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I. INTRODUCTION

1. The European Communities, the United States, and Canada each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*[1] (the "Panel Report, *US – Continued Suspension*"), and the Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*[2] (the "Panel Report, *Canada – Continued Suspension*").[3] The Panels were established to consider complaints by the European Communities concerning the suspension of concessions or other obligations by the United States and by Canada against the European Communities because of the latter's alleged failure to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") stemming from the *EC – Hormones* dispute.[4] The European Communities asserts that the United States and Canada must cease the suspension of concessions because the European Communities adopted Directive 2003/74/EC[5] and notified it to the DSB as a measure taken to comply with the DSB's recommendations and rulings in *EC – Hormones*.[6]

2. Before the panels in *EC – Hormones*[7], the United States and Canada claimed that the ban imposed by the European Communities on meat from cattle treated with six hormones—oestradiol-17β, progesterone, testosterone, trenbolone acetate, zeranol, and melengestrol acetate ("MGA")—was inconsistent with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), in particular, Articles 2, 3, and 5 thereof, the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

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1 WT/DS320/R, 21 March 2008.
2 WT/DS321/R, 21 March 2008.
3 In this Report, we refer to the United States first and then to Canada, in keeping with the chronology of the WT/DS numbers assigned to these disputes.
4 The recommendations and rulings of the DSB resulted from the adoption on 13 February 1998, by the DSB, of the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R; the Panel Report, WT/DS26/R/USA; and the Panel Report, WT/DS48/R/CAN.
5 Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, *Official Journal of the European Union*, L Series, No. 262 (14 October 2003) 17 (Exhibits EC-1 and US-3 submitted by the European Communities and the United States, respectively, to the Panel).
6 Panel Report, *US – Continued Suspension*, para. 1.1; Panel Report, *Canada – Continued Suspension*, para. 1.1.
7 As the same individuals served on both panels, in this Report we will henceforth refer to the panels in the singular.

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3. The panel in *EC – Hormones* held that:

- by maintaining sanitary measures that are not based on a risk assessment, the European Communities had acted inconsistently with Article 5.1 of the *SPS Agreement*;

- by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considered appropriate in different situations which result in discrimination or a disguised restriction on international trade, the European Communities had acted inconsistently with Article 5.5 of the *SPS Agreement*; and

- by maintaining sanitary measures that are not based on existing international standards without justification under Article 3.3 of the *SPS Agreement*, the European Communities had acted inconsistently with Article 3.1 of that Agreement.[8]

4. The European Communities appealed the panel's findings under Articles 3.1, 3.3, 5.1, and 5.5 of the *SPS Agreement*. In addition, the European Communities claimed that the panels had erred in the selection and use of scientific experts, in allocating the burden of proof, and in applying the standard of review. The United States and Canada appealed the panel's decision not to make findings relating to Articles 2.2 and 5.6 of the *SPS Agreement*.

5. The Appellate Body upheld, albeit on the basis of modified reasoning, the panel's findings that the European Communities' import ban on meat and meat products treated with the six hormones at issue was inconsistent with Article 5.1 of the *SPS Agreement*, and, as a consequence, was also inconsistent with Article 3.3 of that Agreement. The Appellate Body found that the scientific studies submitted by the European Communities in that dispute were not "sufficiently specific to the case at hand"[9], because they were "general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake".[10] For this reason, the Appellate Body concluded that "no risk assessment that reasonably support[ed] or warrant[ed] the import prohibition embodied in the [European Communities'] Directives was furnished to the Panel"[11], and accordingly found that the European Communities' import ban, imposed under Directive 96/22/EC, was not "based on" a risk assessment within the meaning of Article 5.1. Moreover, the Appellate Body disagreed with the panel's interpretation of the relationship between Arti-

[8] Panel Report, *EC – Hormones (US)*, para. 9.1; Panel Report, *EC – Hormones (Canada)*, para. 9.1.
[9] Appellate Body Report, *EC – Hormones*, para. 200.
[10] *Ibid*.
[11] *Ibid*., para. 208.

