WORLD TRADE ORGANISATION

UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE (WT/DS320)

(AB-2008-5)

CANADA – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE (WT/DS321)

(AB-2008-6)

THIRD PARTY SUBMISSION OF NEW ZEALAND

26 June 2008

CONTENTS

TABLE OF CASES

Short Title	***Full Title and Citation***
Australia- Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, 20 October 1998.
Canada - Continued Suspension of Obligations	Panel Report, *Canada – Continued Suspension of Obligations in the* EC - Hormones *Dispute*, WT/DS321/R, 31 March 2008.
EC - Bananas III (US) (Article 22.6 – EC)	Arbitrator Award, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities*, WT/DS27/ARB, 9 April 1999.
EC - Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R.
Japan – Apples	Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, 15 July 2003.
Japan - Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003.
Japan - Varietals	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, 22 February 1999.
US - Continued Suspension of Obligations	Panel Report, *United States – Continued Suspension of Obligations in the* EC - Hormones *Dispute*, WT/DS320/R, 31 March 2008.
US - Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996.

I. EXECUTIVE SUMMARY

1.1 New Zealand's participation in this appeal is primarily predicated on a desire to ensure that:

a) the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (***DSU***) is properly interpreted in accordance with customary rules of interpretation of public international law, so as to effectively preserve and uphold any authorisation(s) granted, in the post-suspension of concessions phase of a dispute; and

b) the principles and obligations of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (***SPS Agreement***) continue to be effectively maintained.

1.2 This dispute is essentially focussed on whether the EC:

a) has finally brought itself into compliance with the original recommendations and rulings of the Dispute Settlement Body (**DSB**) in *EC - Hormones*; and

b) can unilaterally determine itself to be in compliance and then demand the withdrawal of the authorised suspension of concessions.

1.3 The Panel's approach, particularly its application of the *DSU*, was fundamentally flawed. In New Zealand's view, the Panel did not sufficiently adhere to customary rules of interpretation of public international law when it was considering the issues before it, nor is its decision grounded in the practical reality of the post-suspension of concessions phase of dispute settlement.

1.4 In the context of this appeal, New Zealand submits that the Panel erred:

a) in finding that Canada and the United States had acted inconsistently with Articles 23.1 and 23.2(a) of the *DSU*; and

b) in stating that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the covered agreements, and then suggesting that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay.

The Panel erred in finding that Canada and the United States had acted inconsistently with Articles 23.1 and 23.2(a) of the *DSU*

1.5 *In the first instance, the Panel failed to consider the "context" in its interpretation of Articles 23.1 and 23.2(a) of the* DSU.

1.6 In New Zealand's view, the Panel should have interpreted Articles 23.1 and 23.2(a) of the *DSU* in the context of other relevant provisions of the *DSU*. In particular, Articles 21 and 22 provide a framework for the various situations that could arise after the adoption of recommendations and rulings by the DSB. It is these two provisions that the Panel should have more fully addressed in the context of the post-suspension of concessions phase of a dispute.

1.7 The Panel reached its conclusion on Article 23 by reading it in isolation from its context, as if:

a) Article 22 did not exist;

b) there had been no prior determination of non-compliance and authorisation of suspension of concessions; and

c) this case related to actions by Canada and the United States that had no connection with measures already authorised by the DSB.

1.8 Such a de-contextualised reading of Article 23 finds no support in either: the jurisprudence of panels and the Appellate Body; or, most significantly, the *DSU* itself.

1.9 *In the second instance, the Panel failed to consider "object and purpose" in its interpretation of Articles 23.1 and 23.2(a) of the* DSU.

1.10 Pursuant to Article 3.2 of the *DSU*, security and predictability is an object and purpose of the *DSU*, as well as the World Trade Organization (**WTO**) Agreement as a whole.

1.11 By considering Article 23 of the *DSU* without regard to the objective of security and predictability when reviewing the EC's first series of main claims, the Panel arrived at a finding that significantly diminishes the effectiveness of the WTO dispute settlement mechanism.

1.12 In New Zealand's view, the Panel's findings:

a) seriously undermine the strength of the DSB-authorised retaliation;

b) weakens an important incentive for Members to bring their measures promptly into compliance; and

c) most significantly, undermines the object and purpose of the *DSU* by reducing the security and predictability of the multilateral trading system, by allowing a unilateral assertion of compliance by a previously (long-standing) non-compliant Member to override the multilateral authorisation of the DSB to suspend concessions.

