

<b>1 ARTICLE 13 AND APPENDIX 4 .....</b>	<b>1</b>
1.1 Text of Article 13.....	1
1.2 Text of Appendix 4 .....	2
1.3 Article 13.1.....	3
1.3.1 "right to seek information and technical advice from any individual or body" .....	3
1.3.1.1 General .....	3
1.3.1.2 Amicus curiae briefs .....	3
1.3.1.2.1 Discretion to accept unsolicited amicus curiae briefs .....	3
1.3.1.2.2 Discretion to accept amicus curiae brief from a WTO Member .....	5
1.3.1.2.3 Due process with respect to amicus curiae briefs.....	6
1.3.1.2.4 Time-limit for filing <i>amicus curiae</i> briefs.....	6
1.3.1.2.5 Table of proceedings in which amicus curiae submissions were received.....	7
1.3.1.3 Discretion to seek information from the parties.....	7
1.3.1.4 Discretion to seek information from non-parties.....	10
1.3.1.5 Other international intergovernmental organizations .....	11
1.3.1.5.1 General.....	11
1.3.1.5.2 Table of proceedings in which information was sought from other international intergovernmental organizations .....	11
1.3.1.6 Discretion not to seek information.....	12
1.3.2 "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate".....	14
1.3.3 "Confidential information which is provided shall not be revealed without formal authorization".....	14
1.4 Article 13.2.....	15
1.4.1 Discretion to consult with individual experts rather than expert review group pursuant to Appendix 4.....	15
1.4.2 Disagreement over the need for scientific or technical advice .....	15
1.4.3 Permissible scope of consultation with experts and international organizations .....	15
1.4.4 Panel may not use authority to consult with experts to make a case for a party.....	16
1.4.5 Panel may not delegate legal characterization to experts .....	17
1.4.6 Table of proceedings in which panels consulted with scientific experts .....	17

## 1 ARTICLE 13 AND APPENDIX 4

### 1.1 Text of Article 13

#### ***Article 13***

##### *Right to Seek Information*

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

## **1.2 Text of Appendix 4**

### **APPENDIX 4**

#### **EXPERT REVIEW GROUPS**

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.
2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.
3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.
4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.
5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.
6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

### 1.3 Article 13.1

#### 1.3.1 "right to seek information and technical advice from any individual or body"

##### 1.3.1.1 General

1. In *US – Shrimp*, the Appellate Body underscored the comprehensive nature of a panel's authority under Article 13:

"The comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any individual or body' it may consider appropriate, or from 'any relevant source', should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine the *need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received."<sup>1</sup>

2. In *US/Canada – Continued Suspension*, the Appellate Body drawing from its conclusion in *Japan – Agricultural Products II* delineated the Panel's authority to seek information:

"Panels are understood to have 'significant investigative authority' under Article 13 of the DSU and Article 11.2 of the *SPS Agreement* and broad discretion in exercising this authority."<sup>2</sup>

##### 1.3.1.2 Amicus curiae briefs

###### 1.3.1.2.1 Discretion to accept unsolicited amicus curiae briefs

3. In *US – Shrimp*, the Panel received a brief from three non-governmental organizations. The complaining parties in the dispute requested the Panel not to consider the contents of the briefs submitted by the organizations while the United States urged the Panel to take into account any relevant information in the two briefs that the Panel acknowledged receiving. The Panel found that "[a]ccepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration."<sup>3</sup> The Appellate Body found that the Panel had erred in its legal interpretation of Article 13 of the DSU and held that accepting non-requested information from non-governmental sources was not incompatible with the provisions of the DSU. The Appellate Body began by emphasizing the "comprehensive nature" of a panel's authority to seek information in the context of a dispute:

"The comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any individual or body' it may consider appropriate, or from 'any relevant source', should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine the *need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or*

<sup>1</sup> Appellate Body Report, *US – Shrimp*, para. 104.

<sup>2</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 439.

<sup>3</sup> Panel Report, *US – Shrimp*, para. 7.8.

advice or to conclude that no weight at all should be given to what has been received.

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>4</sup>

4. In *US – Shrimp*, the Appellate Body held that the word "seek" in the phrase "seek information" should not be given an excessively "formal and technical" reading. The Appellate Body opined that given the breadth of a panel's mandate to seek information without "unduly delaying the panel process", "for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes":

"That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes.

A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.

Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. The Panel suggested instead, that, if any of the parties wanted 'to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so.' In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word 'seek' in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.

...

