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## **1 ARTICLE 12 AND APPENDIX 3**

### **1.1 Text of Article 12**

#### **Article 12**

##### *Panel Procedures*

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.
2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.
3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.
4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.
5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.
6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.
7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.
8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.
9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.
10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that

the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

## **1.2 Text of Appendix 3 of the DSU**

### **APPENDIX 3**

#### **WORKING PROCEDURES**

1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.
2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.
3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.
5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.
6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.
7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a) Receipt of first written submissions of the parties:		
(1) complaining Party:	_____	3-6 weeks
(2) Party complained against:	_____	2-3 weeks
(b) Date, time and place of first substantive meeting with the parties; third party session: _____		
		1-2 weeks
(c) Receipt of written rebuttals of the parties: _____		
		2-3 weeks
(d) Date, time and place of second substantive meeting with the parties: _____		
		1-2 weeks
(e) Issuance of descriptive part of the report to the parties: _____		
		2-4 weeks
(f) Receipt of comments by the parties on the descriptive part of the report: _____		
		2 weeks
(g) Issuance of the interim report, including the findings and conclusions, to the parties: _____		
		2-4 weeks
(h) Deadline for party to request review of part(s) of report: _____		
		1 week
(i) Period of review by panel, including possible additional meeting with parties: _____		
		2 weeks
(j) Issuance of final report to parties to dispute: _____		
		2 weeks
(k) Circulation of the final report to the Members: _____		
		3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

### 1.3 General

#### 1.3.1 The panel's margin of discretion with respect procedural issues

1. In *EC – Hormones*, the Appellate Body held that panels enjoy a margin of discretion to deal with situations that "are not explicitly regulated":

"[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant

requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling."<sup>1</sup>

2. In *India – Patents (US)*, the Appellate Body examined the Panel's decision at the outset of the first substantive meeting – "that all legal claims would be considered if they were made prior to the end of that meeting; and this ruling was accepted by both parties". The Appellate Body, in being called upon to determine whether the Panel had exceeded its terms of reference, stated:

"We do not find this statement ... consistent with the letter and the spirit of the DSU. Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU."<sup>2</sup>

3. The Panel in *EC – Tariff Preferences* addressed the issue of the joint representation of India, the complaining party and Paraguay, a third party, by the same legal counsel, the Advisory Centre of WTO Law (AWCL). The Panel stated that "flowing from its terms of reference and from the requirement ... pursuant to Article 12 of the DSU, to determine and administer its Working Procedures, the Panel has the inherent authority – and, indeed, the duty – to manage the proceeding in a manner guaranteeing due process to all parties involved in the proceeding and to maintain the integrity of the dispute settlement system."<sup>3</sup>

### 1.3.2 Due process

#### 1.3.2.1 General

4. In *Thailand – Cigarettes (Philippines)*, the Appellate Body discussed the role of due process in WTO dispute settlement, recalling some of its prior jurisprudence:

"We note that Thailand couches its claim under Article 11 of the DSU as a 'due process claim'. Due process is a fundamental principle of WTO dispute settlement.<sup>4</sup> It informs and finds reflection in the provisions of the DSU.<sup>5</sup> In conducting an objective assessment of a matter, a panel is 'bound to ensure that due process is respected'.<sup>6</sup> Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication."<sup>7</sup>

#### 1.3.2.2 Standard panel working procedures as a tool to ensure due process

5. In *EC – Bananas III*, the Appellate Body indicated that issues including whether or not a claim had been specified in the request for establishment of a panel "could be decided early in

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<sup>1</sup> Appellate Body Report, *EC – Hormones*, fn 138.

<sup>2</sup> Appellate Body Report, *India – Patents (US)*, para. 92.

<sup>3</sup> Panel Report, *EC – Tariff Preferences*, para. 7.8.

<sup>4</sup> (*footnote original*) The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Appellate Body Reports, *Canada – Continued Suspension / US – Continued Suspension*, para. 433; and Appellate Body Report, *Thailand – H-Beams*, para. 88, respectively. See also Appellate Body Report, *Chile – Price Band System*, para. 176)

<sup>5</sup> (*footnote original*) See Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107. See also Appellate Body Report, *India – Patents (US)*, para. 94; and Appellate Body Report, *Chile – Price Band System*, para. 176.

<sup>6</sup> (*footnote original*) Appellate Body Report, *Chile – Price Band System*, para. 176.

<sup>7</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings".<sup>8</sup>

6. In *India – Patents (US)*, the Appellate Body also pointed to the relevance of having standard panel working procedures that provide for appropriate factual discovery at an early stage in order to assist the requirements of due process, stating that "[i]t is worth noting that, with respect to fact-finding, the dictates of due process could better be served if panels had standard working procedures that provided for appropriate factual discovery at an early stage in panel proceedings."<sup>9</sup>

7. In *Thailand – Cigarettes (Philippines)*, the Appellate Body returned to the issue of due process and panel working procedures:

"Panel working procedures should both embody and reinforce due process. Article 12.1 of the DSU states that panels 'shall' follow the working procedures set out in Appendix 3 to the DSU 'unless the panel decides otherwise after consulting the parties to the dispute'. The working procedures adopted by a panel must conform to the DSU. As the Appellate Body has previously observed, the use by panels of detailed, standardized working procedures promotes fairness and the protection of due process. The inclusion by a panel in its working procedures of a rule that is inconsistent with due process would be a clear sign that such panel has failed to ensure the protection of due process. At the same time, even when the working procedures are themselves sound, a panel's failure to adhere to those procedures may be pertinent to, albeit not necessarily determinative of, the issue of whether such panel has failed to ensure the protection of due process in a given instance.

We also recall that panel proceedings consist of two main stages, the first of which involves each party setting out its 'case in chief, including a full presentation of the facts on the basis of submission of supporting evidence', and the second designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties.<sup>10</sup> Nonetheless, the submission of evidence may not always fall neatly into one or the other of these categories, in particular when panels themselves, in the exercise of their fact finding authority, seek to pursue specific lines of inquiry in their questioning of the parties. In this respect, we wish to reiterate that due process will best be served by working procedures that provide 'for appropriate factual discovery at an early stage in panel proceedings', and that '[d]ue process may be of particular concern in cases where a party raises *new facts* at a late stage of the panel proceedings.'<sup>11</sup> Furthermore, when the particular circumstances of specific disputes present situations that are not explicitly regulated by their working procedures, panels, in the exercise of their control over the proceedings, and subject to the constraints of due process and the DSU, enjoy a margin of discretion to deal with such situations."<sup>12</sup>

### 1.3.2.3 Due process demands when identifying the measures and claims at issue

8. The European Communities argued in *EC – Computer Equipment* that its right to due process during the course of the proceedings was violated because the term LAN equipment lacked precision in the request for establishment of a panel. The Appellate Body stated:

"We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a

<sup>8</sup> Appellate Body Report, *EC – Bananas III*, para. 144.

<sup>9</sup> Appellate Body Report, *India – Patents (US)*, para. 95.

<sup>10</sup> (footnote original) Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 240.

<sup>11</sup> (footnote original) Appellate Body Report, *US – Gambling*, para. 271.

<sup>12</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 148-149.

lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."<sup>13</sup>

9. In *India – Patents (US)*, the Appellate Body noted that "the demands of due process that are implicit in the DSU make [the clear statement of the claims and the free disclosure of facts] especially necessary during consultations".<sup>14</sup>

10. In *Chile – Price Band System*, the Appellate Body ruled that "[t]he requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement".<sup>15</sup> Also in *Chile – Price Band System*, the Appellate Body, in the context of its analysis of whether an amendment to a measure after the request for establishment of a panel was part of the measure at issue, considered the importance for the "demands of due process" "that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'".<sup>16</sup>

#### **1.3.2.4 Right of response**

11. In *Australia – Salmon*, the Appellate Body warned panels to be careful to observe due process, when complying with the Article 12.2 requirement of flexibility in panel procedures, by providing parties with adequate opportunity to respond to evidence submitted:

"We note that Article 12.2 of the DSU provides that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.' However, a panel must also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted."<sup>17</sup>

12. In *Australia – Salmon*, Australia had claimed that the Panel erred in failing to accord it an opportunity to submit a formal written rebuttal submission to respond to the oral statement made by Canada at the second meeting. The Appellate Body, noting that Australia had requested one week to respond to Canada's oral statement and that the Panel had granted Australia's request, dismissed the claim as follows:

"A fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it. In this case, we believe that the Panel *did* accord Australia a proper opportunity to respond by allowing Australia to submit a third written submission. We cannot see how the Panel failed to accord due process to Australia by granting the extra time it had requested."<sup>18</sup>

13. In *Chile – Price Band System*, the Appellate Body concluded that the Panel had made a finding on a claim not made by Argentina. Chile had claimed that, by making a finding on that claim, the Panel had deprived Chile of a fair right to response. The Appellate Body agreed with Chile and ruled that the Panel had acted inconsistently with Article 11 of the DSU by denying Chile the fair right of response and thus had denied it the due process rights to which it was entitled:

"There is, furthermore, the requirement of due process. As Argentina made no claim under the second sentence of Article II:1(b) of the GATT 1994, Chile was entitled to assume that the second sentence was not in issue in the dispute, and that there was no need to offer a defence against a claim under that sentence. We agree with Chile that, by making a finding on the second sentence—a claim that was neither made nor argued—the Panel deprived Chile of a 'fair right of response'.