1.13 *In the third instance, the Panel's approach reduces whole clauses or paragraphs to redundancy or inutility.*

1.14 In New Zealand's view, the Panel's approach to the first series of the EC's main claims meant that the Panel dealt with Articles 23.1 and 23.2(a) of the *DSU* in the abstract, with no reference to Article 22 of the *DSU*. This was an error. It meant that Article 22.8 of the *DSU* had no meaning and was reduced to redundancy or inutility.

The Panel erred in stating that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the covered agreements and then suggesting that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay

1.15 In New Zealand's view, the Panel should have explicitly determined the compatibility of Directive 2003/74/EC with the covered agreements. After all, it had substantively reviewed the Directive and concluded, amongst other things, that:

a) the EC had not conducted a risk assessment as appropriate to the circumstances within the meaning of Article 5.1 of the *SPS Agreement*;

b) the EC had not established that the relevant scientific evidence with respect to any of the five hormones in question was insufficient within the meaning of Article 5.7 of the *SPS Agreement*; and

c) most significantly, the measure that had been found to be inconsistent with the *SPS Agreement* in the original *EC - Hormones* proceedings had not been removed by the EC.

1.16 Finally, the Panel's suggestion that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay is simply not tenable. Not only does it undermine the authorisations to suspend concessions that Canada and the United States have already received from the DSB, but it also raises serious questions as to its compatibility with Article 3.3 of the *DSU* which is focussed upon the "prompt settlement" of disputes.

1.17 Accordingly, New Zealand requests that the Appellate Body reverse the findings and conclusions of the Panel referred to above and find that:

a) Canada and the United States have not acted inconsistently with Articles 23.1 and 23.2(a) of the *DSU* because, as the Panel had found, the EC had failed to demonstrate that it had brought itself into compliance, in accordance with Article 22.8 of the *DSU*; and

b) if required, the Appellate Body has jurisdiction to determine the compatibility of Directive 2003/74/EC with the applicable covered agreements, namely the *SPS Agreement*.

II. INTRODUCTION

2.1 New Zealand's participation in this appeal is primarily predicated on a desire to ensure that:

a) the *DSU* is properly interpreted in accordance with customary rules of interpretation of public international law so as to effectively preserve and uphold any authorisation(s) granted in the post-suspension of concessions phase of a dispute; and

b) the principles and obligations of the *SPS Agreement* continue to be effectively maintained.

2.2 In its submission, the EC seeks to persuade the Appellate Body that this dispute is all about procedural violations committed by Canada and the United States. This contention is not borne out by an examination of the situation. Contrary to what the EC might seek to suggest, the key issue before the Appellate Body is whether the EC:

a) has finally brought itself into compliance with the original recommendations and rulings of the DSB in *EC - Hormones*; and

b) can unilaterally determine itself to be in compliance and then demand the withdrawal of the authorised suspension of concessions.

2.3 The authorisation for, and subsequent application of the suspension of concessions to encourage compliance is an essential element in the WTO's dispute settlement system. The relevant *DSU* provisions have to be interpreted in the proper way, so as to ensure prompt compliance, whilst also giving meaning to the multilateral authorisation to suspend concessions, as well as ensuring the security and predictability of the multilateral trading system.

2.4 As the Appellate Body knows, this dispute has a long history, stretching back to early 1998 when the DSB adopted the original Panel and Appellate Body reports in *EC - Hormones*, and recommended that the EC bring itself into compliance with its obligations under the WTO, primarily the relevant obligations under the *SPS Agreement*. Unfortunately, the EC did not bring itself into compliance within the

applicable reasonable period of time, and Canada and the United States both received authorisation from the DSB to suspend concessions in the latter period of 1999.

2.5 In October 2003, more than four years after the expiry of the reasonable period of time, the EC notified the DSB that Directive 2003/74/EC had entered into force and, as a result of its adoption and entry into force, the EC considered itself to be in compliance with the recommendations and rulings of the DSB.

2.6 The EC went on to assert that the suspension of concessions by Canada and the United States were no longer justified. Following on from this, the EC brought the present dispute against Canada and the United States, claiming that they can no longer continue their DSB-authorised suspension of concessions without recourse to dispute settlement under the *DSU*.