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cles 3.1 and 3.3 of the *SPS Agreement*. The panel interpreted Article 3.3 to be an exception to the "general obligation" of Article 3.1, and found that the European Communities had not acted consistently with Article 3.1 and had not provided appropriate scientific justification for a higher level of SPS protection under Article 3.3. The Appellate Body concluded, however, that the right of Members to establish a higher level of sanitary protection under Article 3.3 is an autonomous right and not an exception to a "general obligation" under Article 3.1. Accordingly, the Appellate Body reversed the panel's conclusion that the import prohibition was inconsistent with Article 3.1. Nevertheless, as the Appellate Body found that the European Communities' import prohibition was inconsistent with Article 5.1, it also concluded that the import prohibition was inconsistent with Article 3.3. The Appellate Body, however, modified the panel's interpretation of "risk assessment" by holding that there was no requirement "to establish a minimum quantifiable magnitude of risk", and that the factors "not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences" were not excluded from the scope of a risk assessment.[12] The Appellate Body also reversed the panel's findings that the European Communities had acted inconsistently with Article 5.5 of the *SPS Agreement*, which requires that a WTO Member avoid arbitrary or unjustifiable distinctions in the levels of sanitary protection that result in discrimination or a disguised restriction on international trade. Furthermore, the Appellate Body agreed with the panel that the precautionary principle would not override Articles 5.1 and 5.2 and that it had been incorporated in, *inter alia*, Article 5.7 of the *SPS Agreement*. With regard to the selection and use of experts by the panel, the Appellate Body concluded that the panel had acted consistently with therequirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and the *SPS Agreement*. The Appellate Body rejected the European Communities' claim that the panel had erred in the standard applied to the review of the evidence and thus found that the panel had complied with its obligation under Article 11 of the DSU. Finally, the Appellate Body concluded that the panel's exercise of judicial economy was proper in not making findings under Articles 2.2 and 5.6 of the *SPS Agreement*.

6. On 13 February 1998, the DSB adopted the panel and Appellate Body Reports in *EC –Hormones* and recommended that the European Communities bring its measures into conformity with the *SPS Agreement*. Following the adoption of the panel and Appellate Body reports by the DSB, the European Communities requested that the reasonable period of time for implementation be determined through arbitration in accordance with Article 21.3(c) of the DSU. The Arbitrator determined a reasonable period of time of 15 months, expiring on 13 May 1999.[13]

[12] *Ibid*., para. 253(j).
[13] Award of the Arbitrator, *EC – Hormones*, para. 48.

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7. On 12 May 1999, the European Communities addressed a communication to the Chairman of the DSB, which stated:

> [T]he Community has undertaken a complementary risk assessment in light of the relevant clarifications on risk assessment provided by the Appellate Body.
>
> In light of such results of that risk assessment as are now available to it, the Community is not in a position to lift its existing import ban on 13 May.
>
> The Community now intends to study in more depth these results in order to evaluate on this basis and in the light of any new relevant information what steps may be necessary in light of our WTO rights and obligations.[14]

8. As a result, the United States and Canada requested the DSB to authorize suspension of concessions and other obligations pursuant to Article 22.2 of the DSU. The European Communities objected to the levels of suspension of concessions proposed by the United States and Canada, and requested that such levels be determined through arbitration pursuant to Article 22.6 of the DSU.[15] The Arbitrators concluded that the levels of nullification and impairment in relation to United States and Canadian meat exports were US$116.8 million and Can$11.3 million, respectively.[16] On 26 July 1999, the United States and Canada obtained authorization from the DSB to suspendconcessions and other obligations in relation to the European Communities.