As we said in *India – Patents*, '... the demands of due process ... are implicit in the DSU'. And, as we said in *Australia – Salmon* on the right of response, '[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to

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<sup>13</sup> Appellate Body Report, *EC – Computer Equipment*, para. 70.

<sup>14</sup> Appellate Body Report, *India – Patents (US)*, para. 94.

<sup>15</sup> Appellate Body Report, *Chile – Price Band System*, para. 164.

<sup>16</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>17</sup> Appellate Body Report, *Australia – Salmon*, para. 272.

<sup>18</sup> Appellate Body Report, *Australia – Salmon*, para. 278.

claims made against it'. Chile contends that this fundamental tenet of due process was not observed on this issue.

As we said earlier, Article 11 imposes duties on panels that extend beyond the requirement to assess evidence objectively and in good faith, as suggested by Argentina. This requirement is, of course, an indispensable aspect of a panel's task. However, in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU."<sup>19</sup>

14. In *Thailand – Cigarettes (Philippines)*, Thailand claimed that the Panel violated Thailand's due process rights and acted inconsistently with Article 11 of the DSU by accepting and relying on certain evidence without affording Thailand the right to comment on that evidence. The Appellate Body found that the Panel had not failed to accord Thailand due process in the circumstances of that case, but underscored the importance of the right of response in WTO proceedings:

"As a general rule, due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This was expressly acknowledged by the Appellate Body in *Australia – Salmon* when it stated that '[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it'. At the same time, due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close. These interests find reflection in the provisions of the DSU, including Article 3.3, which calls for '[t]he prompt settlement' of WTO disputes, as this is 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members'. Likewise, Article 12.2 of the DSU provides that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. Furthermore, 'in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity'. Accordingly, ensuring due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations. In our view, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.

...

... As set out above, due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties. In the context of this dispute, there are several considerations that are germane to our assessment of Thailand's claim under Article 11 of the DSU. These include: the conduct of the parties; the legal issue to which the evidence related and the circumstances surrounding the submission of the evidence relating to that issue; and the discretion afforded under the DSU to panels in their handling of the proceedings and appreciation of the evidence."<sup>20</sup>

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<sup>19</sup> Appellate Body Report, *Chile – Price Band System*, paras. 174-176.

<sup>20</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 150 and 155.



15. In the context of *amicus curiae* submissions, the Panel in *US – Tuna II (Mexico)* stated that "[w]here the Panel considered the information presented in and the evidence attached to the *amicus curiae* brief relevant, it has sought the views of the parties in accordance with the requirements of due process".<sup>21</sup> In the course of its analysis, the Panel reiterated that "insofar as the Panel deemed this information to be relevant for the purposes of its assessment, it invited Mexico to comment on it in order to take full account of Mexico's right of response and defense in respect of due process considerations".<sup>22</sup>

#### 1.4 Article 12.1: special and additional procedures in panel proceedings

##### 1.4.1 The panel's margin of discretion under Article 12.1

16. In *India – Patents (US)*, the Appellate Body found that the Panel exceeded its authority by ruling, at the first substantive meeting, that all legal claims would be considered if they were made prior to the end of that meeting. See paragraph 2 above.

17. In *EC – Hormones*, the Panel decided to hold a joint meeting with the scientific experts in the two parallel disputes brought by the United States and Canada. The Appellate Body considered the Panel's approach to be reasonable, and stated that:

"Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. In this regard, we note that in *European Communities – Bananas*, the panel considered that particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU."<sup>23</sup>

18. In *US – Shrimp*, the Appellate Body ruled that panels have the discretion to accept unsolicited *amicus curiae* briefs. The Appellate Body found support for this conclusion in Article 12.1:

"It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports while not unduly delaying the panel process.'(emphasis added)

The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to 'make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements ...* .' (emphasis added)"<sup>24</sup>

19. In *India – Export Related Measures*, the Panel departed from Appendix 3 of the DSU, by scheduling only one substantive meeting with the parties, to be held after both parties filed their respective first and second written submissions. The Panel explained the reasons for its preference, as follows:

"The Panel's choice was motivated by the need to reconcile competing considerations. First, the Panel is bound by the provision for abbreviated proceedings in Article 4 of the SCM Agreement. Second, the Panel is bound by the requirement in Article 12.10

<sup>21</sup> Panel Report, *US – Tuna II (Mexico)*, para. 7.9.

<sup>22</sup> Panel Report, *US – Tuna II (Mexico)*, fn 559.

<sup>23</sup> Appellate Body Report, *EC – Hormones*, para. 154.

<sup>24</sup> Appellate Body Report, *US – Shrimp*, paras. 105-106.

of the DSU that it accord sufficient time for a developing country respondent to prepare and present its argumentation. The Panel abided by this requirement, in particular, by allowing four weeks for India to prepare its first written submission following the United States' first written submission, and four weeks for India to prepare its second written submission following the United States' second written submission. The Panel's timetable also provided for more than two months between the filing of submissions and the substantive meeting with the parties. Third, in seeking to comply with Article 4 of the SCM Agreement and Article 12.10 of the DSU, the Panel had to take into account resource constraints in the Secretariat.

After consulting the parties during the organizational meeting, as a means of balancing the considerations described above in the particular circumstances of this case, the Panel proposed Working Procedures and a timetable that envisaged a single panel meeting with the parties. The parties ... had opposite views on the matter. ... In the circumstances of this case, the Panel decided to proceed with only one substantive meeting, while reserving the right to hold further substantive meetings with the parties if required."<sup>25</sup>

20. In *Saudi Arabia – Intellectual Property Rights*, the respondent had taken the position that it did not wish to engage with the complainant in any way during the dispute. As of 5 June 2017, the respondent had severed all relations with the complainant. The respondent's position raised novel issues for the Panel concerning the manner in which it would work with the parties to prepare the Working Procedures and the Timetable for the dispute. The Panel ultimately decided to forego the normal practice of holding an organizational meeting with the parties to solicit their comments on the draft Working Procedures and Timetable sent in advance. The Panel consulted with the parties exclusively through a written procedure.

21. Below, the Panel describes the background concerning the respondent's severance of all relations with the complainant, the respondent's subsequent refusal to engage with the complainant, and the principles and obligations guiding the Panel's preparation of the Working Procedures and Timetable with the parties. The Panel stated, in particular, that it was guided by the requirement that no parties engage in *ex parte* communication with the Panel, and that Article 12 of the DSU does not require that a panel hold an organizational meeting with the parties:

"Throughout the proceeding, Saudi Arabia took the position that, consistent with its severance of all relations with Qatar (including diplomatic and consular relations), and the essential security interests that motivated it to take that action, it would not interact, or have any direct or indirect engagement, with Qatar in any way in this dispute. Saudi Arabia took this position in the context of consultations, at the DSB meeting where the request for the establishment of this Panel was first considered, and in its comments on the Panel's draft Working Procedures and Timetable during the organizational phase. Saudi Arabia reiterated, in all of its subsequent submissions in this proceeding, its refusal to interact in any way, or have any direct or indirect engagement, with Qatar in this dispute.