We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted

---

<sup>4</sup> Appellate Body Report, *US – Shrimp*, paras. 104 and 106.

within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions."<sup>5</sup>

5. In *US – Lead and Bismuth II*, the Appellate Body recognized that it also had the authority to accept *amicus curiae* briefs, albeit on a different legal basis.<sup>6</sup> In *US – Lead and Bismuth II*, the Appellate Body considered that as long as it acts consistently with the provisions of the DSU and the covered agreements, the Appellate Body also has the legal authority pursuant to Article 17.9 of the DSU to decide whether or not to accept and consider any information that it believes is relevant and useful in an appeal:

"In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit[s] acceptance or consideration of such briefs. ... [Article 17.9] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."<sup>7</sup>

6. In *US – Lead and Bismuth II*, the Appellate Body drew a distinction between, on the one hand, parties and third parties to a dispute, which have a legal right to participate in panel and Appellate Body proceedings, and, on the other hand, private individuals and organizations, which are not Members of the WTO, and which, therefore, do not have a legal right to participate in dispute settlement proceedings:

"We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute. And, under the DSU, *only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. ..."

Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO Members which are parties or third parties in a particular dispute."<sup>8</sup>

7. The Appellate Body on *US – Lead and Bismuth II* further explained that participation by private individuals and organizations is dependent upon the Appellate Body permitting such participation if it finds it useful to do so:

"[W]e have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision."<sup>9</sup>

### **1.3.1.2.2 Discretion to accept *amicus curiae* brief from a WTO Member**

8. In *EC – Sardines*, the Appellate Body received for the first time an *amicus curiae* brief from a WTO Member, Morocco, that had not exercised its third-party rights at the panel stage of the proceedings. The Appellate Body found that it was entitled to accept the *amicus curiae* brief

<sup>5</sup> Appellate Body Report, *US – Shrimp*, paras. 107-110.

<sup>6</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 39-42.

<sup>7</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 39.

<sup>8</sup> Appellate Body Report, *US – Lead and Bismuth II*, paras. 40-41.

<sup>9</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 42.

submitted by Morocco, and to consider it. However, the Appellate Body emphasized that, in accepting the brief filed by Morocco in this appeal, it was not suggesting that each time a Member files such a brief it was required to accept and consider it. The Appellate Body indicated that it could well exercise its discretion to reject an *amicus curiae* brief if, by accepting it, this would interfere with the "fair, prompt and effective resolution of trade disputes":

"As we explained in *US – Lead and Bismuth II*, the DSU gives WTO Members that are participants and third participants a legal *right* to participate in appellate proceedings. In particular, WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief. We may do so, however, based on our legal authority to regulate our own procedures as stipulated in Article 17.9 of the DSU. The fact that Morocco, as a sovereign State, has chosen not to exercise its *right* to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our *legal authority* under the DSU and our *Working Procedures* to accept and consider the *amicus curiae* brief submitted by Morocco.

Therefore, we find that we are entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. We wish to emphasize, however, that, in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis. We recall our statement that:

The procedural rules of WTO dispute settlement are designed to promote  
... the fair, prompt and effective resolution of trade disputes.

Therefore, we could exercise our discretion to reject an *amicus curiae* brief if, by accepting it, this would interfere with the "fair, prompt and effective resolution of trade disputes." This could arise, for example, if a WTO Member were to seek to submit an *amicus curiae* brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden on other participants."<sup>10</sup>

9. In *Australia – Tobacco Plain Packaging*, the Panel received *amicus curiae* briefs, including in exhibits presented by one of the parties.<sup>11</sup>

#### **1.3.1.2.3 Due process with respect to *amicus curiae* briefs**

10. In *US – Tuna II (Mexico)*, the Panel received an received an unsolicited *amicus curiae* brief from Humane Society International and American University's Washington College of Law. The Panel 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>12</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>13</sup>

#### **1.3.1.2.4 Time-limit for filing *amicus curiae* briefs**

11. In *EC – Seal Products*, the Appellate Body received three unsolicited *amicus curiae* briefs, one of which was received on the first day of the oral hearing. The Appellate Body found it inadmissible and stated that:

<sup>10</sup> Appellate Body Report, *EC – Sardines*, paras. 166-167.

<sup>11</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.50.

<sup>12</sup> Panel Report, *US – Tuna II (Mexico)*, para. 7.9.

<sup>13</sup> Panel Report, *US – Tuna II (Mexico)*, footnote 559.

"In the light of its late filing, and mindful of the requirement to ensure that participants and third participants are given an adequate opportunity fully to consider any written submission filed with the Appellate Body, the Division deemed this brief inadmissible. The Division did not find it necessary to rely on the other two *amicus curiae* briefs in rendering its decision."<sup>14</sup>

#### **1.3.1.2.5 Table of proceedings in which *amicus curiae* submissions were received**

12. For a table providing information on WTO dispute settlement proceedings in which *amicus curiae* submissions were submitted to panels or the Appellate Body, see the chapter of the Analytical Index on "DS Information Tables".

