects of tyre fires within Brazil. There may be situations in which such specific evidence would be required to demonstrate the existence of a risk. In this case, however, accepting the European Communities' argument would imply that a WTO Member can never prove the existence of health risks from a tyre fire until a tyre fire does in fact take place and the government of that country conducts its own assessment of the consequences of such a fire. The Panel does not consider that detailed proof of actual tyre fires and associated negative impact on health within the territory of Brazil is required in this case. This is because potential harmful effects caused by tyre

fires on human health can be assessed on the basis of incidents that have occurred in other countries. The Panel is thus of the view that the incidence of such fires in Brazil, when considered in combination with evidence of the harmful impact of tyre fires on human health and the evidence of specific incidents of such fires in other countries, is sufficient in this case to prove the existence of potential health risks relating to tyre fires in Brazil.

The Panel also rejected the EC's argument that the low probability of a tyre fire negated any risk, stating that "the low probability of tyre fires occurring negates neither the fact that tyre fires do actually occur, as shown by the evidence presented in relation to tyre fires that have occurred in other countries, nor the fact that health risks exist in relation to tyre fires and that once they occur, tyre fires are very difficult to extinguish." para. 7.78. As with mosquito-borne diseases, the Panel rejected the EC's argument that the risk from tyre fires did not fall within the risk contemplated by Article XX(b), because the risk arose only from improperly managed waste tyres. In addition, it found that the risk for tyre fires is not necessarily limited to improper management.

The Panel also concluded that Brazil had demonstrated a risk to animal or plant life or health from tyre fires and mosquito-borne diseases. The Panel particularly noted that "[a]lthough the evidence is less explicit in explaining the risk to animal and plant life or health than that to human health or life, the evidence before us suggests that contamination of water and soil leads to an inevitable negative impact on animal and plant life and health." The Panel also responded to the EC's claim that as for mosquito-borne illnesses, in particular yellow fever, monkeys seem to get infected with it in their natural environment, independently of the presence of waste tyres.]

7.91 However, as for "yellow fever", which is also one of the mosquito-borne diseases, the evidence shows that the mosquitoes acting as a vector of yellow fever to monkeys are wild mosquitoes rather than urban mosquitoes that breed in, *inter alia*, waste tyres as argued by the European Communities. We also note the argument contained in the brief by the Humane Society International, attached by Brazil to its second submission, that the mosquito-borne diseases that can put at risk the health of both humans and animals include malaria, filarosis, canine heartworm, dengue, yellow fever and West Nile virus. However, no specific element is provided in support of this assertion, showing how each of these diseases affects animals, in particular in relation to the accumulation of waste tyres.

In light of the above, the Panel concluded that Brazil has demonstrated the existence of risks to animal life or health in relation to dengue and risks to animal and plant life or health in relation to toxic emissions caused by tyre fires. The Panel then found that Brazil's policy measures fell within the range of policies covered by Article XX(b), because Brazil's policy objective was to reduce exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres: "Measures specifically designed to avoid the generation of further risk, thereby contributing to the reduction of exposure to the risk, fall, in our view, within [Article XX(b)]." para. 7.98..

b. *Is the Measure “Necessary” within the Meaning of Article XX(b)?*

While the Panel’s discussion of risk did not differ from the analysis in *EC–Asbestos*, the Panel’s analysis of “necessary” differed markedly. The Panel began by drawing together various analyses of “necessary” under several WTO agreements.

7.104 The Panel notes that the term “necessary”, as contained in paragraphs (b) and (d) of Article XX of GATT 1994 and paragraph (a) of Article XIV of the GATS, has been interpreted in a number of previous cases by the Appellate Body: the necessity of a measure should be determined through “a process of weighing and balancing a series of factors”, which usually includes the assessment of the following three factors: the relative importance of the interests or values furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce. Once all those factors have been analyzed, the Appellate Body said a comparison should be undertaken between the challenged measure and possible alternatives. In performing this comparison, the Appellate Body also stated that the weighing and balancing process of the factors informs the determination of whether a WTO-consistent alternative measure, or a less WTO-inconsistent measure, which the Member concerned could reasonably be expected to employ, is available.

The Panel then engaged in a highly detailed, fact-based analysis of the importance of the objective pursued, the trade-restrictiveness of the measure, the contribution of the measure to the objective, and whether any of the numerous alternative measures suggested by the EC were less WTO-inconsistent and which Brazil could reasonably be expected to employ. Concerning the contribution of the measure to achieving the objective, the Panel rejected the EC’s argument that Brazil needed to quantify the impact of its import ban and prove that removing the import would result in higher volumes of waste tires having to be disposed of in Brazil. The Panel stated that in this case Brazil could use quantitative or qualitative means that sufficiently demonstrate that the import ban contributes to the reduction of waste tires that need to be disposed of in Brazil.

Concerning the availability of less trade-restrictive alternatives, EC claimed that Brazil could reasonably have been expected to reduce the number of waste tires by promoting domestic retreading operations, undertaking education campaigns, enacting measures to reduce the use of cars in Brazil, and adopting programs to improve better vehicle maintenance and better driving habits. The also EC claimed that Brazil had reasonably available alternative measures to improve the management of waste tires, such as controlled landfilling, stockpiling, energy recovery and material recycling. Panel began by citing the Appellate Body’s statement in *US–Gambling*:

“An alternative measure may be found not to be ‘reasonably available’, however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a ‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued....”

The Panel summarized its findings as follows:

7.209 As stated above, the **Panel**'s assessment of the necessity of the measure under Article XX(b) will be the result of a "weighing and balancing" process, taking into account the factors considered above and the availability of a less trade-restrictive alternative measure, to determine whether the measure at issue is "necessary" within the meaning of Article XX(b).

7.210 We first recall that we have found the protection of human, animal, and plant life and health against risks arising from the accumulation of waste tyres to be an important objective. Specifically, we have found that the objective of protecting human life and health against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree. This factor must be taken into account in assessing the challenged measure. At the same time, we agree with the European Communities that the importance of human life and health in and of itself is not sufficient to establish that a measure is necessary for the purposes of Article XX(b). Rather, we are required to assess whether the challenged measures, i.e. the specific measures chosen by Brazil in order to address this important objective, is necessary. In making this assessment, we must consider in particular the trade-restrictiveness of the challenged measure and its contribution to the achievement of the objective, in light of the availability to Brazil of any alternative measures.

7.211 In this instance, we have found that the challenged measure, being an import ban, was by design as trade-restrictive as can be in respect of the products that it covers, i.e. retreaded tyres. We note that the European Communities argued that this, in itself, made it "impossible to consider the challenged measure as "necessary"". We do not exclude, however, that there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective.

7.212 The Panel recalls the Appellate Body's statement that a "necessary" measure is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to." As we have determined above, an import ban on retreaded tyres has the potential to reduce the amount of waste tyres generated on Brazil's territory and, hence, can contribute to the realization of the stated objective, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres. Moreover, our examination of the alternatives identified by the European Communities suggests that no alternative measure is reasonably available that could avoid the generation of the specific risks arising from imported retreaded tyres. Alternatives that would involve management or disposal of the tyres once imported do exist, but raise their own concerns, either because they lead to the type of risks that Brazil seeks to avoid in the first place (unsafe stockpiling and emissions from incineration) or because they would not meet the level of protection sought by Brazil. The safest methods (material recycling) are useful but insufficient on their own to absorb the entire amount of waste from end-of-life tyres.

7.213 In "weighing and balancing" these elements, the Panel is mindful of the specific circumstances of this case. First, based on the elements presented by the parties, it appears to us that *non-generation* measures, i.e. measures that avoid the generation of waste tyres in the first place, are a pertinent way of addressing the risks arising from the accumulation of waste tyres. Secondly, it is clear from the submissions of both parties that in addressing such risks, including through the management of waste tyres, a

combination of measures may be appropriate, so that the question of a specific measure's justification does not necessarily present itself in terms of simple alternatives or the replacement of one specific measure by another, as it is possible that different measures may address different aspects of the same risk and complement each other towards addressing this risk.

7.214 In this instance, the chosen measure only addresses a specific component of the overall risk arising from the accumulation of waste tyres in Brazil, namely the importation of tyres that have already exhausted part of their useful life by the time they enter Brazil, and it is applied by Brazil in combination with other measures addressing other aspects of the overall risk. The European Communities has suggested a number of alternative ways to address the challenges arising from the management and disposal of waste tyres. None of these methods, by hypothesis, involve avoiding the entry of the imported retreaded tyres into Brazil in the first place. Rather, they would aim to address the management and disposal of such tyres, as part of Brazil's overall management and disposal strategy for waste tyres in general. Our examination of these alternatives suggests that none of these, either individually or collectively, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended under the current import ban. In fact, it appears that Brazil already implements some of the alternative measures identified by the European Communities in order to address the challenges arising from the management of waste tyres. The imposition of an import ban on retreaded tyres thus appears to be consistent with other efforts by Brazil to control the risks arising from the accumulation and disposal of waste tyres.

7.215 In light of these elements and of our analysis of the different factors above, the **Panel** concludes that Brazil has demonstrated that the alternative measures identified by the European Communities do not constitute reasonably available alternatives to the import ban on retreaded tyres that would achieve Brazil's objective of reducing the accumulation of waste tyres on its territory and find that Brazil's import ban on retreaded tyres can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under Article XX(b).