Saudi Arabia's refusal to engage with Qatar in the manner described above raised the question of how the Panel ought to conduct the proceeding. In the light of the parties' comments on the draft Working Procedures and Timetable made at the organizational phase of the proceeding, the Panel did not consider it necessary to develop any special or additional working procedures in the circumstances of this case. However, the Panel did adjust certain aspects of the normal panel process, as well as certain aspects of the standard Working Procedures, to address this special circumstance. The Panel has been guided at all times by the prohibition against any *ex parte* communications between the Panel and either party.<sup>26</sup>

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<sup>25</sup> Panel Report, *India – Export Related Measures*, Annex D-1, paras. 2.20-2.21.

<sup>26</sup> (*footnote original*) Article 18.1 of the DSU provides that "[t]here shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body." This prohibition is reiterated in similar terms in paragraph VII:2 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Regarding the organizational meeting, Articles 12.1 and 12.3 of the DSU provide for the adoption of the Panel's Working Procedures and Timetable for the panel process following consultation with the parties. While the normal practice is for a panel to hold an organizational meeting with the disputing parties to receive their comments on the draft Working Procedures and Timetable sent in advance, this particular means of consultation is not mandated by the text of Article 12 of the DSU. In the special circumstances of this case, and taking into account the views of the parties, the Panel decided to consult with the parties exclusively through a written procedure."<sup>27</sup>

22. The Panel subsequently modified the standard Working Procedures to reflect the special circumstances between the disputing parties. Specifically, the Panel did the following:

"a. modified the normal requirement of direct service of documents by the parties on one another, so as to provide instead that '[e]ach party shall send all communications and documents directly to the Secretariat, which the Secretariat will then proceed to transmit promptly to the other party'; and

b. adjusted its Working Procedures to clarify that the purpose of the first and second substantive meetings with the Panel was to allow each party to address the Panel directly, and to provide that neither party was under any obligation to respond to questions posed by the other party at or following those meetings."<sup>28</sup>

#### **1.4.2 Special and additional procedures for virtual hearings during the COVID-19 pandemic**

23. In the context of the COVID-19 pandemic, multiple panels adopted special and additional procedures for holding virtual hearings.<sup>29</sup>

24. In *India – Tariffs on ICT Goods (Japan)*, India objected to holding the first substantive meeting of the Panel in a virtual format, on the grounds that the practice has always been to hold in-person meetings unless both parties agree to waive this right; that a virtual meeting would not allow contemporaneous exchanges between the Panel and the parties; that the proposed duration of the virtual meeting was short; that virtual meeting limit the possibilities to ensure coordination within the Indian delegation; and that virtual meetings would create the risk of breaches of the confidentiality of the meeting. The Panel rejected all these arguments, and decided to hold the first substantive meeting virtually. In so deciding, the Panel also took into account the need to provide for the prompt settlement of disputes, as stated in Article 3.3 of the DSU.<sup>30</sup>

25. In *India – Tariffs on ICT Goods (Japan)*, the Panel also disagreed with India's argument that the proposed additional working procedures concerning meetings with remote participation unduly expanded and modified the relevant DSU provisions. The Panel disagreed with this view:

"The Panel is not persuaded by India's first argument that the draft Additional Working Procedures 'unduly expand[] and modif[y]' relevant provisions of the DSU. Panels enjoy a margin of discretion in establishing their own working procedures, provided they do not disregard or modify the substantive provisions of the DSU. While the draft Additional Working Procedures include modalities and technical instructions for virtual meetings that may not be specifically reflected in the Working Procedures in Appendix 3 of the DSU, this does not imply, as a general proposition, that they disregard or modify the substantive provisions of the DSU. Nor do the draft Additional Working Procedures place an undue burden on the parties to the dispute.

One provision of the DSU that India argues would be disregarded in this context is Article 18.2, which concerns the obligation of confidentiality in panel proceedings. India questions the extent to which that obligation can be enforced during a virtual

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<sup>27</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 1.10-1.12.

<sup>28</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 1.13.

<sup>29</sup> See e.g. Panel Report, *US – Ripe Olives from Spain*, paras. 1.9-1.10; Panel Report, *India – Sugar and Sugarcane*, paras. 1.20 and 1.28; and Panel Report, *US – Safeguard Measure on PV Products*, para. 1.9; Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 1.32.

<sup>30</sup> Panel Report, *India – Tariffs on ICT Goods (Japan)*, Annex D-3.

meeting. However, as India itself acknowledges, the obligation to respect the confidentiality of panel proceedings applies to the participants regardless of the format of the meeting. The Panel discerns no reason to doubt that the participants will strictly uphold the confidentiality of the proceedings as they would at an in-person meeting."<sup>31</sup>

#### **1.4.3 Special and additional procedures to protect business confidential information (BCI)**

26. For a table providing information on panel, Appellate Body and Article 22.6 proceedings in which one or both parties requested additional BCI or similar procedures, see the chapter of the Analytical Index on "DS information tables".

27. Panels have adopted additional procedures to protect BCI in a number of disputes. The Panel in *Canada – Aircraft* observed that Article 12.1 granted it the authority to do so:

"We note that procedures concerning the protection of confidential information are provided for in Article 18.2 of the DSU. We note, however, that Article 12.1 of the DSU effectively permits panels to adopt working procedures in addition to those set forth in the DSU, after consulting the parties to the dispute.<sup>524</sup> Given the sensitive nature of the BCI that could be submitted to the Panel in the present case, and given the agreement between the parties on the need for additional protection of such Business Confidential Information, the Panel decided to adopt special Procedures Governing Business Confidential Information that go beyond the protection afforded by Article 18.2 of the DSU. The Panel agreed with Canada that such Procedures should strike a balance between 'reasonable access' to BCI, and the need to protect the integrity of such BCI."<sup>32</sup>

28. For information on special and additional procedures adopted by panels regarding BCI, see the Section on Article 18 of the DSU.

#### **1.4.4 Special and additional procedures for open panel hearings**

29. For a table providing information on panel, Appellate Body and Article 22.6 proceedings in which meetings/hearings were opened to public observation, see the chapter of the Analytical Index on "DS information tables".

30. Several panels have opened their hearings to the public, pursuant to the authority to adopt special and additional procedures under Article 12.1 of the DSU. The Panel in *US/Canada – Continued Suspension*, the first panel to open its hearings to the public, explained that:

"The Panel thus is of the view that Article 12.1 entitles it to proceed with any adaptation of the working procedures contained in Appendix 3, as long as such an adaptation is not expressly prohibited by any provision of the DSU. Therefore, we need to examine whether there is any DSU provision that would explicitly prohibit the opening of panel meetings to public observation."<sup>33</sup>

31. The Panel concluded that "it is entitled, under the particular circumstances of this case and pursuant to Article 12.1 of the DSU, to open its hearings for public observation".<sup>34</sup>

32. For more information on panel hearings opened to the public, see also the Section on Article 18 of the DSU.

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<sup>31</sup> Panel Report, *India – Tariffs on ICT Goods (Japan)*, Annex D-4, p. 99.

<sup>32</sup> Panel Report, *Canada – Aircraft*, para. 9.56.

<sup>33</sup> Panel Reports, *US/Canada – Continued Suspension*, para. 7.45.

<sup>34</sup> Panel Reports, *US/Canada – Continued Suspension*, para. 7.51.

#### **1.4.5 Special and additional procedures for third parties**

33. For information on proceedings in which additional third-party rights were requested, see the Section on Article 10 of the DSU.

34. For a table providing information on cases where panels addressed requests for enhanced third party rights, see the chapter of the Analytical Index on "DS information tables".

#### **1.4.6 Special and additional procedure for separate briefing and argumentation on threshold issue**

35. In *US – Upland Cotton*, the Panel decided to structure the proceeding into two stages. First, the Panel would determine whether measures raised in this dispute satisfy the conditions in Article 13 of the Agreement on Agriculture. To the extent that it was able to do so, it would defer its consideration of claims under Articles 3, 5 and 6 of the SCM Agreement and Article XVI of the GATT 1994 until after it determined whether measures raised in this dispute satisfy the conditions in Article 13.<sup>35</sup>

#### **1.5 Article 12.2: flexibility and undue delay**

36. In *Australia – Salmon*, the Appellate Body warned panels to be careful to observe due process when complying with Article 12.2 requirement of flexibility in panel procedures. See paragraph 11 above.