#### **1.3.1.3 Discretion to seek information from the parties**

13. In *Australia – Automotive Leather II*, the Panel noted that "it is a common feature of panel proceedings for panelists to question parties about the facts and arguments underlying their positions."<sup>15</sup>

14. In *Canada – Aircraft*, Canada argued that the Panel should not have sought certain information from Canada in the absence of Brazil having made a *prima facie* case. The Appellate Body stated that:

"[A] panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence."<sup>16</sup>

15. In *Thailand – H-Beams*, Thailand argued that the claims of Poland were not sufficiently clear, and that the Panel, therefore, overstepped the limits of its authority in asking questions of the parties. The Appellate Body stated:

"[W]e have previously stated that panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them. In our Report in *Canada – Measures Affecting the Export of Civilian Aircraft*, we dismissed the view that a panel has no authority to ask a question relating to claims for which the complaining party had not first established a *prima facie* case, and stated that such an argument was 'bereft of any textual or logical basis'."<sup>17</sup>

16. In *US – Upland Cotton*, Brazil requested that the United States submit information that would permit the calculation of the precise amount of contract payments made to producers of upland cotton and asked the Panel to require this information pursuant to Article 13.1 of the DSU. The United States noted that panels must take care not to use the information gathered under its authority to relieve a complaining party from its burden of establishing a *prima facie* case of WTO inconsistency based on specific legal claims asserted by it, such that the Panel could not relieve Brazil of its burden of advancing and establishing claims and arguments relating to the key issue in the serious prejudice claim of the value of decoupled payments benefiting upland cotton.<sup>18</sup> The Panel stated:

"The Panel wishes to point out that it has used its powers under Article 13 of the DSU to evaluate Brazil's arguments. The support delivered to upland cotton by these four types of payments is a central issue in this dispute. Brazil presented USDA data in its first written submission which measured support in accordance with payment formulae in the measures themselves. The Panel has relied on that

---

<sup>14</sup> Appellate Body Reports, *EC – Seal Products*, para. 1.15.

<sup>15</sup> Panel Report, *Australia – Automotive Leather II*, para. 9.28.

<sup>16</sup> Appellate Body Report, *Canada – Aircraft*, para. 192.

<sup>17</sup> Appellate Body Report, *Thailand – H-Beams*, para. 135.

<sup>18</sup> Panel Report, *US – Upland Cotton*, para. 7.27.

data. Brazil later proposed a methodology using the then-available data which relied on a particular assumption. Data that could prove or disprove that assumption was in the control of the United States but not available to Brazil or to the Panel. Brazil had already explained the problems caused by the aggregation of data. At the Panel's request, Brazil explained the methodology which it would apply to the unavailable data, which showed the Panel that it was both necessary and appropriate to use its powers under Article 13 of the DSU to access the data in a suitable format that would permit Brazil to run its methodology. At that stage, it was not clear to the Panel what the data would show, nor what the results of Brazil's methodology would be. This was an information-gathering exercise on the Panel's part, in order for it to carry out its function. Any suggestion that a panel 'makes the complainant's case', when it merely exercises its powers under the DSU, is entirely inaccurate. The DSU contains extensive provisions about the effective way for panels to gather facts and information, and how to assess those facts (including by way of commissioning advisory reports). It is a central feature of any system of redress, be that judicial, arbitral or otherwise, that evidence be obtained and analysed, and that the parties have equal opportunities to present their cases by using or contradicting that evidence, including by presenting their own evidence."<sup>19</sup>

17. In *EC – Bananas III* (Article 21.5 – US), the Panel stated that "[u]nder Article 13 of the DSU the Panel has a broad right to seek information and may take into account evidence even if not provided by any of the parties".<sup>20</sup>

18. In *US – Continued Zeroing*, the Panel clarified the extent of its authority to seek information:

"[W]e consider that it would be inappropriate for a panel to exercise its authority to seek information based on its own judgement as to what information is necessary for a party to prove its case, as opposed to seeking information in order to elucidate its understanding of the facts and issues in the dispute before it."<sup>21</sup>

19. In *US – Large Civil Aircraft* (2<sup>nd</sup> complaint), the Appellate Body found that the Panel had failed to make an objective assessment when it had refused to seek necessary information from the respondent, which "could have afforded the European Communities a fair opportunity to produce evidence necessary to make out its *prima facie* case".<sup>22</sup> It was emphasized that the circumstances of the dispute required the Panel to engage in "a train of inquiry".<sup>23</sup> The Appellate Body explained the relevant factors a panel should take into account in deciding whether to exercise the authority to seek information under Article 13 of the DSU:

"We note, in this regard, that one aspect of ensuring that the proceedings are fairly conducted is that each party must be entitled to know the case that it has to make or to answer and must be afforded a fair and reasonable opportunity to do so. In general, panels are best situated to determine how this should be accomplished in the particular circumstances of each case, including through the exercise of their authority to seek information. The use of this authority, however, is not untrammelled. In considering whether to exercise its authority under Article 13 of the DSU—in particular when a party has made an explicit request that it do so—a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is

---

<sup>19</sup> Panel Report, *US – Upland Cotton*, para. 7.633.