Questions and Discussion

1. The Panel in *Brazil–Retreaded Tyres* first concluded that Article XX(b) covered risks deriving from products that are not the same as the product subject to the GATT-inconsistent measure. Thus, Brazil could seek to justify its ban on *retreaded* tires even though *waste* tires were the source of risks that Brazil sought to reduce or eliminate. This decision is consistent with *US–Gasoline*, where the health risks, strictly speaking, did not directly relate to gasoline itself (i.e. the product targeted by the measure) but rather to air pollution caused by the consumption of gasoline. Similarly, the Appellate Body has found that restrictions on the importation of shrimp to protect sea turtles fell within the scope of measures allowable under Article XX(g). In our discussion of Article XX(g), we will return to the question of just how tight the link must be between the regulated product and the resource to be protected or the risk to be avoided.

2. Also with respect to risk, the Panel repeated the clarification in *US–Shrimp* that the legitimacy of the declared policy objective of the measure is to be examined in light of the measure itself and its general design and structure. In addition, it restated the Appellate Body's declaration in *EC–Asbestos* that the Panel's task was *not* to examine the desirability of the declared policy goal:

7.97 * * * In other words, we are not required to assess the policy choice declared by Brazil to protect human, animal or plant life or health against certain risks, nor the level of protection that Brazil wishes to achieve. We also recall in this respect that in the *EC – Asbestos* case, the Appellate Body asserted clearly that it was each WTO Member’s “(...) right to determine the level of protection of health that [it] consider[s] appropriate in a given situation”

3. The EC argued that Brazil did not show specific health risks from tire fires in Brazil and that, in any event, the probability of an adverse health effect is low. The EC also argued that Brazil needed to quantify the contribution of the import ban to a reduction in waste tires. With these arguments, the EC appears to be bringing the risk assessment provisions of the SPS Agreement into an analysis of Article XX(b). As will be seen in *EC–Hormones*, the Appellate Body has interpreted the SPS Agreement as requiring WTO members to provide substantial evidence of risk and a very close connection between the level of risk demonstrated and the measure adopted. For example, if the probability of harm is low, then a ban would likely not be considered consistent with the SPS provisions. While the *Retreaded Tyres* Panel clearly required Brazil to establish the existence of risk, it made equally clear that the information needed to establish that risk was substantially less under Article XX(b) than under the SPS Agreement. How much evidence should the responding Party need to demonstrate risk? Should Parties invoking Article XX(b) be required to quantify the contribution of the measure to achieving the measure’s objective?

4. The new “necessary” test allows panels to balance many different factors. Some of the effects of the balancing test are obvious. Whereas the *Tuna/Dolphin* panels considered very little factual information as to whether the U.S. restrictions on tuna were necessary, the *Asbestos* and *Retreaded Tyres* panels analyzed reams of technical data and addressed an incredibly large number of variables that could indicate whether a measure was “necessary.” For the purpose of resolving tensions between trade and environmental goals, do you think this is a positive step forward?

5. In its appeal, the European Communities make the following claims concerning the Panel’s analysis of Article XX(b) (it appeals other issues with respect to the Chapeau):

- in assessing the contribution of the measure to the protection of human, animal and plant life and health, the EC claims that the Panel merely assesses whether the ban is capable of making a potential contribution to its stated objectives. The EC believes that the Panel should have determined whether the ban *actually* contributes to its stated objectives. Moreover, in reaching its conclusion regarding the potential contribution of the ban, the EC claims that the Panel effectively shifted the burden of proof to the EC;
- in assessing the reasonably available alternative measures, the EC claims that the Panel wrongly excluded some of the alternatives proposed by the European Communities on the basis that those alternatives are related to the manner in which the import ban is implemented *in practice*, that they are not necessarily readily available, that they do not avoid the waste tyres arising specifically from imported retreaded tyres, that they already exist in Brazil, or that they are individually capable of disposing only of a small number of waste tyres.

Brazil–Measures Affecting Imports of Retreaded Tyres, Notification of Appeal, WT/DS332/9 (Sept. 4, 2007). Assess the validity of the EC’s claims. Is the EC correct?

V. The Chapeau of Article XX

The following sentence should be added to the end of the penultimate introductory paragraph of Section V on page 330:

The Panel in *Brazil–Retreaded Tyres* has further refined the distinction between “arbitrary” and “unjustifiable” discrimination. It has also provided useful guidance on the meaning of disguised restriction on international trade.

At 346, add a new Section C:

C. *Brazil–Retreaded Tyres*

Recall that the Panel found that Brazil’s ban on the issuance of licenses to import retreaded tires was provisionally justified pursuant to Article XX(b). It then assessed whether that ban was consistent with the chapeau of Article XX.

Brazil–Measures Affecting Imports of Retreaded Tyres, Report of the Panel, WT/DS332/R (decided June 12, 2007) (not yet adopted)

(ii) *Arbitrary or unjustifiable discrimination* * * *

[The Panel first concluded that discrimination within the meaning of the chapeau of Article XX existed between MERCOSUR and non-MERCOSUR countries constituted discrimination as a result of Uruguay’s successful MERCOSUR challenge to the ban on the importation of retreaded tyres. It also concluded that discrimination arose resulting from injunctions to Brazil’s ban on the importation of *used* tyres (also contained in Portaria SECEX 14/2004). The Panel concluded that the court injunctions caused discrimination because they enabled retreaded tyres to be produced in Brazil from imported casings while retreaded tyres using the same casings could not be imported. Consistent with Article 31.1 of the Vienna Convention on the Law of Treaties, the Panel then analyzed “the ordinary meaning” of the terms “arbitrary” and “unjustifiable”, in their context and in light of the object and purpose of the GATT.

7.257 We first observe that definitions of “arbitrary”, as set out in *The Shorter Oxford English Dictionary*, provide some guidance as to the ordinary meaning of the term:

“**arbitrary** 1 Dependent on will or pleasure; 2 Based on mere opinion or preference as pop. to the real nature of things; capricious, unpredictable, inconsistent; 3 Unrestrained in the exercise of will or authority; despotic, tyrannical.”

* * *

7.259 As to the term “unjustifiable”, definitions set out in *The Shorter Oxford English Dictionary*, provide some guidance on its ordinary meaning:

“**unjustifiable** Not justifiable, indefensible.”

“*justifiable*” 2 Able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible.”

7.260 Read in the context of the chapeau of Article XX, these definitions suggest, overall, the need to be able to “defend” or convincingly explain the rationale for any discrimination in the application of the measure.

* * *

Is the discrimination arising from the MERCOSUR exemption “arbitrary” or “unjustifiable”? * * *

7.271 The key factual circumstances that ultimately led to the exemption of remoulded tyres originating in other MERCOSUR countries are undisputed. Both parties agree that the import ban, as it was originally designed in Portaria 8/2000, applied to all retreaded tyres regardless of their country of origin, and that it was only after a dispute settlement tribunal established under MERCOSUR found Brazil’s restrictions on the importation of a certain type of retreaded tyres (remoulded tyres) to be in violation of its obligations under MERCOSUR that Brazil exempted that particular kind of retreaded tyres from the application of the import ban. This ruling arose in the context of a challenge initiated by Uruguay against Brazil’s import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under the MERCOSUR agreements. We also note that MERCOSUR rulings are *res judicata* for the parties involved and that the European Communities does not dispute that Brazil had an obligation, under MERCOSUR, to implement the ruling.

7.272 The exception of remoulded tyres originating in MERCOSUR therefore does not seem to be motivated by capricious or unpredictable reasons. It was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR.

7.273 We also note that this ruling was adopted specifically in the context of an agreement intended to liberalize trade among its members. This type of agreement inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries. To the extent that the existence of some discrimination in favour of other members of a customs union is an inherent part of its operation, the possibility that such discrimination might arise between members of MERCOSUR and other WTO Members as a result of the implementation of the MERCOSUR Agreement is not, in our view, *a priori* unreasonable.

7.274 We note that this type of agreement is expressly recognized in Article XXIV, which provides a framework for WTO Members to discriminate in favour of their partners in customs unions or free trade areas, subject to certain conditions. In making this observation, we make no determination as to whether MERCOSUR meets the requirements of Article XXIV in respect of customs unions. * * *

7.281 In light of the above, the discrimination resulting from the MERCOSUR exemption cannot, in our view, be said to be “capricious” or “random.” To that extent, the measure at issue is not being applied in a manner that would constitute *arbitrary* discrimination. * * *

7.283 However, in observing that the MERCOSUR ruling provided a reasonable basis for Brazil to enact an exemption from the import ban in favour of remoulded tyres originating in MERCOSUR, we are not suggesting that the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX. Rather, we have considered the specific circumstances of the case, including the nature of the international agreement and of the ruling on the basis of which Brazil has acted, and concluded that in the circumstances, this provided a reasonable basis for Brazil to enact an exemption from the import ban in favour of its MERCOSUR partners.

7.284 We also do not consider that it is contrary to the terms of Article XXIV:8(a) for us to take into account, in our assessment of the measure under Article XX, the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR. As noted by the Appellate Body, Article XXIV:8(a) provides "some flexibility" to the members ... of a customs union to maintain certain restrictive regulations of commerce. * * *

7.285 However, the fact that we give due consideration to the existence of Brazil's commitments under MERCOSUR in our assessment does not imply that the exemption must necessarily be justified. Rather, we must now examine the manner in which the import ban is applied, taking into account the existence of an exemption for MERCOSUR members, in order to determine whether the discrimination arising from the MERCOSUR exemption is arbitrary or unjustifiable.