37. In *US – Cotton Yarn*, the Panel declined a request by the United States to attach the parties' full submissions to the Report. The Panel considered that, among other things, doing so would "unduly delay the process":

"In the present dispute, this Panel at the outset declined to follow the attachment method. Using the attachment method would increase the Descriptive Part of the Report to approximately 400 single-spaced pages from the approximately 70 it now is. We do not consider this to be a viable approach. We are aware that the WTO dispute settlement system is struggling under the burden of massive translation requirements arising from the multi-hundred page Reports that result from the attachment method. Using such a method here would also result in significant delays in issuing the Final Report. We take note of Article 12.2 of the DSU, which provides that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while *not unduly delaying the panel process*'. Furthermore, while our responsibility is to decide the case before us, we also feel constrained not to take steps that would damage the dispute settlement system as a whole."<sup>36</sup>

38. In *Thailand – Cigarettes (Philippines)*, the Appellate Body explained that the right of each party to comment on the arguments and evidence of the other party must be balanced against the need for proceedings to be brought to a close:

"As a general rule, due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This was expressly acknowledged by the Appellate Body in *Australia – Salmon* when it stated that '[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it'. At the same time, due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close. These interests find reflection in the provisions of the DSU, including Article 3.3, which calls for '[t]he prompt settlement' of WTO disputes, as this is 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members'. Likewise, Article 12.2 of the

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<sup>35</sup> Panel Report, *US – Upland Cotton*, para. 7.5.

<sup>36</sup> Panel Report, *US – Cotton Yarn*, para. 7.10. See also Panel Report, *EC – Tube or Pipe Fittings*, para. 7.53.

DSU provides that '[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. Furthermore, 'in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity'. Accordingly, ensuring due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations. In our view, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU."<sup>37</sup>

### 1.6 Article 12.3: Panel's timetable

39. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among other issues, the Panel referred to the timetable for its proceedings as follows:

"The Panel notes at the outset that this case is likely to impose a heavy burden on parties in terms of their obligations to make submissions as set out in the timetable for the proceedings, a copy of which is attached. As is noted at the end of the timetable, the Panel would like to emphasize that the calendar may be changed during the panel process. The Panel would also like to assure parties that it will do its utmost, within reason, to accommodate the parties' concerns and requests in relation to the deadlines set out in the timetable. Some of the requests that have been made by the parties in this respect are already reflected in the attached timetable."<sup>38</sup>

40. In *Saudi Arabia – Intellectual Property Rights*, the Panel declined to hold an organizational meeting with the parties, in the light of special circumstances in the dispute, and instead solicited comments from the parties on the draft Working Procedures and Timetable by way of a written procedure. For more information on the Panel's deliberations concerning this process, see paragraphs 20 and 21 above.

### 1.7 Types of submissions made to a Panel

41. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the complainant, the Philippines, sent a letter to Thailand, the respondent, copying the Panel and asking the respondent to include certain information in its responses to the Panel's questions. The respondent objected to such request, arguing that the request presented comments not contemplated in the Panel's timetable, asked the Panel to exclude the Philippines' communication from the record and not to take into consideration the comments it contained.<sup>39</sup> The Panel described the types of submissions in which a party can present substantive comments, as follows:

"[T]he Panel hereby confirms that any substantive comments that a party wishes to make on the factual or legal issues in dispute will be taken into account by the Panel only insofar as those comments are made in the context of a written or oral submission that is scheduled according to the timetable, in the context of an unscheduled submission that the Panel has previously granted leave to file, or in the context of procedural request addressed to the Panel."<sup>40</sup>

42. The Panel therefore indicated that if the Philippines wished the Panel to take its comments into account, the Panel would expect the Philippines to present such comments "in the context of its responses to the Panel's questions due on 8 October 2018 or in its oral submissions at the meeting with the Panel, and/or in the context of a future request, made pursuant to Article 13 of the DSU, that is addressed to the Panel."<sup>41</sup>

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<sup>37</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

<sup>38</sup> Appellate Body Report, *US – Steel Safeguards*, para. 5.3.

<sup>39</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 1.22.

<sup>40</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 1.23.

<sup>41</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 1.23.

43. Thailand subsequently objected to the Panel's response, reiterating its view that the Panel should exclude the Philippines' submission from the Panel record and disregard the comments that it contained.<sup>42</sup> In response, the Panel noted that the issue had become moot because the Philippines had submitted the comments at issue in its response to a question from the Panel.<sup>43</sup> The Panel also rejected Thailand's request that the Philippines' letter be excluded from the Panel record, on the following grounds:

"[T]he practical effect of declaring that the letter was 'excluded from the record' would be the same as the Panel's confirmation that 'the comments made in the Philippines' letter of 24 September 2018 will not be taken into account by the Panel in its resolution of the matter before it' except and insofar as the Philippines makes them in the context of a subsequent authorized submission or procedural request addressed to the Panel. In both scenarios, it would mean that the Panel would not take into account the substantive comments made in that letter. Thus, in the interest of disposing of the matter raised in the most economical way, the Panel did not consider it necessary or useful for its communication to engage in a discussion of this aspect of the sentence referred to above.

... It appears that Thailand is requesting the Panel to remove the electronic and paper copies of the letter from the official record of the dispute. We note that, in the light of Rule 25(2)(c) of the Working Procedures for Appellate Review, it is doubtful that a panel could instruct the Secretariat to remove the electronic and paper copies of any party correspondence from the official record of a dispute.<sup>44</sup> However, even assuming for the sake of argument that there may be circumstances in which a panel would have the authority to exclude a document from the record in the manner suggested by Thailand, there is no requirement in WTO dispute settlement practice that a panel rule that a document be removed from 'the record' of a panel proceeding as a pre-condition for the panel excluding the contents of a document submitted to a panel from its consideration of the matter before it. As one panel has recently observed, 'the mere fact that exhibits submitted by parties may form part of the panel record in no way implies any judgment by the Panel on the relevance, accuracy or value of their contents to the issues before the Panel'.<sup>45</sup>

## **1.8 Article 12.6: written submissions**

### **1.8.1 Legal right to have a submission considered by the panel**

44. In *US – Shrimp*, the Appellate Body considered whether panels have the right to accept so-called *amicus curiae* briefs. In this context, the Appellate Body made a general statement on the issue of access to the dispute settlement process of the WTO and noted:

"[U]nder the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU."<sup>46</sup>

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<sup>42</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 1.24.

<sup>43</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 1.25.

<sup>44</sup> (*footnote original*) Indeed, in the event that either party were to appeal the manner in which the Panel has disposed of Thailand's request, deleting the Philippines' letter of 24 September 2018 from the official record of the dispute would arguably violate the parties' due process rights insofar as it would hinder the Appellate Body's ability to meaningfully review whether the Panel committed any error of law or legal interpretation.

<sup>45</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 1.25.

<sup>46</sup> Appellate Body Report, *US – Shrimp*, para. 101. See also Appellate Body Report, *US – Lead and Bismuth II*, paras. 40-41.

### 1.8.2 Timing of objections to panel's jurisdiction

45. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the respondent, Morocco, initially requested the Panel to make a preliminary ruling that a number of the claims set out in the complainant's first written submission were not included in the panel request and were therefore outside of the Panel's terms of reference.<sup>47</sup> The Panel dismissed this request.<sup>48</sup> In its second written submission, Morocco presented fresh objections to the Panel's jurisdiction, this time concerning the manner in which the complainant had formulated the said claims.<sup>49</sup> After considering the text of its working procedures, the Panel found that a party was required to submit jurisdictional objections "at the earliest possible opportunity and in any event no later than in its first written submission to the Panel."<sup>50</sup> The Panel explained that this would enable it "to take note of any objections concerning its jurisdiction as soon as possible and, if it sees fit, to resolve those matters in the form of a preliminary ruling, after having gathered the comments of the requesting party ... and third parties, if appropriate."<sup>51</sup> Accordingly, the Panel found that "Morocco did not submit all its objections concerning the panel request in its preliminary ruling request of 19 June 2020. ... Other objections on the same grounds [addressed in the preliminary ruling] could therefore have been submitted as part of the same request."<sup>52</sup> Although it considered Morocco's new submissions to be late, the Panel nevertheless concluded that "it is important to leave no room for doubt concerning our jurisdiction before examining Tunisia's substantive requests. We have therefore decided to respond to Morocco's objections, after having invited Tunisia to submit a full response."<sup>53</sup>