<sup>20</sup> Panel Report, *EC – Bananas III* (Article 21.5 – US), para. 6.33.

<sup>21</sup> Panel Report, *US – Continued Zeroing*, footnote 20.

<sup>22</sup> Appellate Body Report, *US – Large Civil Aircraft* (2<sup>nd</sup> complaint), para. 1143.

<sup>23</sup> Appellate Body Report, *US – Large Civil Aircraft* (2<sup>nd</sup> complaint), para. 1144.

likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s)."<sup>24</sup>

20. In *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)* the Panel rejected the European Union's request to deny the United States' request for the Panel to pose additional questions to the European Union, agreeing with the first compliance panel's view that panels are vested with discretion to pose questions to the parties and that there are no explicit limitations on when a panel may exercise that discretion. The Panel elaborated:

"The European Union's request to deny the US request for the Panel to pose allegedly unnecessary additional questions to the European Union covers an array of information concerning the provision of German A350 LA/MSF, on the one hand, and information pertaining to the R&TD measures, on the other hand. The European Union's request appears to centre on several distinct concerns: (i) the information is either not necessary to the matter before it or the United States has not demonstrated that it is necessary; (ii) that it is too late in the proceeding to seek this information; and (iii) the Panel is not permitted to make the case for the United States (in the case of the R&TD measures) and therefore is not permitted to gather the relevant information in the exercise of its authority under Article 13 of the DSU.

...

The first compliance panel went on to explain that panels are vested with discretion to pose questions to the parties and there are no explicit limitations on when a panel may exercise that discretion, although a decision to exercise this discretion relatively late in a proceeding must also take account of the need to settle disputes in a timely manner, particularly in the context of Article 21.5 proceedings. The panel was clear in its view, however, that the objective of achieving a prompt settlement of disputes cannot alone dictate when a panel is entitled to request the parties to provide information and/or explanations that are considered necessary to perform its function. Finally, the panel noted that it had previously informed the parties of the possibility that it may need to pose further questions on both factual and legal issues as necessary in considering the claims before it.

We consider the guidance of the first compliance panel relevant to the circumstances of this proceeding, in the event that the Panel were to address further questions to the parties, including as necessary, on those matters referred to by the United States in its comments on the European Union's responses to Panel questions. Notably, we have also informed the parties at the conclusion of its meeting that it may need to pose further questions on factual or legal issues in addition to those sent following the meeting. In light of this, we see no basis to rule on the European Union's request that we deny US requests to pose additional questions to the European Union."<sup>25</sup>

21. In *Australia – Tobacco Plain Packaging*, Australia requested the Panel to exercise its authority under Article 13 to seek certain information from the Dominican Republic and Ukraine. The Dominican Republic provided the required information. Ukraine stated that "it was not in principle opposed to providing the requested datasets but stated that Article 13 of the DSU was intended to provide the Panel, not Australia, with the right to request the additional information and that the Panel should therefore be 'led only by its own needs'.<sup>26</sup> The Panel decided to seek the information at issue from Ukraine, on the following grounds:

"The Panel noted that the datasets requested by Australia underlay reports that Ukraine had submitted and relied upon in the presentation of its case, and that this reliance formed the basis for Australia's argument that access to the data was necessary to allow it 'to test the veracity of the assertions based on the data and consequently to ensure due process and a proper adjudication of [the] disputes.' The

<sup>24</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1140. See also Panel Reports, *EC – Seal Products*, para. 7.77.

<sup>25</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, Annex D-1, paras. 41-44.

<sup>26</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.68.

Panel also noted that Australia had attempted unsuccessfully to obtain the data in question from the private entities responsible for its collection. The Panel was mindful of the Appellate Body's observation that due process is connected, *inter alia*, to the right of parties to be afforded an adequate opportunity to pursue their claims, make out their defences and establish the facts, and that there may be circumstances in which a party cannot meet its burden by adducing all relevant evidence, most notably when the information is in the exclusive possession of an opposing party.