7.286 The MERCOSUR exemption entails that certain imports of retreaded tyres may take place. We also note that Brazil has confirmed that under the MERCOSUR exemption, it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyre to Brazil under the MERCOSUR exemption. This means that casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR. This further increases the potential for imports of retreaded tyres to enter into Brazil through the MERCOSUR exemption.

7.287 If such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination. The more imports enter Brazilian territory through the exemption, the more Brazil's declared policy objective of reducing the unnecessary accumulation of waste tyres to the greatest extent possible will be undermined, thereby affecting the justification for the maintenance of the import ban *vis-à-vis* non-MERCOSUR WTO Members. This is a matter of preserving the "line of equilibrium" between Brazil's right to invoke Article XX and the rights of other WTO Members under the Agreement.

7.288 As of the time of the Panel's examination, however, volumes of imports of retreaded tyres under the exemption appear not to have been significant. The European Communities has indicated that such imports had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. That figure remains much lower than the 14,000 tons per

year imported from the European Communities alone prior to the imposition of the import ban. Even if all the retreaded tyres imported from MERCOSUR countries were made from used tyres of EC origin, the import ban would still have resulted in eighty six percent of the previous imports from the European Communities not taking place, for the year 2004. Thus, the measure's ability to fulfil its objective does not appear to have been significantly undermined by the occurrence of imports from other sources, even in the presence of an exemption for MERCOSUR imports.

7.289 The **Panel** finds, therefore, that, as of the time of the Panel's ruling, the operation of the MERCOSUR exemption has not resulted in the measure being applied in a manner that would constitute arbitrary or unjustifiable discrimination.

Is the discrimination arising from the importation of used tyres through court injunctions "arbitrary" or "unjustifiable"?

[Brazil banned the importation of used tyres in addition to its prohibition on issuance of licenses to import retreaded tyres. Due to injunctions granted to importers of used tyres, however, retreaded tyres continue to be produced in Brazil using imported carcasses. The European Communities argued that the discrimination is not reasonable, and thus, arbitrary, because all retreaded tyres produce the same environmental externalities in Brazil irrespective of the country where they are produced. Because Brazil provided evidence that it had judicially challenged such injunctions, with a certain degree of success, the Panel considered the use by Brazilian retreaders of imported casings to make retreaded tyres as not resulting from "a capricious or unpredictable action of Brazil," but rather from successful court challenges to the import ban. In addition, the decision of the Brazilian administrative authorities to comply with the preliminary injunctions was not "irrational or unpredictable." Consequently, the Panel concluded that the measure at issue was not being applied in a manner that would constitute *arbitrary* discrimination.]

7.295 Nonetheless, the existence of such discrimination leads to a situation in which the very casings that Brazil seeks to prevent from entering Brazilian territory, i.e. used tyres that have been first used in other (non-MERCOSUR) countries, are in fact entering Brazil through the court injunctions. As noted earlier, the measure's capacity to contribute to the objective of reducing the number of waste tyres accumulating in Brazil is premised on imports of used tyres being prohibited, so that "second-life" tyres do not enter Brazilian territory, be it as used tyres or as retreaded tyres. The granting of injunctions allowing used tyres to be imported, however, runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading.

7.296 This has the direct potential to undermine the objective of the prohibition on importation of retreaded tyres. Indeed, to the extent that some of these used tyres are not retreaded and end up as waste in Brazil without being used further at all, the adverse impact of these imports is greater than the importation of the same casings after retreading would be. If these imports were to take place in volumes so as to significantly undermine the achievement of Brazil's declared objective of avoiding the unnecessary generation of waste tyres to the greatest extent possible, this would lead to the measure being applied in a manner that would constitute a means of unjustifiable discrimination.

7.297 Indeed, the volumes of imports of used tyres that have actually taken place under the court injunctions confirm that the objective of the import ban on retreaded tyres, i.e. prevent the entry of short-life tyres into Brazil, has been significantly undermined. [In fact, imports of used tyres increased from 1,407,618 in 2000 to 10,478,466 in 2005. Brazilian imports of retreaded tyres from the EC declined from more than 10 million kg in 1999 to zero in 2005 while imports of used tyres increased from about 5 million kg in 1999 to more than 70 million in 2005.]

7.301 The European Communities further states that in 2005, Brazil imported, largely for the purposes of domestic retreading, 10.5 million used tyres (out of which 8.4 million came from the European Communities), while the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the import ban.

7.302 These figures suggest that imports of used tyres have taken place in significant amounts. More specifically, the figures before us, as cited above, show that in 2005 (the last year for which we have complete figures, and also the last full year prior to establishment of this Panel), Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted in, at the time, Portaria 8/00. This means that imports of used tyres to Brazil have not only continued, but increased, by 2005, to reach levels (i.e. 10.5 million) representing approximately three times the amount of retreaded *plus* used tyres (2 million plus 1.4 million) that were annually imported in the year 2000.

7.303 The result of the court injunctions is therefore that used tyres of foreign origin from which retreaded tyres are made are in fact allowed to enter Brazil, with at best the same adverse impact or, at worse, a more negative impact on the objective Brazil asserts than the importation of retreaded tyres themselves would have, directly defeating the objective of the import ban itself. Such imports have taken place in significant amounts.

7.304 We take note of the Brazilian government's efforts, within the Brazilian domestic legal system, to prevent the grant, or seek reversal, of court injunctions for the importation of used tyres. We also take note of the initiative taken in the course of these proceedings to resolve the matter in a definitive manner through the initiation of proceedings at the federal level. However, we also note that, while it hopes to succeed in halting the flow of imports of used tyres arising from such injunctions, the Government has not been able, so far, to ensure that no such imports occur. It is also not in a position to guarantee that such imports will cease in the near future.

7.305 While the Panel appreciates the practical difficulties that may be associated with the prevention of such imports within Brazil's domestic legal system, it is of the view that it remains incumbent upon Brazil to ensure that it applies its measure in a manner that is consistent with the requirements of Article XX. The fact that the imports arise from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX. Rather, as noted by the Appellate Body in *US – Shrimp*, a Member of the WTO "bears responsibility for acts of all its department of government, including its judiciary."

7.306 The **Panel** finds, therefore, that, since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared

objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination. * * *

7.309 * * * Brazil has not identified any difference between the conditions prevailing in Brazil and in other WTO Members, that would be pertinent in the context of considering whether the discrimination between retreaded tyres made in Brazil from imported casings and imported retreaded tyres occurs between countries where the same conditions prevail. In light of these elements, we conclude that this discrimination occurs between countries where the same conditions prevail.

* * *

(iii) *Is the measure applied in a manner that constitutes a disguised restriction on international trade?* * * *

7.315 Under the very terms of the provision, three elements would need to exist for a violation to arise under this part of the chapeau:

- (a) first, this assessment, like those considered above in relation to other aspects of the chapeau, relates to the manner in which the measure is *applied*;
- (b) secondly, the measure is applied in a manner that would constitute a *restriction on international trade*; and
- (c) thirdly, a violation arises if this restriction on international trade is *disguised*.

7.316 As far as the first element is concerned, we note that the observations made above in the context of the chapeau in general remain pertinent in this context. As expressed by the Appellate Body, the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.

7.317 With respect to the second element, namely the existence of a “restriction on international trade”, we agree with Brazil that, just as the standard of “arbitrary or unjustifiable discrimination” under the chapeau of Article XX differs from that applied to the determination of the type of discrimination that leads to a violation of Articles I or III, the standard of “disguised restriction” under the chapeau also differs from the standard of “prohibition or restriction” referred to in Article XI.1. In this instance, the existence of a restriction on international trade is inherent in the very notion of import ban, and this restriction is the basis on which the measure has initially been found to be inconsistent with Article XI.1. What we are required to examine in this part of our analysis is whether the import ban, which by its very nature involves a restriction on international trade, is *applied in a manner* that constitutes a *disguised* restriction on international trade. This assessment goes beyond a consideration of the existence of the type of restriction inherent in an import ban as such.

7.318 As to what constitutes such a “disguised restriction” within the meaning of the chapeau, the Appellate Body has clarified that:

“‘Arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade may ... be read side-by-side; they impart meaning to one another. It is clear to us that ‘disguised restriction’ includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of ‘disguised restriction’.”

7.319 From the above, we understand that a restriction need not be formally “hidden” or “dissimulated” in order to constitute a disguised restriction on international trade within the meaning of the chapeau. We also note that the existence of a restriction on international trade could be derived from “the kinds of considerations” that are otherwise also relevant under other parts of the chapeau. We therefore do not exclude that the elements we have considered earlier in determining whether the application of the import ban amounts to “arbitrary or unjustifiable discrimination”, may also be pertinent in determining the existence of a “disguised restriction” on international trade in the application of the import ban.

7.320 More generally, we observe that these terms, as interpreted by the Appellate Body, do not suggest that a single test might uniformly apply in all cases to determine the existence of a “disguised restriction on international trade.” Rather, the Appellate Body’s understanding of the terms suggests that the existence of a “disguised restriction on international trade” might be derived from a variety of situations where a restriction on international trade, arising in the application of a measure provisionally justified under a specific paragraph of Article XX, would lead to that exception being abused or illegitimately used.