2.7 In its Reports, the Panel concluded that, with respect to the claims concerning the violation of Article 23.2(a) read together with Articles 21.5 and 23.1 of the *DSU*, Canada and the United States made the following "procedural violations":

a) by continuing the suspension of concessions subsequent to the EC's notification of Directive 2003/74/EC, Canada and the United States were seeking to redress a violation of obligations under a covered agreement without recourse to, and abiding by, the rules and procedures of the *DSU* in breach of Article 23.1 of the *DSU*; and

b) by making a determination within the meaning of Article 23.2(a) of the *DSU* to the effect that a violation had occurred without having recourse to dispute settlement in accordance with the rules and procedures of the *DSU*, Canada and the United States were in breach of Article 23.2(a) of the *DSU*.[1]

2.8 The Panel also addressed the claims of the EC concerning Article 23.1 when read together with Articles 22.8 and 3.7 of the *DSU* and concluded that:

a) to the extent that the measure found to be inconsistent with the *SPS Agreement* in the original proceedings has not been removed by the EC, Canada and the United States had not breached Article 22.8 of the *DSU*; and

[1] See, for example, Panel Report, *US - Continued Suspension of Obligations*, para 7.856.

b) to the extent that Article 22.8 had not been breached, the EC had not established a violation of Articles 23.1 and 3.7 of the *DSU* as a result of a breach of Article 22.8.[2]

2.9 The Panel then observed that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the applicable covered agreements, primarily the *SPS Agreement*, notwithstanding the fact that it had found that Canada and the United States had not breached Article 22.8 of the *DSU* because the EC had not been able to demonstrate that it had actually remedied the inconsistencies of its original measure by way of Directive 2003/74/EC.

2.10 New Zealand's view is that the Panel Reports erred in interpreting key provisions of the *DSU*, particularly Articles 21, 22 and 23, resulting in contradictory findings that:

a) are disconnected from the facts of this long-standing dispute; and

b) fail to give proper effect to the overarching framework, as well as the specific provisions, of the *DSU*.

2.11 In particular, by ignoring the specific terms of Article 22.8 of the *DSU*, the Panel failed to follow well-established rules and principles of treaty interpretation, resulting in the unsubstantiated findings that Canada and the United States had violated Articles 23.1 and 23.2(a) of the *DSU*, notwithstanding the Panel's separate finding that they had not violated Article 22.8 of the *DSU* because the EC had not removed the measure that had originally been found to be inconsistent with the *SPS Agreement*.[3]

2.12 As opposed to the EC's argumentation in its Appellant Submission,[4] the Panel was right to substantively review Directive 2003/74/EC. It is, however, unfortunate that the Panel did not take that additional step and explicitly determine the compatibility of

[2] See, for example, Panel Reports, *US - Continued Suspension of Obligations*, para 7.857.

[3] Indeed, as the United States has argued in its Other Appellant Submission (13 June 2008) at para 8:

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

[4] See, for example, the Appellant Submission by the EC (5 June 2008), para 28.

Directive 2003/74/EC with the covered agreements. New Zealand is of the view that the Panel erred in this regard. The EC arguments in relation to the *SPS Agreement*, particularly those touching on Article 5.1 and 5.7, would seriously undermine the principles and obligations of that Agreement which the Appellate Body has consistently upheld, most notably in the context of the original *EC - Hormones* dispute.

III. LEGAL ARGUMENTS

3.1 Contrary to the EC's contention that this dispute is all about procedural violations committed by Canada and the United States, at the heart of the current dispute is whether the EC:

a) has finally brought itself into compliance with the original recommendations and rulings of the DSB in *EC - Hormones*; and

b) can unilaterally determine itself to be in compliance, and then demand the withdrawal of the authorised suspension of concessions.

3.2 The Panel's approach, particularly its application of the *DSU*, was flawed. In New Zealand's view, the Panel did not sufficiently adhere to customary rules of interpretation of public international law when it was considering the issues before it, nor is its decision grounded in the practical reality of the post-suspension of concessions phase of dispute settlement.

3.3 Indeed, the Panel's findings that, on the one hand, Canada and the United States have violated Articles 23.1 and 23.2(a) of the *DSU*, but on the other hand, they have not violated Article 22.8 of the *DSU* because the EC had not removed the measure that had originally been found to be inconsistent with the *SPS Agreement*, are so clearly mutually inconsistent that the principal parties to this dispute – namely, Canada, the EC and the United States – are unified in their condemnation of such findings, albeit for markedly disparate reasons.

3.4 In the context of this appeal, New Zealand submits that the Panel erred:

a) in finding that Canada and the United States had acted inconsistently with Articles 23.1 and 23.2(a) of the *DSU*; and

b) in stating that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the covered agreements, and then suggesting that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay.

3.5 In relation to the first error, the Panel failed to apply relevant principles of treaty interpretation, most notably that treaties must be interpreted:

a) in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and *in light of its object and purpose*; and

b) in a way that does not reduce whole clauses or paragraphs to redundancy or inutility.