The Panel further noted that Ukraine had not suggested that it would be unable or unwilling to provide the requested information, if requested to do so, and that the Panel had adopted additional working procedures for the protection of SCI. The Panel concluded that the provision of the data was appropriate and requested Ukraine to provide the datasets at issue, without prejudice to any later finding by the Panel concerning their relevance to the Panel's assessment of the matter before it. The datasets, along with select related computer codes, were provided to the Panel and the parties on 13 November 2014. Additional related computer codes were provided on 28 November 2014 and 5 December 2014.<sup>27</sup>

22. In *Australia – Tobacco Plain Packaging*, Australia requested the Panel to exercise its discretion to request certain information from the Dominican Republic. The Dominican Republic provided parts of the information, and asked the Panel to make a ruling under Article 13.1 of the DSU to obtain the remainder of the required information, which the Panel did:

"On 10 November 2014, Australia requested the Panel to exercise its discretion under Article 13 of the DSU to request additional information relating to the IPE Report from the Dominican Republic. On 12 November 2014, the Dominican Republic communicated that it would provide certain information, which it subsequently submitted on 24 November 2014, but required a ruling from the Panel under Article 13.1 of the DSU to obtain the remainder of the requested information from private entities. On 20 November 2014, the Panel exercised its discretion under Article 13 of the DSU and requested that the outstanding data in question be provided to the Dominican Republic in order to facilitate its production by the Dominican Republic to the Panel and the other parties. The Dominican Republic provided this information on 12 December 2014."<sup>28</sup>

23. In *US – Safeguard Measure on PV Products*, due to the imposition of various restrictions on gatherings and international travel in relation to the COVID-19 pandemic, the Panel was forced to postpone the first substantive meeting. To facilitate continued work on the dispute, the Panel posed written questions to the parties and third parties concerning certain factual and legal issues, pursuant to its authority under Article 13.<sup>29</sup>

#### **1.3.1.4 Discretion to seek information from non-parties**

24. In *Turkey – Textiles*, the Panel asked the European Communities, which was not party to the dispute, to provide factual and legal information relevant to the case, pursuant to Article 13.2 of the DSU.<sup>30</sup>

25. In *Australia – Tobacco Plain Packaging*, the Panel disagreed with Australia's view that Article 13 of the DSU does not cover data underlying scientific articles:

"With respect to Australia's argument that data underlying independent, peer-reviewed journal articles (as opposed to data underlying commissioned expert reports) is not properly the subject of a request for information under Article 13 of the DSU, the Panel noted that Articles 13.1 and 13.2 of the DSU permit panels to request and obtain information from "any individual or body which it deems appropriate" and from 'any relevant source' and the Panel did not see any *a priori* restriction on the individual to whom, or body to which, we might direct a request. The Panel therefore

<sup>27</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 1.70-1.71.

<sup>28</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.72.

<sup>29</sup> Panel Report, *US – Safeguard Measure on PV Products*, para. 1.8.

<sup>30</sup> Panel Report, *Turkey – Textiles*, paras. 4.1-4.3.

considered that the fact that the requested information underlay published articles did not, in itself, shield it from scrutiny under Article 13 of the DSU."<sup>31</sup>

### **1.3.1.5 Other international intergovernmental organizations**

#### **1.3.1.5.1 General**

26. In *India – Quantitative Restrictions*, the Panel consulted with the IMF on India's balance-of-payments situation. In this context, the question arose whether in the light of Article XV:2, which speaks of consultations between the CONTRACTING PARTIES and the IMF, a panel could engage in such consultations with the IMF. The United States, the complaining party, opined that the terms of Article XV:2 of GATT 1994, read in accordance with paragraph 2(b) of the Incorporation Clause of GATT 1994 in Annex 1A of the WTO Agreement, require the WTO to consult with the IMF in specific matters, and the WTO, by definition, includes panels. India, in contrast, argued that to interpret the terms of Article XV to refer to panels meant to ignore the division of functions between the different bodies of the WTO, and that only the General Council and the BOP Committee were covered by this provision. The Panel stated:

"Article 13.1 of the DSU entitles the Panel to consult with the IMF in order to obtain any relevant information relating to India's monetary reserves and balance-of-payments situation which would assist us in assessing the claims submitted to us.

... We do not find it necessary for the purposes of this case to decide the extent to which Article XV:2 may require panels to consult with the IMF or consider as dispositive specific determinations of the IMF. As will be seen in Section V.G *infra*, we accept in the circumstances of this case certain assessments of the IMF. In this regard, however, we note that whether or not the provisions of Article XV:2 extend to panels, the Panel has the responsibility of making an objective assessment of the facts of the case and the conformity with GATT 1994, as incorporated into the WTO Agreement, of the Indian measures at issue, in accordance with Article 11 of the DSU."<sup>32</sup>

27. In *EC – Sardines*, the Appellate Body found that the Panel did not err in deciding not to seek information from the Codex Commission. The Appellate Body stated that:

"Article 13.2 of the DSU provides that '[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.' This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ('Argentina – Textiles and Apparel')*, and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to whether or not to seek information from external sources. In this case, the Panel evidently concluded that it did not need to request information from the Codex Commission, and conducted itself accordingly. We believe that, in doing so, the Panel acted within the limits of Article 13.2 of the DSU. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU."<sup>33</sup>

#### **1.3.1.5.2 Table of proceedings in which information was sought from other international intergovernmental organizations**

28. For an information table on cases where panels consulted other international intergovernmental organizations (IGOs) based on the "right to seek information" under Art. 13.1 of the DSU, see the chapter of the Analytical Index on "DS Information Tables".