7.321 As to the elements that might indicate the existence of such disguised restriction on international trade in a given case, both parties highlighted, in response to a question by the Panel, the Appellate Body’s observation that the chapeau is “but one expression of the principle of good faith.” The European Communities suggests that “all aspects of the relevant measure have to be considered in order to prevent the abuse of the exceptions under Article XX.” Brazil agrees with the European Communities that both the intent and the effect of a measure can play a valuable role in the analysis of a measure under the chapeau, and notes that their relative value will depend on the nature of the specific measure at issue and that the specific facts of the case should determine factors that are most relevant to the “disguised restriction” analysis under the chapeau. Brazil considers that there is no “ready formula to help determine whether a measure is applied in a manner which would constitute a disguised restriction on international trade.”

* * *

7.330 The **Panel** agrees that an examination of intent may be helpful in determining whether a measure is applied in a manner that constitutes a disguised restriction, in that it may reveal whether “a restriction which formally meets the requirements of Article XX(b)” “is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.” We are mindful, however, that, as the Appellate Body noted in *Japan – Alcoholic Beverages II*, “the aim of a measure may not be easily ascertained.”

7.331 We first note that Portaria SECEX 14/2004 was adopted by the Ministry of Development, Industry and Foreign Trade, Secretariat for Foreign Trade, *inter alia* “with a view to consolidating the rules governing import operations...” It contains, in

Article 40, a general prohibition on the granting of import licences for both used and retreaded tyres. The design of the measure is therefore consistent with Brazil's declared objective of reducing the further accumulation of waste tyres in its territory by avoiding the importation of short-lifespan tyres. The fact that it has been adopted by the Ministry of Development, Industry and Foreign Trade in an instrument regulating import licensing does not, in our view, imply that the specific prohibition it contains in relation to retreaded tyres could not have reflected health and environmental objectives.

[The European Communities referred to a number of statements made in the course of judicial, legislative, and other proceedings in Brazil. After reviewing the context in which the statements were made, however, the Panel concluded that they did not support the proposition that Brazil adopted its import ban on retreaded tyres to protect domestic industry or they did not provide "conclusive confirmation" of protectionist intent.]

7.346 * * * [T]he European Communities argues that this trade [in retreaded tyres] has been replaced by trade in used tyres to Brazil and other MERCOSUR countries, due to the MERCOSUR exemption and the imports of used tyres to be retreaded. The European Communities further argues that the ban protects new tyre manufacturers in Brazil, who benefit from not facing competition from imported retreads, and that the import ban is applied in a manner that amounts to a disguised restriction on international trade, to the benefit of Brazilian and other MERCOSUR retreaders. As we understand the European Communities' argument, the existence of a disguised restriction on international trade in Brazil's application of the import ban on retreaded tyres arises as a result of ... the importation of used tyres through court injunctions, and the application of the MERCOSUR exemption. We thus consider both aspects in turn.

Imports of used tyres through court injunctions * * *

7.348 We have already found above that the importation of used tyres through these court injunctions results in the measure at issue being applied in a manner that constitutes unjustifiable discrimination. The granting of court injunctions for the importation of used tyres has also in effect meant that, contrary to the intended design of the measure, domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts, while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market. The restriction on international trade inherent in the banning of imports of retreaded tyres has thus operated to the benefit of domestic retreaders, while the fulfilment of the purpose for which it has been justified is being significantly undermined.

7.349 In light of the above, we find that, since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the import ban on retreaded tyres is being applied in a manner that constitutes a disguised restriction on international trade.

The MERCOSUR exemption

7.350 The **European Communities** argues that the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries.

7.351 The **Panel** understands the European Communities' argument in respect of the MERCOSUR exemption to entail that MERCOSUR retreaders do not have to face competition from the European Communities or other non-MERCOSUR retreaded tyres on the Brazilian market (since, under Portaria SECEX 14/2004, such imports are prohibited), while they at the same time have access to this market and can source used casings from the European Communities and elsewhere for importation into Brazil.

7.352 We agree that, to the extent that they are able to import remoulded tyres into Brazil through the MERCOSUR exemption without facing competition from any non-MERCOSUR country, retreaders from other MERCOSUR countries benefit from the application of the import ban on retreaded tyres originating in other countries. We also recall that under the MERCOSUR exemption, it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyre to Brazil under the MERCOSUR exemption. As noted earlier, this further increases the potential for imports of retreaded tyres to enter into Brazil through the MERCOSUR exemption.

7.353 If such imports were to occur in significant amounts, they would have the potential to undermine the achievement of the stated objective of the prohibition on the importation of retreaded tyres, while protecting the retreading industry in the beneficiary countries. If this were the case, the measure would be being applied in a manner that constitutes a disguised restriction on international trade.

7.354 To date, it appears, however, that the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant. In these circumstances, we find that the MERCOSUR exemption, to the extent that it results only in volumes of imports that do not significantly undermine the ability of the general import ban on retreaded tyres to fulfil its intended objective, does not result in the measure being applied in a manner that constitutes a disguised restriction on international trade.

7.355 In conclusion, the **Panel** finds that, since imports of used tyres are taking place to the benefit of the Brazilian retreading industry in such quantities as to seriously undermine the achievement of the stated objective of avoiding the further accumulation of waste tyres in Brazil, the measure at issue is being applied in a manner that constitutes a disguised restriction on international trade. We also find that the MERCOSUR exemption, although it also has the potential to similarly undermine the achievement of the stated objective of the measure, has not been shown to date to result in the measure at issue being applied in a manner that would constitute such a disguised restriction on international trade.

[The Panel concluded that the importation of used tyres through court injunctions results in the import ban being applied in a manner that constitutes a means of unjustifiable discrimination and a disguised restriction to trade within the meaning of the chapeau of Article XX. The measure thus was not justifiable under Article XX of GATT.]

1. The *Brazil–Retreaded Tyre* Panel has attempted to distinguish arbitrary from unjustifiable discrimination. For example, it declared that the exception for the importation of retreaded tires from MERCOSUR members did not constitute arbitrary discrimination because the exception resulted from the decision of a MERCOSUR Tribunal. Yet, the Panel continued its analysis of whether the exception constituted unjustifiable discrimination. In paragraph 7.287 of its report, the Panel stated that the exception could constitute unjustifiable discrimination if the volume of imports that took place under the exception would “significantly undermine[]” Brazil’s objective. The fact-based analysis of “unjustifiable” discrimination is illuminated by the Panel’s conclusions concerning the court injunction to the ban on used tires. There, the Panel found the ban on the importation of retreaded tyres did not constitute arbitrary discrimination due to the injunctions. However, it did constitute unjustifiable discrimination because importation of *used* tires due to court injunctions did significantly undermine the import ban on retreaded tires. Is the distinction the panel makes between “unjustifiable” and “arbitrary” consistent with the definitions the Panel uses of those terms? Do you agree that the Panel’s approach is a useful way to distinguish “arbitrary” from “unjustifiable” discrimination?

2. In *Shrimp/Turtle*, the Appellate Body concluded that U.S. restrictions on shrimp to protect sea turtles did not constitute “unjustifiable discrimination,” because the United States had made a serious effort to negotiate with the objective of concluding a bilateral or multilateral agreement with the WTO members challenging the U.S. restrictions. In *Brazil–Retreaded Tyres*, the Panel analyzes trade data to determine whether Brazil’s exception for retreaded tyres from MERCOSUR members is unjustifiable. In asking whether the MERCOSUR exception significantly undermined the objective of Brazil import ban on retreaded tyres, did the Panel rule consistently with *Shrimp/Turtle*?

3. The *Brazil–Retreaded Tyre* Panel finally takes the time to interpret “disguised restriction on international trade.” The Panel has essentially adopted an “aim and effects” approach. Is the Panel’s approach a sound one?

4. In addition to appealing aspects of the Panel’s conclusions concerning Article XX(b), the European Communities has also appealed the following three Panel conclusions as inconsistent with the chapeau:

- the Panel’s finding that the exemption from the import ban of imports of retreaded tyres from Mercosur countries does not constitute arbitrary or unjustifiable discrimination;
- the Panel’s finding that the imports of used tyres do not constitute arbitrary discrimination and that they constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban;
- the Panel’s finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that imports of used tyres would constitute a disguised restriction only to the extent that they significantly undermine the objectives of the ban;

Brazil–Retreaded Tyres, Notification of Appeal, WT/DS332/9 (Sept. 4, 2007). Do you agree?

C. Unbundling the Chapeau’s Requirements (page 346)

Renumber as Section D

4. “Arbitrary” versus “Unjustifiable” Discrimination

Assuming that the Panel report in *Brazil–Retreaded Tyres* is adopted, this can be deleted.

5. “Disguised Restriction on Trade

Assuming that the Panel report in *Brazil–Retreaded Tyres* is adopted, this can be deleted.

Chapter 7

Sanitary and Phytosanitary Measures, Science, and Risk Assessment

III. The Science-Based Rules of the WTO's SPS Agreement

Replace the paragraph on pages 460-461 with the following:

The exact scope of an SPS measure remains uncertain, but the Panel's report in *EC-Biotech*, which has been adopted by the DSB, indicates that it is extraordinarily broad. European Communities—Measures Affecting the Approval and Marketing of Biotech Products, Report of the Panel, WT/DS291/R, WT/DS292/R, & WT/DS293/R (Sept. 29, 2006) (adopted Nov. 21, 2006). The Panel noted that the phrase “risks arising from” in Annex A(1) “is broad and unqualified” and includes “measures which are applied to protect against risks that will invariably and inevitably arise from, *e.g.*, the spread of a pest, but also measures applied to protect against risks which might arise from, *e.g.*, the spread of a pest.” *EC-Biotech*, para. 7.225. In addition, it covers measures taken to protect against risks that arise indirectly or in the longer term from, *e.g.*, pests.