3.6 In relation to the second error, the Panel should have explicitly determined whether Directive 2003/74/EC was compatible with the covered agreements. After all, it had substantively reviewed the Directive and concluded, amongst other things, that:

a) the EC had not conducted a risk assessment as appropriate to the circumstances within the meaning of Article 5.1 of the *SPS Agreement*;[5]

b) the EC had not established that the relevant scientific evidence with respect to any of the five hormones in question (namely, progesterone, testosterone, trenbolone acetate, zeranol and melengestrol acetate) was insufficient within the meaning of Article 5.7 of the *SPS Agreement*;[6] and

c) most significantly, the measure that had been found to be inconsistent with the *SPS Agreement* in the original *EC - Hormones* proceedings had not been removed by the EC.

3.7 In addition, the Panel's suggestion that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay, not only undermines the authorisations to suspend concessions that Canada and the United States have already received from the DSB, but also raises serious questions as to its compatibility with Article 3.3 of the *DSU* which is focussed upon the "prompt settlement" of disputes.

3.8 Each of these points will be addressed in more detail below.

[5] See, for example, Panel Report, *US - Continued Suspension of Obligations*, para 7.573.
[6] See, for example, Panel Report, *US - Continued Suspension of Obligations*, paras 7.742, 7.756, 7.781, 7.804 and 7.835.

A. THE PANEL ERRED IN FINDING THAT CANADA AND THE UNITED STATES HAD ACTED INCONSISTENTLY WITH ARTICLES 23.1 AND 23.2(A) OF THE *DSU*

3.9 The Appellate Body has acknowledged that, in accordance with Article 3.2 of the *DSU*, the obligations of the WTO are to be construed in accordance with the customary rules of interpretation of public international law, most notably Article 31 of the *Vienna Convention on the Law of Treaties*.[7]

3.10 As elucidated in Article 31 of the *Vienna Convention on the Law of Treaties*:

> 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*. (Emphasis added).

3.11 In addition, and as the Appellate Body has observed, this general rule of interpretation "must give meaning and effect to all of the terms of a treaty",[8] meaning that an "interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[9]

1. The Panel failed to consider the "context" in its interpretation of Articles 23.1 and 23.2(a) of the *DSU*

3.12 In New Zealand's view, the Panel should have interpreted Articles 23.1 and 23.2(a) of the *DSU* in the context of other relevant provisions of the *DSU*. In particular, Articles 21 and 22 provide a framework for the various situations that could arise after the adoption of recommendations and rulings by the DSB. It is these two provisions that the Panel should have more fully addressed in the context of the post-suspension of concessions phase of a dispute.

3.13 Article 21 establishes the principle that prompt compliance with the recommendations and rulings of the DSB is essential in order to ensure the effective

[7] See, for example, the Appellate Body Report, *US – Gasoline*, page 17.
[8] See Appellate Body Report, *US - Gasoline*, page 23.
[9] See Appellate Body Report, *US - Gasoline*, page 23.

resolution of disputes to the benefit of all WTO Members.[10] Such prompt compliance may not, however, be immediate and Article 21 addresses, amongst other things, the establishment of a reasonable period of time to implement the recommendations and rulings of the DSB,[11] and the determination of whether compliance with such recommendations and rulings has actually been achieved.[12]

3.14 Article 22 goes on to address the possible consequences of a WTO Member failing to comply with the applicable recommendations and rulings within a reasonable period of time. The suspension of concessions that is envisaged by Article 22 is supposed to serve as a strong incentive for the responding party to comply with the DSB's recommendations and rulings.[13]

3.15 Of particular relevance to this dispute is Article 22.8 of the *DSU*, which sets out the three conditions that must be met in order to have the suspension of concessions or other obligations terminated, namely that:

a) the measure that has been found to be inconsistent has been removed;

b) the Member that must implement the recommendations or rulings has provided a solution to the nullification or impairment of benefits; or

c) a mutually agreed solution has been reached.

3.16 In this dispute, the latter two instances are clearly not applicable. As such, the only way in which the suspension of concessions could be removed would be where the measure that has been found to have been inconsistent has been removed.

3.17 And it is clear that nothing in Article 22.8 of the *DSU* grants the EC the authority to unilaterally determine that such a condition has occurred. Indeed, Article 22.8 refers to where the measure has actually been removed, not where the measure is merely claimed to have been removed.