9. On 29 July 1999, the United States applied 100 per cent import duties on a range of imports from certain member States of the European Communities.[17] On 1 August 1999, Canada applied 100 per cent *ad valorem* duties on a similar range of imports from the European Communities.[18]

10. After the adoption of the panel and Appellate Body Reports in the *EC – Hormones* dispute, the European Commission initiated 17 scientific studies to as-

[14] WT/DS26/18, WT/DS48/16.
[15] WT/DS26/20; WT/DS48/18.
[16] Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 83; Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 72.
[17] Office of the United States Trade Representative, Implementation of WTO Recommendations Concerning *EC – Measures Concerning Meat and Meat Products (Hormones)*, *United States Federal Register*, Vol. 64, No. 143 (27 July 1999) 40638.
[18] European Union Surtax Order, *Canada Gazette Part II*, Vol. 133, No. 17 (18 August 1999).

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sess any risks to human health posed by the six hormones at issue.[19] On 30 April 1999, the Scientific Committee on Veterinary Measures relating to Public Health (the "SCVPH") of the European Communities issued the Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products[20] (the "1999 Opinion"). Subsequent to the adoption of the 1999 Opinion, additional scientific information was made available to the European Commission in the form of scientific studies conducted by: (i) the United Kingdom's Veterinary Products Committee sub-group on the 1999 Opinion (October 1999); (ii) the Committee for Veterinary Medicinal Products ("CVMP") of the European Union (a subcommittee of the European Medicines Agency (EMEA)) (December 1999); and (iii) the Joint FAO/WHO Expert Committee on Food Additives ("JECFA") (February 2000). At the request of the European Commission, the SCVPH examined this scientific information and, on 3 May 2000, issued a review of its 1999 Opinion in which it declined to alter the conclusions contained therein[21] (the "2000 Opinion"). On 10 April 2002, a second review of the 1999 Opinion was issued by the SCVPH[22] (the "2002 Opinion") on the basis of more recent scientific data collected since the previous review. Thescientific data reviewed by the SCVPH included the final results of all 17 studies that had been commissioned by the European Commission.

11. In the light of the conclusions of the 1999, 2000, and 2002 Opinions, the European Communities adopted Directive 2003/74/EC on 22 September 2003[23], which amends Directive 96/22/EC in relation to the prohibition of the use of hormones in stockfarming. Directive 2003/74/EC maintains the permanent prohibition of the placing on the market of meat and meat products from animals treated with oestradiol-17β for growth-promotion purposes originally contained

[19] These scientific studies are contained in Exhibits EC-7 (US) through EC-42 (US) and Exhibits EC-4 (CDA) through EC-39 (CDA) submitted by the European Communities to the Panel.

[20] "Opinion of the SCVPH – Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (30 April 1999) (Exhibits US-4 and CDA-2 submitted by the United States and Canada, respectively, to the Panel). The main conclusions of the 1999 Opinion are set out in Panel Report, *US – Continued Suspension*, para. 7.391, and Panel Report, *Canada – Continued Suspension*, para. 7.388.

[21] "Review of Specific Documents relating to the SCVPH Opinion of 30 April 99 on the Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (adopted on 3 May 2000) (Exhibits US-17 and CDA-4 submitted by the United States and Canada, respectively, to the Panel). The main conclusions of the 2000 Opinion are set out in Panel Report, *US – Continued Suspension*, para. 7.392, and Panel Report, *Canada – Continued Suspension*, para. 7.389.

[22] "Opinion of the SCVPH on Review of Previous SCVPH Opinions of 30 April 1999 and 3 May 2000 on the Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (adopted on 10 April 2002) (Exhibits US-1 and CDA-17 submitted by the United States and Canada, respectively, to the Panel). The 2002 Opinion confirmed the validity of the 1999 and 2000 Opinions and concluded that no amendments to those Opinions were justified. The main conclusions of the 2002 Opinion are set out in Panel Report, *US – Continued Suspension*, para. 7.393, and Panel Report, *Canada – Continued Suspension*, para. 7.390.

[23] *Supra*, footnote 5.