### 1.8.3 Content of the first written submission

46. In *India – Sugar and Sugarcane*, the complainants alleged that India's Marketing and Transportation Scheme was not permitted under Article 9.4 of the Agreement on Agriculture. India argued that the burden of proof lay with the complainants, and that they were required to include in their first written submissions all their evidence and arguments, and to set out their case in chief, including an explanation of why the Scheme was inconsistent with Article 9.4.<sup>54</sup> The Panel disagreed with India's argument:

"We disagree with India's argument that the complainants were required to submit their evidence and arguments in their first written submissions. Contrary to what India argues, paragraph 3(1) of the Panel's Working Procedures does not require the complainants to present exhaustively their arguments in the first written submissions. Rather, it requires 'each party [to] submit a written submission in which it presents the facts of the case and its arguments'. Furthermore, India has not shown that it was somehow prejudiced by the complainants' alleged late submission of evidence and arguments on this issue. Rather, regardless of whether Article 9.4 provides an autonomous right or grants an exception, the parties have exchanged considerable evidence and arguments on this issue, and, in our view, India has not demonstrated that the timing of these exchanges restricted its ability to respond to the complainants' assertions, or otherwise limited the Panel's ability to objectively examine those arguments and evidence in order to assess whether the Marketing and Transportation Scheme falls within the scope of Article 9.4."<sup>55</sup>

47. On this basis, the Panel proceeded to examine the totality of arguments and evidence submitted by the complainants and India to decide whether the scheme fell under Article 9.4 of the Agreement on Agriculture.<sup>56</sup>

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<sup>47</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.14.

<sup>48</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.15.

<sup>49</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.16.

<sup>50</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.20.

<sup>51</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.20.

<sup>52</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.21.

<sup>53</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.22.

<sup>54</sup> Panel Report, *India – Sugar and Sugarcane*, para. 7.179.

<sup>55</sup> Panel Report, *India – Sugar and Sugarcane*, para. 7.182.

<sup>56</sup> Panel Report, *India – Sugar and Sugarcane*, para. 7.183.



#### **1.8.4 Meaning of the term "second written submission"**

48. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters.<sup>57</sup> Among the issues, the Panel referred to the United States' request to replace the reference to "rebuttal submissions" in paragraph 11 of its Working Procedures with the word "rebuttals". This paragraph dealt with the timing of the submission of factual evidence.<sup>58</sup> In support of this proposal, the United States made the argument that the word "submission" is ordinarily taken to mean written submissions. Hence, the reference to "rebuttal submissions" in paragraph 11 would restrict the application of the qualification in that paragraph to rebuttals made in writing and would not extend to rebuttals made orally. The complainants argued in response that the suggested amendment would allow, for example, new arguments and evidence to be adduced orally at the Panel's second substantive meeting. The Panel disagreed and, recalling the comments made by the Appellate Body in the case *Argentina – Textiles and Apparel*<sup>59</sup>, indicated that they had drafted paragraph 11 to ensure due process and that new evidence was not adduced at a late stage in the panel process, while simultaneously ensuring that all parties and the Panel were kept fully informed of all relevant evidence.

#### **1.8.5 Second written submissions in the context of compliance proceedings**

49. In the context of compliance proceedings under Article 21.5 of the DSU, the standard working procedures of panels provide that second written submissions are to be filed sequentially (and not simultaneously).

### **1.9 Article 12.7**

#### **1.9.1 "basic rationale behind any findings and recommendations"**

##### **1.9.1.1 Minimum standard required**

50. In *Korea – Alcoholic Beverages*, the Appellate Body, although refraining from attempting to define the scope of the obligation in Article 12.7, considered that the Panel had not failed to set out the basic rationale for its findings and recommendations as required by Article 12.7 of the DSU because it had provided a "detailed and thorough" rationale for its findings:

"Korea claims that the Panel has failed to fulfil its obligation under Article 12.7 of the DSU to set out the basic rationale behind its findings and recommendations. Korea maintains that 'much' of the Panel Report contains contradictions and that it is vague.

...

In this case, we do not consider it either necessary, or desirable, to attempt to define the scope of the obligation provided for in Article 12.7 of the DSU. It suffices to state that the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case. The Panel went to some length to take account of competing considerations and to explain why, nonetheless, it made the findings and recommendations it did. The rationale set out by the Panel may not be one that Korea agrees with, but it is certainly more than adequate, on any view, to satisfy the requirements of Article 12.7 of the DSU. We, therefore, conclude that the Panel did not fail to set out the basic rationale for its findings and recommendations as required by Article 12.7 of the DSU."<sup>60</sup>

51. Similarly, in *Chile – Alcoholic Beverages*, the Appellate Body concluded that the Panel had set out a "basic rationale" for its finding and recommendation on the issue of "not similarly taxed",

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<sup>57</sup> See Panel Reports, *US – Steel Safeguards*, para. 5.3.

<sup>58</sup> Paragraph 11 of the Panel's Working Procedures read as follows: Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party(ies) shall be accorded a period of time for comment, as appropriate. (Panel Reports, *US – Steel Safeguards*, para. 6.1.)

<sup>59</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

<sup>60</sup> Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 166 and 168.

as required by Article 12.7 of the DSU, because it had "identified the legal standard it applied, examined the relevant facts, and provided reasons for its conclusion that dissimilar taxation existed."<sup>61</sup>

52. In *Argentina – Footwear (EC)*, the Appellate Body, although not agreeing with all the Panel's reasoning, considered that it had met its obligation under Article 12.7 because the Panel had "conducted *extensive* factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentine authorities as well as other evidence presented to the Panel, and provided extensive explanations of how and why it reached its factual and legal conclusions".<sup>62</sup>

53. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body analysed the term "basic rationale" and considered that Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. The Appellate Body, however, indicated that it did not believe that it is either possible or desirable to determine, in the abstract, the minimum standard of reasoning that will constitute a "basic rationale" for the findings and recommendations made by a panel:

"In considering the scope of the duties imposed on panels under Article 12.7, we turn first to the dictionary meaning of 'basic', which includes both 'fundamental; essential' and 'constituting a minimum ... at the lowest acceptable level'. 'Rationale' means both 'a reasoned exposition of principles; an explanation or statement of reasons' and 'the fundamental or underlying reason for or basis of a thing; a justification'. The 'basic rationale' which a panel must provide is directly linked, by the wording of Article 12.7, to the 'findings and recommendations' made by a panel. We, therefore, consider that Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.

In our view, the duty of panels under Article 12.7 of the DSU to provide a 'basic rationale' reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU. In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a 'basic rationale' in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal. Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide 'basic' reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements.

We do not believe that it is either possible or desirable to determine, in the abstract, the minimum standard of reasoning that will constitute a 'basic rationale' for the findings and recommendations made by a panel. Whether a panel has articulated adequately the 'basic rationale' for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.

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<sup>61</sup> Appellate Body on *Chile – Alcoholic Beverages*, para. 78.

<sup>62</sup> Appellate Body on *Argentina – Footwear (EC)*, para. 149.

This does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations. We can, for example, envisage cases in which a panel's 'basic rationale' might be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference. Indeed, a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings."<sup>63</sup>

54. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body further noted that for purposes of transparency and fairness to the parties, an Article 21.5 panel "should strive to present the essential justification for its findings and recommendations in its own report":

"Having regard to these circumstances, we are of the view that the Panel Report, read together with the original panel report, leaves no doubt about the reasons for the Panel's additional finding under Article 3.1 of the *Anti-Dumping Agreement*. We, therefore, find that the Panel did not fail to provide a 'basic rationale' for that finding.

...

We wish to add that for purposes of transparency and fairness to the parties, even a panel proceeding under Article 21.5 of the DSU should strive to present the essential justification for its findings and recommendations in its own report. In this case, in particular, we consider that the Panel's finding under Article 3.1 of the *Anti-Dumping Agreement* would have been better supported by a direct quotation from or, at least, an explicit reference to, the relevant reasoning set out in the original panel report."<sup>64</sup>

55. In *US – Steel Safeguards*, the Appellate Body also considered that the Panel had complied with Article 12.7 by providing a detailed explanation on how the investigating authority had failed to provide a reasoned and adequate explanation:

"Based on our review of the Panel's reasoning, it appears to us that the Panel considered in detail the evidence that was before the USITC, and provided detailed explanations of how and why it concluded that the USITC had failed to demonstrate, through a reasoned and adequate explanation, that the alleged 'unforeseen developments' *resulted* in increased imports of *each* product subject to a safeguard measure ...