[10] See, for example, Article 21.1 of the *DSU*.
[11] See Article 21.3 of the *DSU*.
[12] See Article 21.5 of the *DSU*.
[13] See, for example, Decision by the Arbitrators, *EC - Bananas III (US) (Article 22.6 – EC)*, where the Arbitrators agreed that the essential purpose of countermeasures is to induce compliance (para 6.3).

3.18 In New Zealand's view, the Panel failed to follow the general framework of the *DSU*, particularly Articles 21 and 22, in its approach to the issue at dispute. The Panel failed to properly consider the applicability of Article 22.8 of the *DSU* and therefore erred in finding that the first series of EC main claims were completely unrelated to whether the European Communities implemented the DSB recommendations and rulings in the *EC - Hormones* dispute.[14]

3.19 Indeed, the Panel's approach eventually culminated in contradictory findings that, on the one hand, Canada and the United States, in continuing to suspend concessions, had made unilateral determinations that the EC was in violation of its obligations (contrary to Article 23.2(a) and, consequently, Article 23.1 of the *DSU*) and, on the other hand, that the EC had not removed the measure found to be inconsistent in the *EC - Hormones* dispute, with the result that Canada and the United States were not in violation of Article 22.8.

3.20 In New Zealand's view, the conclusion that Canada and the United States were not in violation of Article 22.8 of the *DSU* necessarily means that these two WTO members had every right to continue to suspend concessions. After all, if:

a) the original measure that was found to be inconsistent has not been removed; and

b) the suspension of concessions is still validly in place,

then on what basis could Canada and the United States be regarded as having breached their obligations?

3.21 Finally, New Zealand notes that the relevance of Article 23 of the *DSU* to the current situation is far from clear. Article 23 is the framework provision setting up the requirement to have recourse to dispute settlement when seeking redress of a violation of obligations. It does not, however, address the specific situation in this case, where Canada and the United States have already had recourse to dispute settlement in accordance with this Article and have taken all the steps there identified.

[14] See, for example, Panel Report, *US - Continued Suspension of Obligations*, para 7.182.

3.22 Article 23 does not, in New Zealand's view, impose an obligation on Canada and the United States to cease the application of suspension of concession or to take a compliance review case where they do not accept that the original non-compliant measure has been removed. Nor does it do so when "read together" with Articles 3.7 and 22.8 of the *DSU*. New Zealand does not see how these provisions can be read to displace the specific authorisation under Article 22.6 of the *DSU*, which has never been revoked.

3.23 In short, the Panel reached its conclusion on Article 23 by reading it in isolation from its context, as if:

a) Article 22 did not exist;

b) there had been no prior determination of non-compliance and authorisation of suspension of concessions; and

c) this case related to actions by Canada and the United States that had no connection with measures already authorised by the DSB.

3.24 Such a de-contextualised reading of Article 23 finds no support in either: the jurisprudence of panels and the Appellate Body; or, most significantly, the *DSU* itself.

2. The Panel failed to consider "object and purpose" in its interpretation of Articles 23.1 and 23.2(a) of the *DSU*

3.25 Article 3.2 of the *DSU* provides:

> The dispute settlement system of the WTO *is a central element in providing security and predictability to the multilateral trading system*. (Emphasis added).

3.26 Security and predictability is therefore an object and purpose of the *DSU*, as well as the WTO Agreement as a whole. And the ability of the WTO dispute settlement system to provide security and predictability is intrinsically linked to the effectiveness of such a mechanism and the remedies that are provided therein.

3.27 By considering Article 23 of the *DSU* without regard to the objective of security and predictability when reviewing the EC's first series of main claims, the Panel arrived

at a finding that would significantly diminish the effectiveness of the WTO dispute settlement mechanism.

3.28 Indeed, the effect of the Panel Reports is that a Member who has been authorised by the DSB to suspend concessions would have to terminate such a suspension of concessions as soon as the non-compliant Member purports to adopt an implementing measure and notifies such adoption to the DSB, unless the Member who has been authorised challenges the purported implementing measure pursuant to either Article 21.5 of the *DSU* or in the context of a completely new dispute.

3.29 Such a scenario simply does not stand up to examination. The non-compliant Member could avoid the legitimately authorised suspension of concessions by another Member merely by adopting an implementing measure that purportedly complies with the original recommendations and rulings, and then waiting to be challenged.

3.30 As both Canada and the United States observe, the Panel's approach would almost inevitably give rise to the situation where an implementing Member could continually impose successive rounds of litigation at will, merely by asserting that it had complied.[15] There is no predictability in a system of suspension of concessions that operates at the whim of the Member against whom suspension of concessions has been authorised.