With respect to the SPS measures covered by Annex A(1)(a), the Panel concluded that the development of resistance to herbicides in target pests constitutes the “entry, establishment or spread” of a pest. *Id.* at para. 7.232. The term “pest” includes any “animal or plant that is destructive or causes harm to the health of other animals, plants or humans, or other harm, or a troublesome or annoying animal or plant.” *Id.* at para. 7.240. Thus, the growth of genetically modified plants where they are undesired constitutes the spread of a pest. So, too, does the unintentional gene flow or transfer from a GM plant to other plants. *Id.* at para. 7.257. To the extent that a law seeks to prevent GM plants from impacting non-target populations and biogeochemical cycles, introducing or spreading diseases, or altering susceptibility to pathogens that facilitate the dissemination of infectious diseases and/or creating new reservoirs or vectors, that law constitutes a measure applied to protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms (*e.g.*, vectors) and disease-causing organisms (*e.g.*, pathogens). The Panel reached these findings in part by first concluding that “there is nothing in the text of Annex A(1) to suggest that the product subject to an SPS measure—in this case, a GM plant to be released into the environment—need itself be the pest which gives rise to the risks from which the measure seeks to protect.” It is for that reason “that even if the GM plant or the [antibiotic resistance marker genes] were not viewed as a “disease-causing organisms” in and of themselves, the pathogen which develops resistance to the antibiotic in question could be regarded as a ‘disease-causing organism’ for the purposes of Annex A(1).” *Id.* at para. 7.282.

With respect to the SPS measures covered by Annex A(1)(b), the Panel concluded that a GM crop grown for one purpose, for example as a feedstuff for farm animals, but is eaten by animals, including wild fauna, can be considered a “food” for that animal. According to the Panel, this would include pollen of the GM crop which is consumed by insects and GM plants consumed by non-target insects, deer, rabbits or other wild fauna. GM seeds used for growing crops could also be considered animal “food” if the seeds are spilled and subsequently eaten by birds. *Id.* at para. 7.292. Genes, including antibiotic resistance marker genes, that are intentionally added to a product for a technological purpose are “additives” within the meaning of Annex A(1)(b). *Id.* at paras. 7.301, 7.303.

The Panel also distinguished “additive” from “contaminant” by defining “contaminant” as the “unintentional” presence of a substance that is said to “infect or pollute.” *Id.* at para. 7.313. Thus, if a GM plant produces an intended protein, then it is not a “contaminant,” although the gene inserted to create that protein would still be an “additive.” However, “proteins produced through the *unintended* expression of modified genes in agricultural crops may be considered ‘contaminants’ within the meaning of Annex A(1)(b), if these proteins ‘infect or pollute’ the food product.” *Id.* Moreover, the introduction of herbicide-resistant GM crops might lead to a higher level of contaminants, specifically herbicide residues, in foods or feedstuffs. The Panel concluded that the term “contaminants” in Annex A(1)(b) encompasses herbicide residues present in foods or feedstuffs, even though the herbicide residues are the direct result of applying herbicides, not the introduction of the herbicide-resistant GM plant.

The term “toxin” in Annex A(1)(b) means “a substance that causes death or harm when introduced into or absorbed by a living organism,” such as a poison. *Id.* at para. 7.336. It thus encompasses allergens, which the Panel considered to be poisons.

The Panel similarly interpreted subparagraphs (c) and (d) of Annex A(1) broadly. For example, possible human health effects from increased herbicide use associated with a regulated product—in this case GMOs—may fall within the scope of Annex A(1)(c). The phrase “other damage” in subparagraph (d) includes impacts on non-living components of the environment, including effects on the dynamics of populations and effects on biogeochemistry.

In addition to interpreting broadly each paragraph of the definition of an SPS measure, the Panel declared that whether a particular measure constitutes an SPS measure is to be determined:

7.1334 * * * by reference to such criteria as the objective of the measure, its form and its nature. Regarding the objective of SPS measures, subparagraphs (a) through (d) indicate that SPS measures must “be applied” to protect against certain enumerated risks. Regarding the form of SPS measures, the second paragraph of the definition provides that SPS measures include “all relevant laws, decrees [and] regulations.” This enumeration suggests that the *SPS Agreement* does not prescribe a particular legal form and that SPS measures may in principle take many different legal forms. Finally, in relation to the nature of SPS measures, the second paragraph stipulates that SPS measures include “requirements and procedures.” The second paragraph then goes on to mention, by way of example, a number of relevant substantive requirements (prescribed end product criteria, prescribed quarantine treatments, certain packaging and labelling requirements, etc.) and procedures (testing procedures, inspection procedures, certification procedures, approval procedures, etc.). We note that the term “requirements” is broad in scope. For instance, both an authorization to market a particular product and a ban on the marketing of a particular product may be considered “requirements”, in that one is effectively a requirement to permit the marketing of a product and the other a requirement to ban the marketing of a product.

7.1335 Still in relation to the reference in the second paragraph of Annex A(1) to “requirements and procedures”, we note that no reference is made to the “application” of “requirements and procedures.” This omission suggests that whereas requirements and procedures as such may constitute SPS measures, the application of such requirements and procedures would not, itself, meet the definition of an SPS measure. The provisions of the *SPS Agreement* support the view that the omission of a reference to “application” is deliberate, for there are several provisions which establish obligations specifically with regard to the “application” of SPS measures. For instance, Article 2.3, second sentence,

states that SPS measures “shall not be applied in a manner which constitute a disguised restriction on international trade.” Similarly, Article 10.1 states in relevant part that “[i]n the preparation and application of [SPS] measures, Members shall take account of the special needs of developing country Members.” Finally, we note that Article 8 draws a distinction between, on the one hand, the “operation” of procedures and, on the other hand, the “procedures”, which, themselves, are defined in Annex A(1) as SPS measures.

Based on these distinctions among “objective,” “form,” and the “nature,” the Panel ruled that the EC’s decision to apply a general moratorium on approvals of biotech products was “a procedural decision to delay final substantive approval decisions [that] did not impose a substantive ‘requirement’ in relation to biotech products with pending or future applications” because the EC “neither approved nor rejected applications.” Moreover, the EC’s decision was not a “procedure” within the meaning of Annex A(1) because it “did not itself establish a new procedure or amend the existing EC approval procedures.” Consequently, the Panel concluded that the EC’s decision to apply a general moratorium did not meet the “nature” element of the second paragraph of Annex A(1), because it did not provide for “requirements [or] procedures.” *Id.* at para. 7.1382. However, it did find that the specific safeguard measures taken by individual EC members, such as Austria’s prohibition against the marketing of T25 maize within Austria, to be a requirement within the meaning of the second paragraph of Annex A(1).

Questions and Discussion (page 464)

Add new discussion note 2:

2. Consider the *EC-Biotech* Panel’s division of “SPS measure” into three parts: (1) objective, (2) the form of the measure (laws, decrees, and regulations) and (3) the nature of the measure (requirements and procedures). Is the Panel’s distinction, particularly as regards “form” and “nature,” consistent with the plain meaning of Annex A(1)? See *Simon Lested, International Decisions: European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, 101 A.J.I.L. 453 (2007) (suggesting that it is contrary to the plain meaning).

A. The Meaning of Article 5.7

Questions and Discussion (page 507)

Add the following discussion notes:

4. Recall that the Appellate Body ruled that Article 2.4 of the TBT Agreement confers a right allowing WTO members to adopt technical regulations that differ from international standards, which are required to form the basis for a member’s technical regulations, to meet a member’s legitimate objectives (see page 385). Similarly, the Appellate Body concluded that Article 3.3 of the SPS Agreement grants a member the right to set a level of protection different from the relevant international standard. These provisions were not exceptions to the requirement to base technical regulations and SPS measures on international standards. Consistent with these conclusions, the Panel in *EC-Biotech* stated that Article 5.7 of the SPS Agreement does not provide an exception to the requirements of Article 2.2, in particular the obligation not to maintain an SPS measure without sufficient scientific evidence. Instead, it held that Article 5.7 confers a right. *EC-Biotech*, para. 7.2969. The Panel relied on the Appellate Body’s description in *EC-Tariff Preferences* of when a provision constitutes a right or an exception:

We recall that the Appellate Body has addressed the allocation of the burden of proof in similar situations. In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party. However, this distinction may not always be evident or readily applicable.

Appellate Body Report, European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries, para. 88 WT/DS246/AB/R (decided April 7, 2004) (adopted April 20, 2004).

As a consequence, the complaining party, not the responding party, must demonstrate that the challenged SPS measure is inconsistent with at least one of the four requirements set forth in Article 5.7. According to the Panel, [i]f such non-compliance is demonstrated, then and only then, does the relevant obligation in Article 2.2 apply to the challenged measure.” *EC–Biotech*, at para. 7.2976. Similarly, Article 5.7 is not an exception to Article 5.1, but rather a qualified right. Consequently, the complaining party must demonstrate that the challenged measure is inconsistent with at least one of the four requirements set forth in Article 5.7. If such non-compliance is demonstrated, then, and only then, is Article 5.1 applicable to the challenged SPS measure. The Panel thus concluded that “when a complaining party presents a claim of violation under Article 5.1, it has the burden to establish a *prima facie* case of inconsistency with both Articles 5.1 and 5.7.” *Id.* at para. 7.3000.