<sup>31</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.91.

<sup>32</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.12-5.13. On the right/obligation to consult the IMF, see Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 82-86.

<sup>33</sup> Appellate Body Report, *EC – Sardines*, para. 302.

### 1.3.1.6 Discretion not to seek information

29. In *Argentina – Textiles and Apparel*, Argentina argued on appeal that the Panel had failed to make "an objective assessment of the matter" because it had not acceded to the request of the parties in seeking information from, and consulting with, the IMF concerning certain aspects of the statistical tax. The Appellate Body held that "[j]ust as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all":

"The DSU gives panels different means or instruments for complying with Article 11; among these is the right to 'seek information and technical advice' provided in Article 13 of the DSU."

...

Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves 'to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.' Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.

...

In this case, we find that the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF."<sup>34</sup>

30. The Appellate Body in *EC – Sardines* rejected the claim of the European Communities that the Panel had failed to conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU. The European Communities had alleged impropriety in relation to the Panel's decision not to seek information from the Codex Commission:

"Article 13.2 of the DSU provides that '[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.' This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ('Argentina – Textiles and Apparel')*, and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to whether or not to seek information from external sources. In this case, the Panel evidently concluded that it did not need to request information from the Codex Commission, and conducted itself accordingly. We believe that, in doing so, the Panel acted within the limits of Article 13.2 of the DSU. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU."<sup>35</sup>

31. In *US – Carbon Steel*, the Appellate Body stated that:

---

<sup>34</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 82, 84 and 86.

<sup>35</sup> Appellate Body Report, *EC – Sardines*, para. 302.

"We also wish to underline that although panels enjoy a *discretion*, pursuant to Article 13 of the DSU, to seek information 'from any relevant source', Article 11 of the DSU imposes no *obligation* on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties. In consequence, given that the European Communities itself had submitted no evidence – other than the text of the provision – on this point, the Panel did not act inconsistently with Article 11 in refraining from seeking additional information on its own initiative."<sup>36</sup>

32. In *US – Continued Zeroing*, the Appellate Body found that the Panel did not act inconsistently with Article 13 when it did not seek certain information requested by the European Communities:

"Article 13 of the DSU gives panels 'the right to seek information and technical advice from any individual or body which it deems appropriate'. The Appellate Body has explained that this is a discretionary authority that panels may exercise in seeking information 'from any relevant source'. The Appellate Body has also explained that, while panels have 'broad authority to pose such questions to the parties as it deems relevant for purposes of considering the issues that are before it', such authority cannot be used 'to make the case for a complaining party'.

The European Communities claims it explained to the Panel that the USDOC does not disclose a complete listing of all transactions and comparisons made in each periodic review. As a result, the European Communities posited to the Panel that, 'should the Panel consider further corroboration appropriate, the Panel should request the United States to provide copies of the detailed margin calculations for each of the seven administrative reviews at issue.' We do not consider that the Panel acted inconsistently with Article 13 of the DSU when it did not seek such information. As noted, a panel's authority to request information under Article 13 of the DSU is discretionary, and there is therefore no error that can be attributed to the Panel for its conduct in respect of that Article."<sup>37</sup>

33. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the European Communities requested the Panel to exercise its authority to seek information under Article 13 of the DSU. However, the Panel concluded that it did not consider it necessary or appropriate "to use its discretion under Article 13 of the DSU to remedy the parties' inability to reach agreement on the initiation of an Annex V procedure, or to remedy the parties' inability to reach agreement on a means for transferring the information obtained during the DS317 Annex V procedure to the present Panel".<sup>38</sup>

34. In *Australia – Tobacco Plain Packaging*, in response to Ukraine's and the Dominican Republic's request, the Panel declined to seek certain information from Australia, the defendant, on the following grounds:

"An important consideration guiding the Panel, in deciding whether an exercise of its authority under Article 13 of the DSU was warranted, was a consideration of in whose possession the information is, whether the information was in the exclusive possession of the other party, whether other reasonable means could be used to procure it, and whether the requesting party had availed itself of or tried to avail itself of such means. The Panel noted that Ukraine and the Dominican Republic had provided no indication of having taken steps to obtain the requested information directly from the institutions they identified as the source of the data, or from the persons identified as contact points in each of the cited publications, following Australia's filing of its first written submission. Based on the information before it and without prejudice to the potential relevance of the requested information, the Panel was also not persuaded that this information could, as the complainants' arguments suggested, 'be assumed to be in the sole possession of, or directly accessible to, the Government of Australia, solely on the basis that the underlying research was publicly funded or conducted in publicly-funded institutions'.