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in Directive 96/22/EC.[24] In relation to the five other hormones—testosterone, progesterone, trenbolone acetate, zeranol, and MGA—Directive 2003/74/EC continues to apply the prohibition contained in Directive 96/22/EC, but on a provisional basis.[25] Directive 2003/74/EC specifies that, even though the scientific information available showed the existence of risks associated with these substances, "the current state of knowledge does not make it possible to give a quantitative estimate of the risk to consumers".[26] Accordingly, the prohibition of these five hormones should apply "while the Community seeks more complete scientific information from any source, which could shed light and clarify the gaps in the present state of knowledge of these substances".[27]

12. On 27 October 2003, the European Communities notified the DSB of the adoption, publication, and entry into force of Directive 2003/74/EC, as well as the 1999, 2000, and 2002 Opinions, which it considered to be risk assessments that sufficiently justified the permanent and provisional import prohibitions under the *SPS Agreement*.[28] The European Communities therefore claimed that it had fully implemented the DSB's recommendations and rulings in the original *EC – Hormones* disputes, and consequently considered that the suspensions of concessions by the United States and Canada were no longer justified. The United States and Canada refused to lift the measures taken pursuant to the DSB's authorization to suspend concessions or other obligations. The European Communities requested consultations with the United States and Canada on 8 November 2004.[29] The Panel was established, at the request of the European Communities, on 17 February 2005.[30]

13. Before the Panel, the European Communities put forward two "series of main claims", and a conditional "alternative" claim. In its first "series of main claims", the European Communities argued that, by maintaining their suspension of concessions and other obligations, the United States and Canada were seeking redress of a perceived violation of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") without having recourse to the rules and procedures of the DSU, in violation of Article 23.2(a) of the DSU

[24] Directive 2003/74/EC, *supra*, footnote 5, Recital 10 and Article 1 (amending Articles 2 and 3 of Directive 96/22/EC).
[25] *Ibid*.
[26] Directive 2003/74/EC, *supra*, footnote 5, Recital 7.
[27] *Ibid*., Recital 10.
[28] WT/DS26/22, WT/DS48/20.
[29] Panel Report, *US – Continued Suspension*, para. 1.1; Panel Report, *Canada – Continued Suspension*, para. 1.1.
[30] Panel Report, *US – Continued Suspension*, para. 1.3; Panel Report, *Canada – Continued Suspension*, para. 1.3. Two separate Panels were established to examine the complaints against the United States and Canada, respectively; however, the Panels were composed of the same panelists. As the composition of both Panels was identical, in this Report we refer to the Panels collectively as the "Panel".

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read in conjunction with Articles 21.5 and 23.1.[31] The European Communities argued that the United States and Canada should have initiated a compliance proceeding under Article 21.5 of the DSU following notification of the implementing measure to the DSB if they considered that this measure was not consistent with the covered agreements. Their failure to do so violated the specific prohibition to make unilateral determinations set out in Article 23.2(a) of the DSU. The European Communities therefore argued that the continued suspension of concessions or other obligations by the United States and Canada constituted a violation of Article 23.2(a) read in conjunction with Articles 21.5 and 23.1 of the DSU.

14. In its second "series of main claims", the European Communities argued that the United States and Canada, by failing to have recourse to, and abide by, the rules and procedures of the DSU, violated Article 23.1 read in conjunction with Articles 22.8 and 3.7 of the DSU. In particular, the European Communities argued that Article 22.8 of the DSU prohibits the continued application of the suspension of concessions when the measure found to be inconsistent is removed. In addition to the two series of main claims, the European Communities asserted that the continued suspension of concessions or other obligations by the United States and Canada violates Articles I and II of the GATT 1994.[32] Finally, the European Communities made an "alternative" claim[33], conditional on "the Panel find[ing] no violation of Article 23 of the DSU, ... that [the United States'/Canada's] measure[s] violate[] Article 22.8 of the DSU and Articles I and II of the GATT 1994."[34]