Although the Panel concluded that a complaining party’s claim under Article 5.1 could not succeed if the responding party complies with the requirement of Article 5.7, it declared that “it is both necessary and appropriate to examine the consistency of the safeguard measures with Article 5.7 within the context, and as part, of an examination of the consistency of the same measures with Article 5.1.” para. 7.3005. It then decided to analyze the consistency of the safeguard measures with Article 5.1 first, because “the critical legal issue in our view is whether the relevant safeguard measures meet the requirements set out in the text of Article 5.1, not whether they are consistent with Article 5.7.” *Id.* at para. 7.3006. Do you agree with the Panel’s analysis?

5. The Panel in *EC–Biotech* was asked to determine whether the insufficiency of relevant scientific evidence is to be judged at the time of adoption of a provisional measure or at the time a Panel is established to judge the validity of that measure. In answering this question, the Panel synthesized the Appellate Body’s conclusions in earlier reports to determine that the first sentence of Article 5.7 refers to the *adoption* of a provisional SPS measure and the second sentence refers to the *maintenance* of a provision measure. Because the phrase “[i]n cases where relevant scientific evidence is insufficient” is part of the first sentence of Article 5.7, the Panel concluded that the insufficiency of relevant scientific evidence is judged by reference to when the provisional SPS measure was adopted. para. 7.354.

VIII. Genetically Modified Organisms, the SPS Agreement, and the Biosafety Protocol

Insert new Section B on page 515

B. The *EC–Biotech* Panel Report

The Report of the Panel in *EC–Biotech* answered a number of questions concerning the scope of the SPS Agreement. However, the Panel did not answer any questions relating to the validity of the EC’s regulatory regime or the safety of genetically modified food products, because the United States, Canada, and Argentina did not challenge the EC GMO regulations themselves. Instead, they challenged three aspects of the EC regime as violating various provisions of the SPS Agreement:

(1) *De Facto Moratorium*. The claimants argued that the EC imposed a de facto moratorium on the approval of biotech products between June 1999 and August 2003 without an adequate risk assessment and that the de facto moratorium constituted “undue delay” in violation of Article 8. The EC denied that it had imposed a general moratorium on the approval of biotech products and that the evolving science justified any delay.

(2) *Various product-specific EC measures related to the approval of biotech products*. The claimants also argued that the EC’s failure to consider specific applications for approval of biotech products also violated the risk assessment and transparency provisions of the SPS Agreement.

(3) *Various EC Member State measures related to the import and/or marketing of specific biotech products*: The claimants challenged the prohibitions on the marketing of certain biotech products enacted by some EC Member States, arguing that these measures were not based on a risk assessment. These “safeguard measures” are permitted by EC regulations and allow EC Member States to limit the importation or marketing of certain biotech products already approved by the EC. The EC claimed that these measures, given their provisional nature, were in full compliance with the SPS Agreement.

Recall from the earlier discussion concerning the scope of SPS measures that the Panel in *EC–Biotech* required an inquiry into three distinct elements of a measure to determine whether it is an “SPS measure”: the objective of the measure, its legal form, and its nature. Because the EC failed to approve any applications between October 1998 and August 2003, the EC member States and the European Commission failed to take actions required by EC regulations to consider applications for marketing biotech products, and the statements of EC officials, the Panel concluded that a de facto moratorium existed. However, it concluded that the de facto moratorium on approvals of biotech products and the failure to approve specific biotech products did not constitute SPS measures, because those actions did not constitute “procedures” within the Panel’s view of the second paragraph of Annex A(1). Nonetheless, it found the underlying procedures and requirements of Directives 90/220 and 2001/18 as well as Regulation 258/97 to be SPS measures. As a consequence, the Panel reviewed the consistency of those Directives and Regulation with other aspects of the SPS Agreement, including Article 8 of the SPS Agreement. Article 8 provides:

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.

Annex C(1)(a) requires members to ensure that “any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures ... are undertaken and completed without undue delay”

The Panel first interpreted the ordinary meaning of the phrase “without undue delay,” in the context of Annex C, as requiring that “approval procedures be undertaken and completed with no unjustifiable loss of time.” *EC–Biotech*, at para. 7.1495. Concerning the meaning of “undue,” the Panel declared that “what matters is whether there is a legitimate reason, or justification, for a given delay, not the length of a delay as such” but that “a lengthy delay for which no adequate explanation is provided might in some circumstances permit the inference that the delay is “undue.” *Id.* at para. 7.1496. The panel had no trouble finding that the EC’s delays in approving biotech products—pursuant to the de facto moratorium as well as delays for 24 specific biotech products—amounted to “undue delay.” It rejected the EC’s reasons for the delay—the perceived inadequacies of the EC approval legislation and the evolving science concerning biotech products—as not providing a justification for the delays. On the question of evolving science, the Panel stated that WTO Members could impose provisional measures under Article 5.7 if the scientific evidence was insufficient to perform a risk assessment. *Id.* at paras. 7.1507–7.1529.

With respect to safeguard measures imposed by six different EC member States on nine different biotech products, the Panel concluded that these were “SPS measures.” Unlike the de facto moratorium and the failure to approve specific products, the safeguard measures has the appropriate “form”—they were adopted as laws and regulations and other formal legal means—and the appropriate “nature”—they prohibited the marketing of biotech products and thus constituted a “requirement.”

The Panel then followed the analysis of *EC–Hormones* and *Australia–Salmon* by confirming that the safeguard measures could be justified by a risk assessment prepared by another WTO member or an international organization. The Panel added, however, that “a risk assessment carried out before the adoption of a particular safeguard measure and a risk assessment carried out after its adoption could ‘sufficiently warrant’, or ‘reasonably support’, the maintenance of that measure. *Id.* at para. 7.3030. The Panel continued:

7.3034 In the present case, the Complaining Parties are challenging the maintenance by the European Communities of the relevant safeguard measures. Thus, in accordance with our interpretation of Article 5.1 we must examine whether, on the date of establishment of this Panel, each safeguard measure was based on an assessment of risks which was appropriate to the circumstances existing at that time. Since what is being challenged is the maintenance of each safeguard measure, it is of no particular importance whether a specific risk assessment which is claimed to serve as a basis for a safeguard measure was performed before or after the adoption of that safeguard measure. What matters is that the relevant risk assessment was appropriate to the circumstances existing at the time this Panel was established. In the light of this, in our analysis of whether there are risk assessments on which individual safeguard measures were based at the relevant time, we will consider assessments which were carried out before these measures were adopted as well as assessments which were carried out after these measures were adopted.

The Panel concluded that the various member States had not presented valid risk assessments when imposing safeguard measures. For example, studies presented by Austria with respect to T25 maize did “not indicate relative probability of the potential risks it identifies, but rather makes reference to possibilities of risks or simply to the inability to determine probabilities.” para. 7.3044. Consistent with the Appellate Body’s decision in *Australia–Salmon*, the panel said that a risk assessment cannot merely conclude that there is a possibility of entry, establishment or spread of diseases and associated

consequences, but rather must evaluate the likelihood of such entry, establishment, or spread of diseases and associated consequences. *Id.* at para. 7.3045. Other documents evaluated risk assessment procedures, but did not evaluate potential risk. The Panel also clarified that governments may base their SPS measures on divergent (i.e., minority opinions), but those divergent opinions must be expressed in a risk assessment, because Article 5.1 requires an SPS measure to be “based on” a risk assessment. *Id.* at para. 7.3060. In the end, the Panel concluded that the safeguard measures for each of the nine products were not based on risk assessments within the meaning of Article 5.1, because:

- (a) the European Communities or relevant member State had not identified any divergent opinions expressed in the risk assessments which were conducted by the lead competent authority and other relevant scientific body with regard to the nine biotech products;
- (b) the European Communities or relevant member State did not explain, by reference to these risk assessments, how and why relevant member State assessed the risks differently, and did not provide a revised or supplemental assessment of the risks;
- (c) the European Communities has not identified possible uncertainties or constraints in the risk assessments in question, and has not explained why, in view of any such uncertainties or constraints, Austria’s prohibition is warranted by the relevant risk assessments; and
- (d) there is no apparent rational relationship between the safeguard measures, which impose a prohibition, and risk assessments which found no evidence that any of the nine biotech products will give rise to any adverse effects on human or animal health and the environment.

The panel subsequently reviewed the measures pursuant to Article 5.7. However, in each case it determined that the safeguard measures were imposed without review of any new information. Indeed, for all of the nine biotech products subject to safeguard measures, the relevant EC scientific body determined that the information submitted by the relevant Member State did not constitute new scientific information that would change the original risk assessment. As such, the Panel concluded that the safeguard measures violated Article 5.7 and, by implication, the requirements of Article 2.2 to ensure that SPS measures are “based on scientific principles” and “not maintained without sufficient scientific evidence.”

Chapter 9

Trade Rule and Multilateral Environmental Agreements

Replace Section III.B, “What Law Applies”, pages 664-675, with the following:

B. What Law Applies?

If a dispute involving an MEA trade measure must be taken to the WTO, what law may panels and the Appellate Body apply? What is the range of law that panels and the Appellate Body can rely on to make decisions? The *EC–Biotech* dispute, in which the European Communities argued that the Convention on Biodiversity, the Biosafety Protocol, and the precautionary principle should inform the Panel’s understanding of the SPS Agreement, has placed new emphasis on these questions. As the following readings make clear, the answer is anything but clear.