In our view, in making these statements, the Panel has sufficiently set out in its Reports the 'basic rationale' for its finding that the USITC failed to explain how, though 'plausible', the "unforeseen developments" identified in the report in fact *resulted* in increased imports of the specific products subject to the safeguard measures at issue."<sup>65</sup>

56. In *US - Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the complainant requested that the Panel make a suggestion pursuant to Article 19.1, and then claimed on appeal that the manner in which the Panel "summarily" dismissed its request was inconsistent with the Panel's duties under Articles 11 and 12.7 of the DSU. The Appellate Body stated:

"The Panel addressed Argentina's request for a suggestion in paragraph 9.4 of the Panel Report. The Panel's explanation is brief, but it is sufficient to convey that the Panel considered Argentina's request and that, in the light of the discretionary nature of the authority to make a suggestion, the Panel declined to exercise that discretion. The discretionary nature of the authority to make a suggestion under Article 19.1

<sup>63</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 106-109.

<sup>64</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 124 and 126.

<sup>65</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 503-504.

must be kept in mind when examining the sufficiency of a panel's decision not to exercise such authority. However, it should not relieve a panel from engaging with the arguments put forward by a party in support of such a request. In the present case, Argentina offered several reasons in support of its request for a suggestion. Although it would have been advisable for the Panel to articulate more clearly the reasons why it declined to exercise its discretion to make a suggestion, this does not mean that Panel's exercise of its discretion was improper, and, thus, even assuming *arguendo* that Articles 11 and 12.7 were applicable to a request for suggestion, we do not consider that, in the circumstances of this case, the Panel failed to fulfil its duties under those provisions."<sup>66</sup>

57. In *US – Carbon Steel (India)*, the Appellate Body found that the Panel provided a basic rationale for a finding by incorporating by reference the reasoning set forth in an earlier Appellate Body report:

"Turning first to India's claim under Article 12.7 of the DSU, we note that the Appellate Body has considered that the term 'basic rationale' in that provision establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Thus, panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations. Moreover, whether a panel has articulated a basic rationale for its findings must be determined on a case-by-case basis. Fundamentally, Article 12.7 of the DSU does not require panels to expound at length on the reasons for their findings and recommendations. In this regard, the Appellate Body has considered that 'a panel's 'basic rationale' might be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference.'

As we see it, the Panel provided a basic rationale for its finding by incorporating by reference the reasoning set forth in the Appellate Body report in *US – Softwood Lumber IV*. As we have found above, the reasoning in that report supports the Panel's finding that Article 14(d) permits the use of out-of-country benchmarks in situations in which the government is not a predominant provider of the relevant good. Accordingly, we do not consider that the Panel acted inconsistently with the standard under Article 12.7 of the DSU."<sup>67</sup>

58. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* expressed the view that where a panel is persuaded by legal reasoning developed in an earlier panel or Appellate Body report, it can employ the technique of incorporation by reference:

"Article 12.7 of the DSU provides that the report of a panel 'shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes'. If a panel considers that the legal reasoning set forth in an earlier panel or Appellate Body report is persuasive and correct, it is under no obligation to restate or extensively quote from that analysis in order to comply with its duty under Article 12.7; it may instead employ the technique of incorporation by reference. ...

[I]f a panel concludes that the analysis of an earlier panel is persuasive and correct, and if the panel decides to adopt the same reasoning, then it is under no obligation to restate or extensively quote from that analysis. It may comply with its duty under Article 12.7 of the DSU by employing the technique of incorporation by reference to avoid repetition, and thereby improve the readability of the Report.

Insofar as there are one or more factual circumstances relating to the measures at issue in this second recourse to Article 21.5 that materially distinguish them from the measures at issue in the first recourse to Article 21.5, and insofar as the legal claims are different, then the Panel cannot simply transpose its findings and reasoning from

<sup>66</sup> Appellate body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 183.

<sup>67</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.194-4.195.

the Report in the first recourse to Article 21.5. However, insofar as issues of law or legal interpretation arise in this second recourse to Article 21.5 that are the same issues of law or legal interpretation that were already ruled on by the Panel in the first recourse to Article 21.5, this Panel may focus its re-examination on any novel legal arguments presented by the parties or third parties in the context of this second recourse to Article 21.5. If the Panel concludes that the legal findings and reasoning of the panel in the first recourse to Article 21.5 remain persuasive and correct, and decides to adopt the same reasoning, the Panel considers that it is under no obligation to restate or extensively quote from that analysis; it may instead employ the technique of incorporation by reference."<sup>68</sup>

59. In *Brazil – Taxation*, the Appellate Body pointed out that, in setting out the time period within which the contested prohibited subsidies had to be withdrawn, the Panel had acted inconsistently with Article 12.7:

"In light of the above, we do not consider that the Panel established a sufficient link between the time period of 90 days specified by it for the withdrawal of the subsidies at issue and the domestic procedure within Brazil for such withdrawal. Instead, the Panel appears to have treated the practice of specifying 90 days by some prior panels as the *de facto* standard to be applied in all cases. As discussed, Article 4.7 requires a case-by-case analysis of the time period to be prescribed for the withdrawal of prohibited subsidies 'without delay'. We therefore find that by failing to provide a 'reasoned and adequate explanation' or a 'basic rationale' in recommending a time period of 90 days under Article 4.7 of the SCM Agreement in the present case, the Panel acted inconsistently with Articles 11 and 12.7 of the DSU."<sup>69</sup>

60. The Appellate Body in *US – Supercalendered Paper* recalled that in determining whether a "basic rationale" has been provided, the panel report should be read as a whole and that panels are free to structure the order of their analysis as they see fit.<sup>70</sup> The United States alleged that the Panel had not incorporated a particular portion of its earlier analysis of Article 12.7 of the SCM Agreement into its examination of the challenged measure, thus failing to provide a "basic rationale" for its finding of inconsistency with that provision. The Appellate Body dismissed that allegation and pointed out:

"Pursuant to the requirement to set out a 'basic rationale' for findings and recommendations in Article 12.7 of the DSU, panels must provide explanations and reasons sufficient to disclose the essential justification for those findings and recommendations. In our view, the Panel appropriately incorporated into its examination of the OFA AFA measure (in paragraph 7.333 of the Panel Report) the relevant portions of its earlier analysis concerning Article 12.7 of the SCM Agreement (in section 7.4.1.4 of the Panel Report). Through these paragraphs, the Panel provided an interpretation of Article 12.7 of the SCM Agreement, addressed pertinent factual aspects of the OFA AFA measure, and provided explanation sufficient to disclose the Panel's essential justification for its finding."<sup>71</sup>

### 1.9.2 Issuance of a brief report where a mutually agreed solution is reached

61. For a table listing the disputes in which panels issued a "brief report" following the notification of a mutually agreed solution prior to the completion of the panel's work, see the chapter of the Analytical Index on "DS information tables".

62. The Panel in *US – Shrimp (Ecuador)* found that although the responding party did not contest any of the claims of the complaining party, the parties had not characterized their shared

<sup>68</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), paras. 7.20, 7.23-7.24.

<sup>69</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.460.

<sup>70</sup> Appellate Body Report, *US – Supercalendered Paper*, para. 5.62.

<sup>71</sup> Appellate Body Report, *US – Supercalendered Paper*, para. 6.6.

views on the substantive matter before the Panel as a "mutually agreed solution", and, thus, Article 12.7 of the DSU did not apply.<sup>72</sup>

63. In *US – Tariff Measures*, the United States asserted that the parties have agreed to settle the matter outside the WTO system, by undertaking a bilateral negotiation process that allegedly amounted to a solution within the meaning of Article 12.7 of the DSU.<sup>73</sup> China, on the other hand, insisted that the parties had not developed a mutually satisfactory solution and that "the matter ... remains unresolved and subject to adjudication by the Panel."<sup>74</sup> The Panel examined whether such mutually satisfactory solution existed between the parties and noted:

"[R]ead in the context of the paragraph as a whole, it seems that the 'solution' referred to in the final sentence is intended to reflect the same concept as the term 'mutually satisfactory solution' referred to in the first sentence. This reinforces the conclusion that for any 'solution' to exist in terms of Article 12.7 of the DSU, it has to be a 'mutually satisfactory' one, rather than one based on one party's unilateral assertion that may be satisfactory to it, but not to the other party. We also note that the term 'solution' refers to 'the act of solving a problem'. Logically, when a solution is found, the problem is solved and does not exist anymore. As the panel in *India – Autos* noted, 'agreed solutions are intended to reflect a settlement of the dispute in question, which both parties expect will bring a final conclusion to the relevant proceedings'.<sup>75</sup>

64. The Panel in *US – Tariff Measures* pointed out that the ongoing negotiations between the parties could not deprive China of its right to adjudication and entitlement to recommendations and rulings by the Panel. In the Panel's view, if a complainant considers that ongoing negotiations with the respondent should lead to a suspension of the work of a panel, it could avail itself of its right to request such suspension under Article 12.12 of the DSU.<sup>76</sup> The Panel further confirmed its conclusion by noting that:

"[T]he pursuit of negotiations between the parties in parallel to an initiated, or an ongoing dispute, is usually not an alternative to the dispute process, but rather an additional path towards solving the parties' disagreement, encouraged by the DSU. Accordingly, it is important that this situation is not interpreted in a manner that results in denying the complainant's entitlement to findings by the panel.