15. The United States and Canada rejected the European Communities' claims, arguing that their measures suspending concessions or other obligations are consistent with Article 22.8 of the DSU. According to the United States and Canada, the suspension of concessions was authorized by the DSB and this authorization remains in effect.[35] They further argued that the European Communities has failed to comply with the DSB's recommendations and rulings stemming from *EC – Hormones*, because Directive 2003/74/EC is inconsistent with the *SPS Agreement*, in particular, Articles 3.3, 5.1, and 5.7.[36] The United States also

[31] Panel Report, *US – Continued Suspension*, para. 7.153; Panel Report, *Canada – Continued Suspension*, para. 7.140.
[32] Panel Report, *US – Continued Suspension*, para. 3.1; Panel Report, *Canada – Continued Suspension*, para. 3.1.
[33] Panel Report, *US – Continued Suspension*, para. 7.155; Panel Report, *Canada – Continued Suspension*, para. 7.142.
[34] Panel Report, *US – Continued Suspension*, para. 3.2; Panel Report, *Canada – Continued Suspension*, para. 3.2.
[35] Panel Report, *US – Continued Suspension*, para. 4.78; Panel Report, *Canada – Continued Suspension*, para. 4.78.
[36] Panel Report, *US – Continued Suspension*, para. 7.180; Panel Report, *Canada – Continued Suspension*, paras. 7.398, 7.552, and 7.826.

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alleged that the European Communities' implementing measure is inconsistent with Article 5.2 of the *SPS Agreement*.[37]

16. The Panel Reports were circulated to Members of the World Trade Organization (the "WTO") on 31 March 2008. The Panel began its analysis with the European Communities' first series of main claims and found that the United States and Canada "violated Article 23.1 and 23.2(a) of the DSU by seeking redress of a violation of the *WTO Agreement* through a determination that the [European Communities'] implementing measure did not comply with the DSB recommendations and rulings in the *EC – Hormones* case without having recourse to dispute settlement in accordance with the rules and procedures of the DSU."[38] Turning to the European Communities' second series of main claims, the Panel explained that the European Communities' "second series of main claims" and its "conditional" claim under Article 22.8 of the DSU were both "based on the [European Communities'] view that it has complied with the recommendations and rulings of the DSB in the *EC – Hormones* case by adopting Directive 2003/74/EC and properly notifying it to the DSB".[39] "The difference", according to the Panel, "is that, under the conditional claim, the European Communities alleges actual compliance, and not that it should be presumed to have complied in good faith."[40] The Panel then observed that it "could not agree with the European Communities and base [its] findings of violation of Article 23.1 read in conjunction with Article 22.8 and 3.7 of the DSU on an irrebuttable presumption of good faith compliance".[41] Consequently, the Panel said that it would have to determine whether it had jurisdiction to examine the consistency of the European Communities' implementing measure with the *SPS Agreement*. It concluded that it was "entitled to determine whether the European Communities has removed the measure found to be inconsistent with a covered agreement in order to establish whether Article 22.8 has been breached" by the United States and Canada.[42] In particular, the Panel determined that it would review the compatibility of the European Communities' implementing measure with Articles 5.1, 5.7, and 3.3 of the *SPS Agreement*.[43] In the case against the United States, the

[37] Panel Report, *US – Continued Suspension*, para. 7.406.
[38] Panel Report, *US – Continued Suspension*, para. 7.251; Panel Report, *Canada – Continued Suspension*, para. 7.244.
[39] Panel Report, *US – Continued Suspension*, para. 7.156; Panel Report, *Canada – Continued Suspension*, para. 7.143. (emphasis omitted)
[40] Panel Report, *US – Continued Suspension*, para. 7.156; Panel Report, *Canada – Continued Suspension*, para. 7.143.
[41] Panel Report, *US – Continued Suspension*, para. 7.359; Panel Report, *Canada – Continued Suspension*, para. 7.357.
[42] Panel Report, *US – Continued Suspension*, para. 7.372; Panel Report, *Canada – Continued Suspension*, para. 7.369.
[43] Panel Report, *US – Continued Suspension*, para. 7.411; Panel Report, *Canada – Continued Suspension*, para. 7.402.