Several provisions of the DSU offer clues as to whether panels can look outside the four corners of the WTO agreements.

- Article 3.2 provides that the dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”
- Article 3.2 also provides that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”
- Under Article 7, the standard terms of reference for a panel are “[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).”
- Article 11 states that the function of panels is to make an objective assessment of the matter before it, including, including the applicability of and conformity with the covered agreements.

Several questions follow from these provisions concerning the applicability of non-WTO law to WTO disputes. First, can panels use rules of treaty interpretation to clarify terms and provisions of a WTO Agreement? Article 3.2 makes clear that they must. These principles of treaty interpretation are found largely in the Vienna Convention on the Law of Treaties.

Vienna Convention on the Law of Treaties
May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331
(entered into force Jan. 27, 1980)

Article 30–Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. * * *

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 connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion 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 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.
4. A special meaning shall be given to a term if it is established that the parties so intended.

As we have seen in *Reformulated Gasoline* and several other decisions, panels and the Appellate Body frequently resort to Article 31(1) of the Vienna Convention for the principle that terms should be given their “ordinary meaning.” See Chapter 2, Section IV.D.4. It is one thing to apply the principles of

treaty interpretation, similar to canons of statutory interpretation, to define a key term. The more challenging question is the second: may panels use other international law, such as an MEA, to shape the meaning of a term used in a WTO agreement? Can an MEA shape the scope of a WTO obligation, such as the scope of a member's national treatment obligation?

1. The Early Decisions

Panels and the Appellate Body have suggested that non-WTO law could be applicable in WTO disputes. The Appellate Body in *Reformulated Gasoline* stated that the GATT “is not to be read in clinical isolation from public international law.” The Appellate Body’s focus on public international law suggests that the Appellate Body believed that panels and the Appellate Body could apply a corpus of law broader than the law of treaty interpretation. A panel later declared:

7.96 We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO. * * *

7.101 Thus, ... we will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.⁷⁵⁵ To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of [Agreement on Government Procurement] commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements.

Korea–Measures Affecting Government Procurement, Report of the Panel, WT/DS163/R (June 19, 2000).

⁷⁵⁵ We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the [Agreement on Government Procurement] would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel’s review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

Consistent with these reports, the Appellate Body in *Shrimp/Turtle* noted that its task was to interpret the chapeau of Article XX, “seeking additional interpretive guidance, as appropriate, from general principles of international law.” United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, para. 158 (Nov. 6, 1998), *reprinted in* 38 I.L.M. 121 (1999). The following excerpt encapsulates the Appellate Body conclusions, which can be read in full in Chapter 5 at pages 337-345.

Howard Mann & Steve Porter, *The State of Trade and Environment Law 2003: Implications for Doha and Beyond*, 22-24 (International Institute for Sustainable Development and the Center for International Environmental Law 2003)

Consistent with other instances of the AB [Appellate Body] moving towards a greater inter-relationship between trade law and public international law more generally, the Appellate Body significantly expanded the scope for considering MEAs in the first Shrimp-Turtle decision and both the Panel and AB do so again in the implementation review. Through various passages, the AB provides guidance in the initial Shrimp-Turtle decision:

- In ruling that the content of the term exhaustible natural resources in Article XX(g) is evolutionary, not static, the AB considers the content of the 1982 United Nations Convention on the Law of the Sea, the 1992 Convention on Biological Diversity, Agenda 21 from the 1992 Rio UNCED Conference, the Convention on the Conservation of Migratory Species of Wild Animals and the Convention on International Trade in Endangered Species.
- Moreover, the AB does so while expressly recognizing that not all the parties to the dispute, let alone the WTO, are signatories or parties to all the outside agreements they cite.
- They cite the 1992 Rio Declaration on Environment and Development as part of the legal and policy developments that lead to the integration of the concept of sustainable development into the fabric of the WTO.
- All of the above gets factored into crafting the balance that the AB seeks between the right to enact measures for the protection of the environment and the duty to meet one’s obligations under the WTO Agreements. They state, “Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretive guidance, as appropriate, from the general principles of international law.”
- The AB also refers to Principle 12 of the 1992 Rio Declaration and to the concluded MEAs already listed above to support its view that measures to address common environmental problems should be, as far as possible, based on international consensus as opposed to unilateral action. Hence, the AB uses these sources of law not just to address the environmental issues but also the development and trade issues.

- The AB uses the regional MEA concluded by the United States with Brazil, Costa Rica, Mexico, Nicaragua and Venezuela on the protection of turtles during shrimp harvesting to help in its analysis of whether alternative, non-unilateral measures were available to the U.S., and whether such alternatives might be less discriminatory or trade restrictive. It does so even though it notes, once again, that not all the parties to the dispute are signatories to that Convention and it had not yet even been ratified by any of the signatories.

All of the above is done in the context of interpreting and applying the terms and tests in Article XX(g) and the chapeau of Article XX. Given these specific and express arguments by the AB, it is clear that the constraints on the use of extraneous materials spoken of in the Tuna-Dolphin II, Superfund and the landing of unprocessed herring and salmon cases has been rejected. In its place, the approach of allowing outside material to be used to help inform the interpretation of the WTO provisions has been adopted. And this has been done whether or not the parties to the dispute are all parties to the agreements in question, or even whether the agreements are in force. * * *

In the implementation review decision, the Panel and the AB both take a further step in the use of MEAs under WTO law. The Panel concludes in its review on implementation that “the Inter-American Convention can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of conservation and protection.” The Panel then went on to use it to assess what elements could reasonably be anticipated in a cooperative agreement, based on the Inter-American Convention, and apply these to test whether the United States was, under its revised measure, still acting in a manner that was arbitrarily or unreasonably discriminatory under the chapeau of Article XX. It found the U.S. was not acting in such a manner, as there was a large degree of concordance between the new U.S. measure and the Inter-American Agreement.

This approach was specifically challenged by Malaysia before the Appellate Body. The AB found that, while the use of the word “benchmark” was unfortunate, the concept of using the Inter-American Agreement as an “example” was appropriate. It then went on to analyze what the Panel had done, and concluded it has used the Agreement in just such a way. Moreover, the AB stated expressly: “The mere use by the Panel of the Inter-American Convention *as a basis for comparison* did not transform the Inter-American Convention into a ‘legal standard.’”

It may be noted that this brings the use of MEAs, whether the states in the dispute are parties or not, or the measures in question in the MEA are specific and mandatory or not, into a source that can be analogized to an international standard. * * *

There is no specific standard for expressing when an MEA can be used as an example to apply for WTO compliance. This issue therefore remains very discretionary. Despite these differences, the conceptual convergence [with rules for the use of international standards in the TBT and SPS agreements] is noteworthy, and is a good basis for understanding that the AB has established an approach to integrating outside agreements such as MEAs into its role of interpreting and applying the WTO Agreements. Thus, the relationship of the WTO to MEAs at its most critical point of potential conflict—in the dispute resolution process—has some specific and cogent direction at this time: it is not a *tabula rasa*.

Questions and Discussion

1. Look closely at the excerpt from Howard Mann and Steve Porter and the excerpts from the *Shrimp/Turtle* dispute in pages 337-345. Did the Appellate Body use non-WTO law merely to interpret terms in Article XX(g) or did it also use that law to shape the content of GATT obligations, as Mann and Porter assert?
2. According to Article 38(1) of the Statute of the International Court of Justice, there are three sources of international law: treaty law, customary international law, and general principles of law. Customary international law represents the general practice of nations as determined by state practice consistent with the rule and *opinio juris*. State practice can be identified when the States particularly affected by the rule comply with the rule. This state practice must follow from a sense of legal obligation (*opinio juris*), not a sense of moral obligation. General principles of law, on the other hand, are rules “accepted in the domestic law of all civilized states” or the principles of private law used within all or most States. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 16 (4th ed. 1990). Such rules need not have attained status as customary international law. The Appellate Body’s use of the phrase “general principles of *international* law” suggests that the Appellate Body has added a second source of law by which to interpret the rules of the WTO. Has the Appellate Body exceeded the scope of its authority under Article 3.2?

2. *EC–Biotech*

In *EC-Biotech*, the Panel considered the relationship between the SPS Agreement and other international law, including the Convention on Biological Diversity, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (“the Biosafety Protocol”) and the precautionary principle. The European Communities argued that, consistent with Article 3.2 of the DSU and the Appellate Body’s conclusions in *Shrimp/Turtle*, the WTO agreements must be interpreted and applied by reference to relevant rules of international law arising outside the WTO context. For the European Communities, it was irrelevant that the United States was not party to either agreement and that neither Argentina nor Canada had ratified the Biosafety Protocol. In addition, the European Communities argued that the Biosafety Protocol and the SPS Agreement 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.

In contrast, the United States, Canada, and Argentina argued that Article 7 of the DSU required the Panel to consider only relevant WTO agreements and that Article 3.2 of the DSU allowed reference to non-WTO law only if that law would assist the Panel in interpreting the particular terms of the covered agreements at issue in this dispute. Moreover, they argued that the reference to “parties” in Article 31 of the Vienna Convention refers to parties to the treaty that is being interpreted, not the parties to the dispute.

European Communities–Measures Affecting the Approval and Marketing of Biotech Products, Report of the Panel, WT/DS291-293/R (Sept. 29, 2006)(adopted Nov. 21, 2006)

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 taken into account in the interpretation of WTO provisions. 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. *

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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.