That negotiations aimed at settlement can be pursued in parallel with panel proceedings is further underlined by Article 11 of the DSU which requires the Panel to 'consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution'. Moreover, Article 5 of the DSU on 'good offices, conciliation and mediation' refers specifically to a series of 'soft' dispute settlement procedures that 'may continue while the panel process proceeds' (Article 5.5 of the DSU).

China's responses to the United States' arguments confirm that China has not relinquished any of its rights under the DSU to pursue proceedings against the United States in the current dispute. China's strong opposition to the existence of a mutually satisfactory solution within the meaning of Article 12.7 serves to further underline that there is no mutually agreed resolution of the matter before the Panel."<sup>77</sup>

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<sup>72</sup> Panel Report, *US – Shrimp (Ecuador)*, para. 7.1.

<sup>73</sup> Panel Report, *US – Tariff Measures*, para. 7.4.

<sup>74</sup> Panel Report, *US – Tariff Measures*, para. 7.6.

<sup>75</sup> Panel Report, *US – Tariff Measures*, para. 7.12.

<sup>76</sup> Panel Report, *US – Tariff Measures*, paras. 7.15-7.16.

<sup>77</sup> Panel Report, *US – Tariff Measures*, paras. 7.17-7.19.

## 1.10 Articles 12.8 and 12.9: time-limit for proceeding

### 1.10.1 General

65. For a table providing information on the time-periods taken between composition and issuance of the final report (Article 12.8) and between establishment to circulation (Article 12.9), see the chapter of the Analytical Index on "DS Information Tables".

66. In *US – Section 301 Trade Act*, the Panel stated that most of the time-limits in the DSU are either minimum time-limits without ceilings, or "maximum time-limits that are, nonetheless, indicative only". The Panel considered Articles 12.8, 12.9, 17.5, and 20 of the DSU to be examples of the latter, noting that:

"Article 12.8 refers to six months 'as a general rule' for the timeframe between panel composition and issuance of the final report to the parties. Article 12.9 provides that '[i]n no case *should* the period from the establishment of the panel to the circulation of the report to the Members exceed nine months' (emphasis added). Article 17.5 states that '[a]s a general rule, the proceedings [of the Appellate Body] shall not exceed 60 days'. It adds, however, that '[i]n no case shall the proceedings exceed 90 days'. However, even this seemingly compulsory deadline has been passed in three cases so far (*United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, DS24/AB/R, 91 days; *European Communities – Measures Concerning Meat and Meat Products (Hormones)* ('*EC – Hormones*'), DS26/AB/R and DS48/AB/R, 114 days; and *US – Shrimp*, op. cit., 91 days). Finally, Article 20 refers to 9 months – 12 months in case of an appeal – 'as a general rule' for the period between panel establishment and adoption of report(s) by the DSB."<sup>78</sup>

67. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body contrasted the language of Articles 12.8 and 12.9 with the language found in Article 21.5 of the DSU:

"Article 21.5 provides that a panel *shall* circulate its report within 90 days after the date of referral of the matter to it. If an Article 21.5 panel considers that it cannot provide its report within that timeframe, it must notify the DSB, specifying the reasons for the delay together with an estimate of the period within which it will issue its report. By contrast, Articles 12.8 and 12.9 of the DSU prescribe that original panel proceedings 'shall, as a general rule, not exceed six months' and 'should' in no case exceed nine months."<sup>79</sup>

## 1.11 Articles 12.10 and 12.11: special & differential treatment

### 1.11.1 "the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation"

68. In *India – Quantitative Restrictions*, India requested additional time to prepare and present its first written submission, pursuant to Article 12.10 of the DSU. The Panel, "in light of this provision, and considering the administrative reorganization taking place in India as a result of the recent change in government," decided to grant an additional period of time (10 days) to India.<sup>80</sup>

69. In *Turkey – Rice*, the Panel explicitly mentioned this provision and explained that, "during the Panel proceedings, the Panel took into account the respondent's status as a developing country Member, a fact not contested by the complainant, when preparing and revising the timetable for the process." The Panel added that it had "attempted, *inter alia*, to accommodate, to the extent possible, Turkey's requests for extensions of deadlines to submit responses to the questions posed

<sup>78</sup> Panel Report, *US – Section 301 Trade Act*, fn 646. See also *ibid.* para. 7.31.

<sup>79</sup> Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 195.

<sup>80</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.10.

by the Panel both after the first and second substantive meetings, as well as Turkey's request for time to submit comments on the United States comments to the Panel's interim report."<sup>81</sup>

70. In *Philippines – Distilled Spirits*, the Panel recalled the terms of Article 12.10 and stated that "[d]uring the proceedings, we took into account the respondent's status as a developing country Member, particularly when preparing the timetable for the process after having heard the views of the parties".<sup>82</sup>

71. In *India – Export Related Measures*, the Panel considered India's status as a developing country Member, in adopting and reviewing the Working Procedures and timetable. Even though the Panel had been established under the fast-track procedures contemplated in Article 4 of the SCM Agreement, it allowed four weeks for India to present its first written submission following the United States' first written submission, and four weeks for India to present its second written submission following the United States' second written submission. The Panel's timetable also provided for more than two months between the filing of submissions and the substantive meeting with the parties. Furthermore, after the substantive meeting with the parties, the Panel partially acceded to India's request to double the time for responding to questions. Although ultimately the Panel did not grant India's request not to hold a single substantive meeting, India's developing country status was taken into consideration in reaching that decision.<sup>83</sup>

72. In *Pakistan – BOPP Film (UAE)*, the Panel explained that it had taken account of both parties' status as a developing country Member in adopting and reviewing its Working Procedures and timetable. Specifically, the Panel noted the amount of time that it had given to both parties to prepare their written submissions:

"We took account of both parties' status as a developing country Member in adopting and reviewing the Working Procedures and timetable. The Panel's timetable provided Pakistan eight weeks to file its own first written submission after having received the complainant's first written submission, as requested by Pakistan, and it provided the United Arab Emirates five weeks after the organizational meeting to prepare its first written submission, as requested by the United Arab Emirates. We have also taken into account the status of the parties as developing country Members when subsequently revising the timetable and the Working Procedures, including when granting Pakistan's request for an extension to file its second written submission."<sup>84</sup>

### 1.11.2 Explicit indication in the panel's report of how special and differential provisions were taken into account

73. In *India – Quantitative Restrictions*, the Panel considered that "Article 12.11 of the DSU requires us to indicate explicitly the form in which account was taken of relevant provisions on special and differential treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures". The Panel then noted that its analysis of Article XVIII:B of GATT 1994 which embodies the principle of special and differential treatment in relation to measures taken for balance-of-payments purposes, reflected its consideration of the relevant provisions on special and differential treatment.<sup>85</sup>

74. In *US – Offset Act (Byrd Amendment)*, India and Indonesia argued that the Act undermined Article 15 of the Anti-Dumping Agreement on special and differential treatment for developing countries. The United States responded that Article 15 was not part of the terms of reference of the Panel as it had not been identified in any of the complaining parties' requests for establishment of a panel. The Panel, although acknowledging that Article 15 was not mentioned in the request, noted that Article 12.11 of the DSU required it to explicitly indicate how it had taken into account the relevant special and differential provisions of the covered agreements which are raised by developing countries in the proceedings:

<sup>81</sup> Panel Report, *Turkey – Rice*, para. 7.305.