<sup>36</sup> Appellate Body Report, *US – Carbon Steel*, para. 153.

<sup>37</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 343-344.

<sup>38</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 7.23.

Without prejudice to the potential relevance of such information, the Panel was therefore not persuaded that the circumstances at that point of the proceedings warranted an exercise of its authority under Article 13 of the DSU to request Australia to produce it, and invited Ukraine and the Dominican Republic to seek to obtain data directly from the relevant sources through appropriate channels."<sup>39</sup>

35. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* declined the complainant's request to seek certain information from the respondent, finding the requested information not necessary for the Panel to make an objective assessment of the matter before it.<sup>40</sup>

### **1.3.2 "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate"**

36. The Appellate Body on *Canada – Aircraft* addressed the issue of the authority of a panel to request a party to a dispute to submit information concerning that dispute. The Appellate Body stated:

"It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just 'from any individual or body' within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: '*A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.*'"<sup>41</sup>

37. In *Canada – Aircraft*, Canada argued in its appeal that it was not legally bound to comply with the Panel's request to provide information relating to the disputed financing of the subject transaction. The Appellate Body held:

"[W]e are of the view that the word 'should' in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather a merely exhortative, sense. Members are, in other words, under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU."<sup>42</sup>

38. In *US – Wheat Gluten*, the Appellate Body found that the conduct of the parties when confronted with a request for information pursuant to Article 13.1 of the DSU from a panel may be relevant:

"Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn."<sup>43</sup>

### **1.3.3 "Confidential information which is provided shall not be revealed without formal authorization"**

39. In *US – Section 110(5) Copyright Act*, the Arbitrators decided to seek additional information from United States collective management organizations. One such organization submitted some of the information requested but attached a number of conditions concerning the use of that information, in particular the obligation for the Arbitrators to submit "any proposed public document" to its counsel in order for it to confirm that the confidentiality of the information submitted had been effectively protected. The Arbitrators understood that the term "any proposed public document" could actually apply to their Award. Therefore, pursuant to their Working Procedures and to general practice under public international law, the Arbitrators considered that "such a condition was incompatible with the confidentiality of their deliberations, which extends to

<sup>39</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 1.82-1.83.

<sup>40</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 1.30.

<sup>41</sup> Appellate Body Report, *Canada – Aircraft*, para. 185.

<sup>42</sup> Appellate Body Report, *Canada – Aircraft*, para. 187.

<sup>43</sup> Appellate Body Report, *US – Wheat Gluten*, para. 174.

the content of their report until it is made public". The Arbitrators also feared that such conditions, if they were to be accepted, could make access to evidence more difficult in future cases under the DSU. As a result, they decided not to use the information submitted.<sup>44</sup>

#### **1.4 Article 13.2**

##### **1.4.1 Discretion to consult with individual experts rather than expert review group pursuant to Appendix 4**

40. As of August 2022, no dispute settlement panel has established an expert review group under Appendix 4 of the DSU. Instead, panels seeking advice on scientific matters have requested the opinions of individual scientific experts.

41. In *EC – Hormones*, the Panel elected to seek advice from individual experts, rather than establish an expert review group pursuant to Appendix 4 of the DSU. The Panel did so in order to leave open the possibility of receiving a range of opinions from the experts in their individual capacity. The Appellate Body confirmed that a panel has the discretion to consult with individual scientific experts and may establish *ad hoc* rules for such consultations:

"Both Article 11.2 of the *SPS Agreement* and Article 13.2 of the DSU require panels to consult with the parties to the dispute during the selection of the experts. However, it is not claimed by any of the participants in this appeal that the Panel did not consult with them when appointing the experts. Moreover, it is uncontested that the experts have been selected in accordance with procedures on which all the participants have previously agreed. It is similarly uncontested that, among the experts consulted by the Panel, there are nationals from each of the parties to the dispute. The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings."<sup>45</sup>

##### **1.4.2 Disagreement over the need for scientific or technical advice**

42. In *Costa Rica – Avocados (Mexico)*, the parties disagreed on whether it would be beneficial to have input from experts and/or international organizations. Mexico indicated that it had no objection to the Panel consulting with individual experts and international organizations because, among other things, "the dispute was fundamentally about scientific and technical issues". Costa Rica, however, stated that, in its view, there were no specific issues that warranted the Panel using experts and that the dispute was of a "highly legal nature". The Panel decided to seek scientific or technical advice, noting that "the facts of the present dispute involved scientific and technical issues on which the panelists lacked expertise" and therefore "in order to be able to make an objective assessment of the facts of the case, the Panel would require advice from experts to assist it with the analysis and assessment of the relevant scientific and technical issues".<sup>46</sup>