3.31 In New Zealand's view, the danger of such an approach is that it could render the mechanism of suspension of concessions inutile and, in this respect, it was most unfortunate that the Panel did not give due regard to such an issue.[16]

3.32 Given the fundamental importance of suspension of concessions as the "last resort" of the dispute settlement system,[17] an interpretation that ignores the object and

[15] See, for example, the Other Appellant Submission of Canada (13 June 2008), para 47; and the Other Appellate Submission of the United States (13 June 2008), paras 61-64.

[16] The Panel did, of course, acknowledge the arguments in relation to the possibility of an "endless loop of litigation" (see, for example, Panel Report, *US - Continued Suspension of Obligations*, para 7.237), but did not actually consider how this would impact on the strength of the mechanism of suspension of concessions, let alone the security and predictability of the multilateral trading system. In New Zealand's view, this is of significant concern.

[17] See, for example, Article 3.7 of the DSU which provides "[t]he last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the

purpose of security and predictability of the multilateral trading system should - in New Zealand's view - be reversed.

3.33 New Zealand also agrees with Canada that the Panel's approach is inconsistent with the last sentence of Article 3.2 of the *DSU*, which provides that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided for in the covered agreements. Indeed, as Canada observes:

> …The panel's approach, if adopted, would diminish the right of Canada to rely on its validly obtained DSB authorization to suspend concessions against the EC. In Canada's view, the design of the WTO dispute settlement process, as evidenced by the structure of the DSU […], is such that a unilateral action, such as the notification by the EC to the DSB of the adoption of the 2003 Directive, cannot alter the status quo and displace Canada's duly authorized right to suspend concessions without multilateral recognition that one of the three conditions for the removal of the suspension of concessions set out in Article 22.8 has been met.[18]

3.34 In New Zealand's view, the Panel's findings:

a) seriously undermine the strength of DSB-authorised suspension of concessions;

b) weakens an important incentive for Members to bring their measures promptly into compliance; and

c) most significantly, undermines the object and purpose of the *DSU* by reducing the security and predictability of the multilateral trading system by allowing a unilateral assertion of compliance by a previously (long-standing) non-compliant Member to override the multilateral authorisation of the DSB to suspend concessions.

---

application of concessions or other obligations under the covered agreements on a discriminatory basis *vis-à-vis* the other Member, subject to authorisation by the DSB of such measures".

[18] See the Other Appellant Submission of Canada (13 June 2008), para 51.

3. The Panel's approach reduces whole clauses or paragraphs to redundancy or inutility

3.35 As indicated previously, the Appellate Body has observed, amongst other things, that an interpreter of a treaty "is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[19]

3.36 In New Zealand's view, the Panel's approach to the first series of the EC's main claims meant that the Panel dealt with Articles 23.1 and 23.2(a) of the *DSU* in the abstract, with no reference to Article 22 of the *DSU*. This was an error. It meant that Article 22.8 of the *DSU* had no meaning and was reduced to redundancy or inutility.

3.37 A correct approach would have been to follow that which it adopted for the second series of main EC claims, where it considered Article 22.8 in the context of its analysis of Articles 23.1 and 23.2(a). The ultimate finding in such circumstances was that neither Canada nor the United States were in violation of any relevant obligations.

B. THE PANEL ERRED IN STATING THAT IT DID NOT HAVE JURISDICTION TO DETERMINE THE COMPATIBILITY OF DIRECTIVE 2003/74/EC WITH THE COVERED AGREEMENTS AND THEN SUGGESTING THAT CANADA AND THE UNITED STATES SHOULD HAVE RECOURSE TO THE RULES AND PROCEDURES OF THE *DSU* WITHOUT DELAY

3.38 In New Zealand's view, the Panel should have explicitly determined the compatibility of Directive 2003/74/EC with the covered agreements. After all, it had substantively reviewed the Directive and concluded, amongst other things, that:

a) the EC had not conducted a risk assessment as appropriate to the circumstances within the meaning of Article 5.1 of the *SPS Agreement*;[20]

b) the EC had not established that the relevant scientific evidence with respect to any of the five hormones in question (namely, progesterone, testosterone,

[19] See para 41 above.
[20] See, for example, Panel Report, *US - Continued Suspension of Obligations*, para 7.573.

trenbolone acetate, zeranol and melengestrol acetate) was insufficient within the meaning of Article 5.7 of the *SPS Agreement*;[21] and

c) most significantly, the measure that had been found to be inconsistent with the *SPS Agreement* in the original *EC - Hormones* proceedings had not been removed by the EC.