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Panel said it would additionally examine the compatibility with Article 5.2 of the *SPS Agreement*.[44]

17. The Panel proceeded to examine the compatibility of the European Communities' implementing measure and made the following findings. As regards Article 5.2 in the case against the United States, the Panel found that "the European Communities took into account risk assessment techniques of the relevant international organizations and took into account the factors listed in Article 5.2 of the *SPS Agreement*."[45]

18. In relation to Article 5.1 of the *SPS Agreement*, the Panel found:

> [T]he Opinions do not constitute a risk assessment because the Opinions do not satisfy the definition of a risk assessment contained in Annex A(4) second sentence and because the scientific evidence referred to in the Opinions does not support the conclusions therein. Because the Opinions are not a risk assessment as appropriate to the circumstances, the measure cannot be based on a risk assessment within the meaning of Article 5.1.[46] (footnote omitted)
>
> In light of the above, the Panel concludes that the [European Communities'] implementing measure on oestradiol-17β is not compatible with Article 5.1 of the *SPS Agreement*.[47]

19. In respect of Article 5.7 of the *SPS Agreement*, the Panel found:

> [I]t has not been demonstrated that relevant scientific evidence was insufficient, within the meaning of Article 5.7 of the *SPS Agreement*, in relation to any of the five hormones with respect to which the European Communities applies a provisional ban.[48]

[44] Panel Report, *US – Continued Suspension*, para. 7.410.
[45] *Ibid*., para. 7.573.
[46] Panel Report, *US – Continued Suspension*, para. 7.578; Panel Report, *Canada – Continued Suspension*, para. 7.548.
[47] Panel Report, *US – Continued Suspension*, para. 7.579; Panel Report, *Canada – Continued Suspension*, para. 7.549.
[48] Panel Report, *US – Continued Suspension*, para. 7.835; Panel Report, *Canada – Continued Suspension*, para. 7.821.

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> We therefore conclude that the [European Communities'] compliance measure does not meet the requirements of Article 5.7 of the *SPS Agreement* as far as the provisional ban on progesterone, testosterone, zeranol, trenbolone acetate and melengestrol acetate is concerned.[49]

20. The Panel refrained from making findings on Article 3.3 of the *SPS Agreement*, explaining that, "[i]n light of our mandate and of our objectives in engaging in a review of the conformity of the [European Communities'] implementing measure with the *SPS Agreement*, we see no reason to reach a conclusion on Article 3.3 of the *SPS Agreement*, to the extent that this conclusion depends on a violation of Article 5."[50]

21. Having concluded its analysis under the *SPS Agreement*, the Panel made the following findings in respect of the European Communities' second series of main claims:

> [W]e conclude that it has not been established that the European Communities has removed the measure found to be inconsistent with a covered agreement.[51]

> For these reasons and those developed above, we find that the European Communities did not demonstrate a breach of Article 22.8 of the DSU by [the United States and Canada].[52]

> The Panel recalls its understanding that violations of Articles 23.1 and 3.7 were only claimed in relation to the violation of Article 22.8 of the DSU. To the extent that Article 22.8 has not been breached, the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU. The Panel concludes that there is no violation of Articles 23.1

[49] Panel Report, *US – Continued Suspension*, para. 7.836; Panel Report, *Canada – Continued Suspension*, para. 7.822.
[50] Panel Report, *US – Continued Suspension*, para. 7.845; Panel Report, *Canada – Continued Suspension*, para. 7.830.
[51] Panel Report, *US – Continued Suspension*, para. 7.847; Panel Report, *Canada – Continued Suspension*, para. 7.832.
[52] Panel Report, *US – Continued Suspension*, para. 7.850; Panel Report, *Canada – Continued Suspension*, para. 7.835.

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