##### **1.4.3 Permissible scope of consultation with experts and international organizations**

43. In *India – Agricultural Products*, the Appellate Body disagreed that the Panel had exceeded the permissible scope of consultation with the scientific experts under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU when it posed interpretative, instead of scientific or technical questions. The Appellate Body reasoned that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU limits the scope of a panel's consultation with experts and international organizations:

---

<sup>44</sup> Award of the Arbitrators, *US – Section 110(5) Copyright Act*, para. 1.10.

<sup>45</sup> Appellate Body Report, *EC – Hormones*, para. 148.

<sup>46</sup> Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 1.38, 1.41 and 1.45.

"Although Article 11.2 indicates that the reason a panel 'should seek advice from experts' is because the dispute 'involve[es] scientific or technical issues', we consider this to be a reference to the types of issues common to SPS disputes, and not to suggest a limitation as to the scope or nature of questioning that would be permitted in such disputes. Thus, while the language of Article 11.2 indicates that experts should be consulted in disputes involving scientific or technical issues, it does not mandate that the advice sought be confined to such issues. This understanding is also consonant with the scope and nature of questioning permitted under Article 13 of the DSU, which grants panels 'the right to seek information and technical advice from any individual or body which it deems appropriate', to 'seek information from any relevant source', and to 'consult experts to obtain their opinion on certain aspects of the matter'. On the basis of the foregoing, we do not consider that either Article 11.2 of the SPS Agreement or Article 13 of the DSU imposes constraints on a panel's consultation with experts, including with any relevant international organizations, and we see no basis for understanding Article 11.2 of the SPS Agreement to circumscribe the authority or discretion a panel enjoys under Article 13 of the DSU in SPS disputes. For these reasons, we disagree that Article 11.2 of the SPS Agreement limits the permissible scope of a panel's consultations with an international organization in the manner suggested by India. To the contrary, these provisions apply cumulatively and harmoniously in SPS disputes, and reinforce the comprehensive nature of a panel's fact-finding powers. We therefore find that the Panel did not act inconsistently with Article 11.2 of the SPS Agreement or Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Code."<sup>47</sup>

#### **1.4.4 Panel may not use authority to consult with experts to make a case for a party**

44. In *Japan – Agricultural Products II*, the Appellate Body held that while a panel had a broad and "comprehensive authority" to engage in fact-finding under Article 13 of the DSU, it could not use this authority so as to effectively relieve the complaining party of making a *prima facie* case of inconsistency:

"Article 13 of the DSU allows a panel to seek *information* from any relevant source and to consult individual experts or expert bodies to obtain their *opinion* on certain aspects of the matter before it. In our Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*United States – Shrimp*'), we noted the 'comprehensive nature' of this authority, and stated that this authority 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 ...*.'

Furthermore, we note that the present dispute is a dispute under the *SPS Agreement*. Article 11.2 of the *SPS Agreement* explicitly *instructs* panels in disputes under this Agreement involving scientific and technical issues to 'seek advice from experts'.

Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.

In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a *prima facie* case of inconsistency with Article 5.6 based on

---

<sup>47</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.89.

claims relating to the 'determination of sorption levels'. The United States did not even *argue* that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6."<sup>48</sup>

#### **1.4.5 Panel may not delegate legal characterization to experts**

45. In *Australia – Apples*, the Appellate Body noted that the Panel asked the experts whether restricting to mature, symptomless apples would achieve Australia's appropriate level of protection. In this regard, the Appellate Body expressed certain reservations about the Panel having done so, because that was the question that the Panel was entrusted to answer according to Article 5.6 of the SPS Agreement. The Appellate Body clarified that experts may assist a panel in assessing the level of risk related to an SPS measure and potentially alternative available measures. However, the Appellate Body found that:

"[W]hether or not an alternative measure's level of risk achieves a Member's appropriate level of protection is a question of legal characterization, the answer to which will determine the consistency or inconsistency of a Member's measure with its obligation under Article 5.6. Answering this question is not a task that can be delegated to scientific experts"<sup>49</sup>

#### **1.4.6 Table of proceedings in which panels consulted with scientific experts**

46. For a table providing information on panel proceedings involving consultations with scientific experts, see the chapter of the Analytical Index on "DS Information Tables".

---

Current as of: December 2023

---

<sup>48</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 127-130.

<sup>49</sup> Appellate Body Report, *Australia – Apples*, paras. 384 and 399.