3.39 As Canada has observed, the refusal of the Panel to claim jurisdiction to determine the consistency of Directive 2003/74/EC is:

> … not only inconsistent with the Panel's earlier conclusion with regard to its jurisdiction to look at the compatibility of the EC measure but it is also inconsistent with what the Panel has done in effect, *ie*, in finding that Canada had not breached Article 22.8 of the *DSU* because the EC had not removed the measure found to be inconsistent with the *SPS Agreement* in the *EC - Hormones* dispute.[22]

3.40 Such a refusal is all the more difficult to rationalise given the fact that the Panel sought advice from scientific and technical experts and the Reports themselves are overwhelmingly dominated by a review of Directive 2003/74/EC in terms of its consistency with the *SPS Agreement*.

3.41 In this regard, New Zealand believes that the Panel Reports are sufficiently comprehensive for the Appellate Body to explicitly determine the compatibility of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement*, if required.

3.42 Turning to the EC's Appellant Submission, New Zealand strongly disagrees with the EC's arguments in relation to the *SPS Agreement* and would make the following observations.

1. If accepted, the EC's arguments would seriously undermine the *SPS Agreement*

[21] See, for example, Panel Report, *US - Continued Suspension of Obligations*, paras 7.742, 7.756, 7.781, 7.804 and 7.835.
[22] See the Other Appellant Submission of Canada (13 June 2008), para 95.

3.43 If accepted, the EC's arguments in relation to the *SPS Agreement*, particularly those touching upon Article 5.1 and 5.7, would seriously undermine the principles and obligations of that Agreement, which the Appellate Body has consistently upheld, most notably in the context of the original *EC - Hormones* dispute.

3.44 For agricultural exporting countries such as New Zealand, the *SPS Agreement* is one of the most important results to flow out of the Uruguay Round. Whilst the *Agreement* affirmed the basic right of countries to apply SPS measures to the extent necessary to protect human, animal or plant life or health, it imposed the very important requirement that any such SPS measures had to be developed and implemented in a manner that is transparent, consistent, scientifically-based, and the least trade-restrictive.[23]

3.45 The idea that SPS measures should be scientifically-based is at the forefront of this dispute. In this regard, New Zealand notes that Article 2.2 of the *SPS Agreement* imposes a general obligation on countries that SPS measures should be based on scientific principles and not maintained without sufficient scientific evidence. This is given specific application by Article 5.1.

3.46 The Appellate Body has found that the requirement for all SPS measures to be "based on" a risk assessment means that there must be a "rational relationship between the measure and the risk assessment" whereby the results of the risk assessment sufficiently warrant the SPS measures at stake.[24]

2. Directive 2003/74/EC is not based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*

3.47 In New Zealand's view, the Panel's conclusion in relation to Article 5.1 was, in substance, correct. Indeed, it was based on an exhaustive overview of all relevant scientific evidence, drawing upon the expertise and knowledge of a group of eminent scientific and technical experts.

[23] See, for example, Articles 2.2, 2.3, 5.1, 5.4, 5.5 and 5.6 of the *SPS Agreement*.
[24] See Appellate Body Report, *EC - Hormones*, para 193.

3.48 There are two elements to the obligation under Article 5.1 of the *SPS Agreement*. First, there must be a risk assessment, within the meaning of Article 5.1 and paragraph 4 of Annex A. Second, measures must be based on that risk assessment.

3.49 An assessment of risk must conform with paragraph 4 of Annex A of the *SPS Agreement*, which defines a risk assessment as:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; *or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs*. (Emphasis added).

3.50 As this definition indicates, the *SPS Agreement* envisages two types of risk assessment:

a) those dealing with a situation where an SPS measure is designed to protect human, animal or plant life or health from risks arising from the entry, establishment or spread of pests or diseases; and

b) those dealing with a situation where an SPS measure is designed to protect from risks arising from additives, contaminants, toxins or disease-causing organisms in foodstuffs.

3.51 The Appellate Body has made it clear that it perceives these two types of risk assessment to be "substantially different" from one another.[25]

3.52 As was the case with *EC - Hormones*, this dispute is focussed upon the second type of risk assessment - where an SPS measure is designed to protect from risks arising from additives, contaminants, toxins or disease-causing organisms in foodstuffs. In

[25] See Appellate Body Report, *Australia – Salmon*, footnote 69.

such circumstances, the Appellate Body has indicated that there are essentially two requirements to be fulfilled:

a) *identify* the adverse effects on human or animal health (if any) arising from the presence of such additives, contaminants, toxins or disease-causing organisms in foodstuffs; and

b) if any adverse effects exist, *evaluate* the potential (or possibility) of the occurrence of such effects.