<sup>82</sup> Panel Report, *Philippines – Distilled Spirits*, para. 7.191. See also Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.60.

<sup>83</sup> Panel Report, *India – Export Related Measures*, paras. 7.554–7.557.

<sup>84</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.663.

<sup>85</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.157.



"We note that there is no reference to AD Article 15 in the various requests for establishment of this Panel. Generally, therefore, AD Article 15 would not fall within our terms of reference. However, we note that DSU Article 12.11 requires panels to 'explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures'. Since we consider AD Article 15 to be relevant, and since that provision has been raised by developing country Members in the present proceedings, we are bound to consider that provision, even though it was not referred to in the various requests for establishment. In doing so, we note that certain developing country Members attach importance to price undertakings as a 'constructive' alternative to anti-dumping duties."<sup>86</sup>

75. In *Mexico – Telecoms*, the Panel explained the manner in which it had taken into account in its findings, pursuant to Article 12.11, the relevant GATS special and differential provisions for developing country Members:

"The Panel notes that, pursuant to Article 12.11 of the DSU, it has taken into account in its findings GATS provisions on differential and more-favourable treatment for developing country Members. In particular, the Panel has examined Mexico's arguments that commitments of such Members have to be interpreted in the light of Article IV of the GATS, paragraph 5 of the preamble to the GATS, and paragraph 5(g) of the Annex on Telecommunications. The Panel emphasizes that its findings in no way prevent Mexico from actively pursuing the development objectives referred to in these provisions by extending telecommunications networks and services at affordable prices in a manner consistent with its GATS commitments."<sup>87</sup>

76. In *Turkey – Rice*, the Panel referred to Article 12.10 and Article 12.11 and observed that:

"The Panel notes that, in the course of these Panel proceedings Turkey did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require particular consideration, nor do we find these specialized provisions relevant for the resolution of the specific matter brought before this Panel."<sup>88</sup>

77. In *India – Export Related Measures*, the Panel noted that it is bound by Article 12.11 of the DSU in cases in which "one or more of the parties is a developing country Member" and identified Article 12.10 of the DSU and Article 27 of the SCM Agreement as the "relevant provisions on differential and more-favourable treatment ... raised by" India. The Panel explained the manner in which it had taken into account India's status as a developing country Member. In addition to the considerations pointed out in paragraph 71 above, the Panel also evaluated the question whether the special and differential treatment provisions of Article 27 of the SCM Agreement exclude India from the scope of application of Articles 3 and 4 of the SCM Agreement.<sup>89</sup>

### **1.11.3 Relevance of developing country status in determining compliance with WTO obligations**

78. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Thailand stated that its developing country status should be taken into account in assessing the conformity of its actions with the relevant provisions of the Customs Valuation Agreement. The Panel pointed out that where the treaty provided a certain margin of discretion, perfection was not required:

"Although the parties in this dispute generally agree that a 'single legal standard applies to all WTO Members', Thailand nonetheless argues that its 'developing country status may be relevant when the Panel attempts to determine compliance with that single legal standard'. In this regard, Thailand states that its developing country status is a 'relevant fact that the Panel may take into account in assessing the

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<sup>86</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.87.

<sup>87</sup> Panel Report, *Mexico – Telecoms*, para. 8.3.

<sup>88</sup> Panel Report, *Turkey – Rice*, para. 7.304.

<sup>89</sup> Panel Report, *India – Export Related Measures*, paras. 7.558–7.560.

reasonableness of the actions of the Thai authorities at issue in this proceeding'. Regarding the BoA Ruling, Thailand submits that 'even if the BoA's decisions are not perfect, in the sense in which the Philippines' legal team, experts in the western legal tradition, wants, such perfection is not required'. With respect to the criminal Charges, Thailand states that 'developing countries such as Thailand face particular difficulties when dealing with customs fraud', and therefore 'need to be able to adopt tough enforcement measures, such as criminal prosecution, in order to fight customs fraud efficiently'.

We are aware that the diversity of existing national legal systems and traditions influences the way in which Members implement their WTO obligations. Regarding the BoA Ruling, which concerns issues of customs valuation and the CVA, we elaborate further below that, where the terms of the CVA are generally-worded and do not prescribe any particular means or methodology that must be followed in discharging a substantive and procedural obligation contained therein, the domestic customs authorities involved in customs valuation enjoy a margin of discretion regarding the means or methodology that they may follow, within the parameters laid down in the applicable treaty provisions, read in their context and in the light of the object and purpose of the CVA. It follows that, insofar as the terms of the CVA leave such a margin of discretion, 'perfection is not the standard' that applies in WTO dispute settlement proceedings."<sup>90</sup>

### **1.12 Article 12.12: suspension of work**

79. In *EU – Fatty Alcohols (Indonesia)*, the European Union requested the Panel to issue a preliminary ruling and find that its authority had lapsed, pursuant to Article 12.12 of the DSU, as a consequence of an alleged suspension of the Panel proceedings for more than 12 months. The Panel concluded that in the absence of a request by the complainant pursuant to Article 12.12, the Panel's work had not been suspended and the Panel's authority had therefore not lapsed. The Appellate Body found that the authority of the Panel had not lapsed, on the grounds that a decision to suspend the work of a panel cannot be taken at any point prior to the Panel having been composed. In the course of its reasoning, the Appellate Body stated:

"We have observed above that the text of Article 12.12 envisages that a decision is taken, and discretion is exercised by a panel. Similarly, other provisions relating to panel procedures contemplate action by the panel. For instance, Article 12.5 stipulates that panels should set precise deadlines for written submissions by the parties, and Article 13 provides a right for panels to seek information and technical advice from any individual or body they deem appropriate. This contrasts with other references to 'a panel' or 'the panel' in provisions relating to earlier stages of a dispute, which do not contemplate action by the panel. Article 6.1, for instance, provides that a panel shall be established by the DSB if certain conditions are met. However, this provision does not refer to any action to be taken by the panel at that point in time. We consider that this, along with the fact that Article 12.12 envisages that discretion be exercised, as well as the placement of Article 12.12 in the overall structure of the DSU, suggests that it is a composed panel that is to take the decision to suspend panel proceedings."<sup>91</sup>

80. The Panel in *Australia – Tobacco Plain Packaging* suspended its work at the request of Ukraine. The Panel was not requested to resume its work during the following 12 months, and the authority for the establishment of the Panel lapsed.<sup>92</sup>

### **1.13 Appendix 3: alternatives to in-person meetings during COVID-19 pandemic**

81. In *Pakistan - BOPP Film (UAE)*, the Panel consulted with the parties, during the COVID-19 pandemic, on the possibility of conducting a written procedure in lieu of an in-person substantive meeting. After hearing the views of the parties and waiting for a period of time to re-assess the

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<sup>90</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), paras. 7.58-7.59.

<sup>91</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.226.

<sup>92</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.54.

health situation, the Panel decided to hear the parties through a written procedure, while reserving the possibility for convening an in-person meeting later:

"In view of the various restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, holding the second substantive meeting in the manner and at the time initially envisaged in the timetable became impossible. Therefore, on 14 April 2020, the Panel consulted the parties on the possibility of hearing them through a written procedure, while reserving the possibility of convening a meeting at a later date. The parties provided comments on the Panel's proposal on 17 April 2020. The United Arab Emirates agreed with the proposed course of action, whereas Pakistan suggested that the Panel delay its decision and reassess the situation in mid-May, taking into account the evolution of restrictions related to the pandemic. On 23 April 2020, the Panel decided to reassess the situation in mid-May and to announce its decision to the parties on 20 May 2020.

As significant restrictions on international travel and meetings as a result of the COVID-19 pandemic were still in place in mid-May, it became clear that holding the second meeting with the parties would not be possible in the near future. To avoid the risk of further delays, the Panel decided on 20 May 2020 to hear the parties through a written procedure in lieu of the second substantive meeting. The Panel reserved the possibility to convene an in-person meeting at a later date, if it considered it necessary to effectively discharge its mandate. The parties did not object to this decision. The written procedure in lieu of the second substantive meeting took place from 9 June to 17 July 2020. Following the completion of the written procedure, on 21 July 2020 the Panel decided that an additional in-person meeting was not necessary to effectively discharge its mandate."<sup>93</sup>

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Current as of: December 2023

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<sup>93</sup> Panel Report, *Pakistan - BOPP Film (UAE)*, paras. 1.9-1.10.