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 * * * 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 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.

[Because the United States is not a party to the Convention on Biological Diversity and Argentina, Canada, and the United States are not parties to the Biosafety Protocol, the Panel concluded that neither treaty was “applicable” in the relations between these WTO Members and all other WTO Members and that it was not required to take them into account in interpreting the WTO agreements at issue in this dispute].

(iii) *Precautionary principle*

[As in *EC–Hormones*, the Panel concluded that the legal status of the precautionary principle remains unsettled and that it would refrain from expressing a view on the issue. See pages 508-509.]

(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). * * *

7.92 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. 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. 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-living resources." 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." 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.

7.95 In the present case, in response to a question from the Panel, 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. 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.

Questions and Discussion

1. The *EC–Biotech* Panel makes two important distinctions. First, it explicitly answers whether Panels *must* use or *may* use non-WTO law in a WTO dispute. Second, in answering the first question, it implicitly answers whether non-WTO law may be used to interpret the terms of WTO agreements only or whether that law may be used more broadly to define the scope of WTO obligations. How does the Panel answer these questions?
2. Scholars have been quick to criticize the Panel's conclusions regarding the applicability of international law. Some consider it a significant departure from the Appellate Body's ruling in previous cases,

particularly *Shrimp/Turtle*, where the Appellate Body referred to several treaties, including UNCLOS, to which the United States is not a party. In the recent *EC–Biotech* dispute, however, a Panel appears to have taken a different approach. The International Law Commission is among those that have criticized the *EC–Biotech* Panel. It has noted that, in resolving previous disputes, including *Shrimp/Turtle*, *EC–Poultry*, and *Korea–Beef*, among others, the Appellate Body has referred to bilateral and regional trade agreements entered into by select parties as a “supplementary means of interpretation,” or “for the purpose of interpreting an ambiguous WTO provision.” Do you think that the Panel has taken a different approach from *Shrimp/Turtle* and these other decisions?

Concerning the use of other agreements to interpret WTO agreements and provisions of them, the International Law Commission stated:

447. One sometimes hears the claim that this might not even be permissible in view of the express prohibition in the DSU according to which the “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements” (DSU 3:2 *in fine*). Such a view would, however, presume that the covered agreements are “clinically isolated” precisely in the way the AB has denied. Two considerations are relevant here. First, when article 31(3)(c) VCLT is used, it is used with the specific authorization of the DSU itself. But second, and more important, interpretation does not “add” anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment. Here it appears immaterial whether recourse to other agreements is had under article 31(3)(c), as supplementary means of interpretation, as evidence of party intent or of ordinary meaning or good faith (the presumption that States do not enter agreements with the view of breaching obligations). The rationale remains that of seeing States when they are acting within the WTO system as identical with themselves as they act in other institutional and normative contexts. Interpretation *does not add or diminish rights or obligations* that would exist in some lawyers’ heaven where they could be ascertained “automatically” and independently of interpretation. All instruments receive meaning through interpretation—even the conclusion that a meaning is “ordinary” is an effect of interpretation that cannot have *a priori* precedence over other interpretations.

International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, P 450, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

With respect to the conclusions of the *EC–Biotech* Panel, the International Law Commission stated:

450. * * * [The Panel] interpreted article 31(3)(c) so that the treaty to be taken account of must be one to which all parties to the relevant WTO treaty are parties. This latter contention makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31(3)(c) would be allowed. The panel buys what it calls the “consistency” of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, taking “other treaties” into account as

evidence of “ordinary meaning” appears a rather contrived way of preventing the “clinical isolation” as emphasized by the Appellate Body.

3. Prior to the *EC–Biotech* case, Professor John Knox argued that “parties” under Article 31 of the Vienna Convention meant all parties bound by a treaty. He then challenged those commentators, such as the International Law Commission, who have resisted this interpretation because they believe that too few extratextual agreements will be able to satisfy it.

[I]t is easier than it may first appear for such agreements to be considered. First, Article 31(3) does not prevent the parties from jointly deciding that subsequent agreements may be relevant to interpretation even if not all of the parties have adopted them. For example, the WTO Agreement allows the General Council to make interpretive decisions on the basis of a three-fourths majority. Second, subsequent agreements, whether reached expressly or through practice, may establish an interpretation of a treaty that is not subject to challenge by states ratifying the treaty later. In other words, new parties have to take the treaty as it is when they join it, including any interpretations of it already established under Article 31(3). Third, rules of customary international law potentially relevant under Article 31(3)(c) may bind nations that have not specifically agreed to them, at least as long as the nations have not persistently objected to their formation.

Fourth, subsequent practice establishing the agreement of the parties under Article 31(3)(b) need not be by every party; the practice need only be accepted by all, and the acceptance can be tacit. MEAs containing trade restrictions provide an example of such subsequent practice. From the early 1970s, when CITES was drafted and adopted, to the present, when it and other major MEAs with trade restrictions have attained close to universal membership, the vast majority of GATT parties have negotiated, signed, and ratified the MEAs without contemporary claims by other GATT parties that the trade restrictions violate GATT. While “negative practice”—i.e., “the absence of action which would have been expected had a certain interpretation of a treaty been the correct one”—should be carefully employed, when coupled with such a long-standing positive practice, there can be little doubt that GATT parties have accepted the MEAs as consistent with GATT. * * *

[A]pplying Article 31(3) would narrow the range of extratextual agreements that the Appellate Body could take into account. In particular, even widely adopted political declarations such as Rio Principle 12, which the Appellate Body cited in *Shrimp-Turtle I* as evidence of the preference of the international community for multilateral approaches to environmental protection, could be taken into account only if they were “regarding” the text under review (in that case, GATT Article XX), or if they reflected relevant customary international law. Principle 12 would not meet either requirement. Political declarations are far more likely to meet the first criterion if they are made in the WTO context. The WTO members’ consensus statement in the 1996 CTE Report that they support and endorse “multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature” probably does qualify as a subsequent agreement under Article 31(3)(a), especially since the following sentence of the report specifically refers to the need to ensure a “mutually supportive relationship” between WTO agreements and MEAs.

John H. Knox, *The Judicial Resolution of Conflicts between Trade and the Environment*, 28 Harv. Envtl. L. Rev. 1, 67-69 (2004). Professor Knox says that the requirement of Article 31(3) of the Vienna Convention to have agreement among “all” parties may not be difficult to overcome. Does Knox suggest reasonable responses to overcome these problems?

4. In arguing that the DSU allows consideration of more than WTO covered agreements and does not include a general and automatic conflict clause in favor of WTO covered agreements, Joost Pauwelyn asks us to consider the following extreme example.

Imagine that the WTO treaty included an agreement regulating the slave trade. Would a WTO panel be obliged to apply and enforce this agreement at the request of a WTO member complaining about trade restrictions regarding slaves imposed by another member? If the DSU were read as precluding reference to international law other than WTO covered agreements (i.e., as a mechanism created outside the system of international law) and/or as containing a conflict clause to the effect that WTO rules always prevail, a WTO panel would be so obliged. This example confirms the absurdity of portraying the DSU as some alien mechanism divorced from, and superior to, all other international law. Following the theory put forward in this paper, the defending party in our hypothetical dispute would be allowed to invoke Article 53 of the Vienna Convention as a legal defense against the WTO slave trade agreement (the applicable law for defenses not being inherently limited). Article 53 provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” On that ground, the WTO panel would be obliged to find the WTO slave trade agreement invalid, hence inapplicable to and unenforceable against the WTO member in question. Nevertheless, given the limited jurisdiction of WTO panels (claims under WTO covered agreements only), the WTO member concerned could not itself bring a complaint to the WTO against the WTO member trading in slaves.

Has Pauwelyn convinced you that non-WTO must be considered by panels in a WTO dispute?

5. Gabrielle Marceau concludes that panels may use non-WTO law only in limited circumstances. By focusing on Article 3.2 and Article 19.1 of the DSU, she comes to another conclusion. Article 19.1 provides that where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, “it shall recommend that the Member concerned bring the measure into conformity with that agreement.” As a result, she concludes:

At best WTO adjudicating bodies could make “suggestions,” yet such suggestions refer to the way the member may implement and correct the situation condemned by the recommendation that a “WTO provision has been violated.” Article 3 of the DSU also states that the dispute settlement process is not the occasion to add to or diminish WTO rights and obligations of Members.

Thus the WTO adjudicating bodies, although they have to perform all necessary reasoning to establish the state of international law and the applicable law between the two WTO members, do not seem to have the constitutional capacity to reach any standard recommendations in situations where another treaty provision has superseded (and thus added to or diminished) a WTO provision. Since there would be no applicable WTO provision, the panel would be faced with a form of WTO *non-liquet*, if this concept is defined [as] a situation where there is no law on the matter.

Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, at 1103-1104.

If Marceau is correct, then it is possible that the DSB has exclusive jurisdiction over issues arising under the GATT and other WTO agreements, but that the panels do not have any authority to rule on the relationship between the relevant WTO Agreement and the MEA. Is that possible? How does one get out of that untenable position? To the extent that the MEA supersedes the WTO agreement, Marceau suggests that a panel or the Appellate Body decline jurisdiction, because there would be no applicable WTO provision to review. *Id.* at 1107. Marceau's suggestion is particularly important, because if panels and Appellate Body cannot turn to non-WTO law, then most international law, except rules of treaty interpretation, cannot be used to judge a member's trade obligations.