3.53 In the context of the original *EC - Hormones* dispute, the Appellate Body made the important observation that the "risk" evaluated in a risk assessment must be ascertainable – "theoretical uncertainty is not the kind of risk which … is to be assessed".[26]

3.54 The Panel in the *Japan–Apples* case summarised its consideration of the elements of Article 5.1 by recalling that a risk assessment in relation to the measure at issue would also involve an evaluation of whether the risk assessment was "as appropriate to the circumstances", and whether it took into account "risk assessment techniques developed by the relevant international organizations".[27] The Panel in that case added that these two factors would "pervade the entire assessment of the risk".[28]

3.55 In the *EC–Hormones* case, the Appellate Body found that the EC "did not actually proceed to an assessment, within the meaning of Articles 5.1 and 5.2 [of the *SPS Agreement*], of the risks arising from the failure of observance of good veterinary practice combined with problems of control of the use of hormones for growth promotion purposes".[29]

3.56 In New Zealand's view, the evidence that the EC seeks to rely upon in this dispute once again falls well short of demonstrating that the EC has met the threshold required under the *SPS Agreement* for the existence of a valid risk assessment.

[26] See Appellate Body Report, *EC - Hormones*, para 186.
[27] See Panel Report, *Japan – Apples*, para. 8.236.
[28] See Panel Report, *Japan – Apples*, para. 8.237.
[29] See Appellate Body Report, *EC–Hormones*, para. 208.

3.57 And as the Panel in its Reports observed, the evidence that the EC seeks to rely upon "do[es] not satisfy the definition of a risk assessment … [and the measure] … cannot [therefore] be based on a risk assessment within the meaning of Article 5.1".[30]

3. The relevant scientific evidence underpinning Directive 2003/74/EC is insufficient within the meaning of Article 5.7 of the *SPS Agreement*

3.58 As the Member seeking to have recourse to Article 5.7 of the *SPS Agreement*, the burden of proof rests on the EC to demonstrate that the four requirements of this provision have been met.[31] And each of these four requirements must be met in order to adopt and maintain a provisional SPS measure:

a) the measure is imposed in a situation where "relevant scientific evidence is insufficient",

b) the measure is adopted on the "basis of available pertinent information";

c) the Member seeks to "obtain the additional information necessary for a more objective risk assessment"; and

d) the Member reviews the measure "accordingly within a reasonable period of time".[32]

3.59 The Appellate Body has observed that:

> These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.[33] (Emphasis in original).

3.60 In New Zealand's view, it is clear that Directive 2003/74/EC does not meet any of the requirements associated with Article 5.7.

---

[30] See, for example, Panel Report, *US - Continued Suspension of Obligations*, para 7.578.
[31] See Panel Report, *Japan - Apples*, para. 8.212, where the Panel discusses the burden of proof under Article 5.7.
[32] See Appellate Body Report, *Japan - Varietals*, para 89.
[33] See Appellate Body Report, *Japan - Varietals*, para 89.

4. The Panel's suggestion that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay is simply not tenable

3.61 Finally, New Zealand would like to turn to the Panel's suggestion that Canada and the United States should have recourse to the rules and procedures of the *DSU* without delay.

3.62 In New Zealand's view, such a suggestion is simply not tenable. Not only does it undermine the authorisations to suspend concessions that Canada and the United States have already received from the DSB, but it also raises serious questions as to its compatibility with Article 3.3 of the *DSU* which is focussed upon the "prompt settlement" of disputes because, as Canada has observed, it "would require a new panel proceeding to look at an issue that was already dealt with in the context of the current proceedings. Such a new proceeding would be redundant".[34]

[34] See, for example, the Other Appellant Submission by Canada (13 June 2008), para 96. See also the Other Appellant Submission of the United States (13 June 2008), para 114.

IV. CONCLUSION

4.1 New Zealand requests that the Appellate Body reverse the findings and conclusions of the Panel referred to above and find that:

a) Canada and the United States have not acted inconsistently with Articles 23.1 and 23.2(a) of the *DSU* because, as the Panel had found, the EC had failed to demonstrate that it had brought itself into compliance, in accordance with Article 22.8 of the *DSU*; and

b) if required, the Appellate Body has jurisdiction to determine the compatibility of Directive 2003/74/EC with the applicable covered agreements, namely the *SPS Agreement*.