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1 ARTICLE 15

1.1 Text of Article 15

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

1.2 Article 15.1: issuance and review of the descriptive (factual and arguments) part of the report

1.2.1 The "factual" section of the descriptive part

1. Panels generally address contested factual issues in the Findings section of the report, rather than in the Factual Aspects section of the descriptive part of the report. For example, in *US – Clove Cigarettes*, the Panel explained, in the introduction to the Factual Aspects section of the descriptive part of the report, that "[t]he parties disagree on a number of factual issues. To the extent it is necessary for the Panel to resolve those disputed factual issues, it will do so in its Findings."¹

1.2.2 Timing of comments on the descriptive section

2. In a number of cases, parties have provided additional comments on the descriptive part of the report in the context of subsequently providing comments on the interim report containing the Panel's findings.² In *US – Clove Cigarettes*, the Panel made a point of noting that:

"[T]he United States put forward a number of requests for review of the language in Section II of this Report which had already been subject to the parties' review as part of the Descriptive Part. We note that the United States did not take advantage of the two-week period provided by the Panel to comment on the Descriptive Part in order to suggest those particular changes. Nevertheless, the Panel has decided to accept some of the United States' requests for changes in Section II of this Report in order to ensure the accuracy of the description of the facts in this Report"³

1.3 Article 15.2: requests to review precise aspects of the Report

1.3.1 Requirement to identify "precise aspects" of the interim report

3. In *Japan – Alcoholic Beverages II*, the Panel stated that the purpose of the interim review stage was to consider "specific and particular aspects" of the interim report, and indicated that it would address those arguments that it considered to be "sufficiently specific and detailed":

"In approaching the interim review stage, the Panel drew guidance from Article 15.2 DSU which states that 'a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members'. Whilst the Panel was willing to approach the interim review stage with the broadest possible interpretation of Article 15.2 DSU, it was of the view that the purpose of the review meeting is not to provide the parties with an opportunity to introduce new legal issues and evidence, or to enter into a debate with the Panel. In the view of the Panel, the purpose of the interim review stage is to consider specific and particular aspects of the interim report. Consequently, the Panel addressed the entire range of such arguments presented by the parties which it considered to be sufficiently specific and detailed."⁴

4. In *Australia – Salmon*, the Panel declined Australia's request for a "whole of report review" and instead confined its interim review to the parties' comments that related to "precise aspects" of the interim report:

"At the interim review meeting, Canada objected to Australia's request for 'a whole of report review'. Canada referred to Article 15.2 of the DSU which provides an

¹ Panel Report, *US – Clove Cigarettes*, para. 2.3.

² See e.g. Panel Reports, *US – Gasoline*, para. 5.6; *Mexico – Corn Syrup*, para. 6.7; and *US – Steel Safeguards*, para. 9.3.

³ Panel Report, *US – Clove Cigarettes*, para. 6.3.

⁴ Panel Report, *Japan – Alcoholic Beverages II*, para. 5.2.

opportunity for parties to request the panel to 'review precise aspects of the interim report'. According to Canada, it is not open to the Panel to consider anything other than comments dealing with 'precise aspects' of the interim report. We agree with Canada and have therefore only reviewed our interim report in light of the comments made by the parties which relate to 'precise aspects' of the interim report."⁵

5. Along the same lines, the Panel in *Japan – Apples (Article 21.5 – US)* recalled that:

"[P]ursuant to Article 15.2 of the DSU, a party may request the Panel 'to review precise aspects of the interim report'. We recall that a previous panel confronted with interim review comments questioning large sections of the interim report refused to address comments which did not relate to precise aspects of the interim report. We note that Japan's comments regarding our finding under Article 2.2 of the SPS Agreement do not identify specific paragraphs that should be modified."⁶

6. In *US/Canada – Continued Suspension*, the Panel recalled the statement above by the panel in *Australia – Salmon*, and noted that:

"We agree with the reasoning of the above-mentioned panel and therefore consider that the general comments by the European Communities did not require a specific reply from the Panel. We limited our replies to the portions of the report on which specific comments, in the form of precise requests for reconsideration on specific paragraphs, had been made by the European Communities. We addressed the EC general comments as part of our review of specific paragraphs."⁷

7. In *Indonesia – Iron or Steel Products (Chinese Taipei)*, the Panel found that the challenged measure did not constitute a safeguard measure subject to the obligations in the Agreement on Safeguards. In response to the complainants' comments at the interim review stage challenging that finding, the Panel stated:

"It is well established that the interim review stage of a panel proceeding is intended to allow parties to 'submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report''. The interim review process is not an opportunity for parties to advance arguments as to why they consider a particular 'theory' allegedly relied upon by a panel in its Interim Report to be incorrect. Neither is it a time for parties to enter into a debate about the merits of a panel's interpretation of relevant legal provisions, *a fortiori* when they have exchanged views on the subject matter during the course of a proceeding (as the parties have done in this dispute). Panels are not required to defend their findings and conclusions during the interim review stage. Issues of law addressed in a panel report and the legal interpretations developed by a panel may always be raised on appeal.

In our view, the complainants' requests raise questions about the merits of our analysis and findings, challenging the very basis of our conclusions and, therefore, go beyond the kinds of requests that properly fall within the scope of the interim review process envisaged in Article 15.2 of the DSU. The complainants' requests in paragraphs 2.6 to 2.9 of their request for interim review do not ask us to modify any specific paragraphs of the Interim Report. In effect, the complainants ask us to reconsider our objective evaluation of, and conclusions, regarding the issues addressed in our Report."⁸

8. In *Korea – Stainless Steel Bars*, the Panel noted comments made by Korea during the interim review process concerning its "promising appeal" if its desired changes were not made to the Interim Report. The Panel declined to take these comments into consideration because they did not pertain to a "precise aspect" of the Interim Report under Article 15.2 of the DSU, and

⁵ Panel Report, *Australia – Salmon*, para. 7.3.

⁶ Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 7.21.

⁷ Panel Reports, *Canada – Continued Suspension*, paras. 6.16-6.17, and *US – Continued Suspension*, para. 6.18.

⁸ Panel Report, *Indonesia – Iron or Steel Products (Chinese Taipei)*, Annex A-3, paras. 2.3-2.4.

because revising its Interim Report in response to a party's litigation strategy would not accord with the Panel's duty under Article 11 of the DSU. The Panel also noted the current, broader systemic context in which Korea had made reference to its "promising appeal" (i.e. a time at which no appellate mechanism had been agreed upon between the parties):

"We do not include a discussion of the comments made by Korea as part of the interim review process regarding its 'promising appeal' if its desired changes were not made to the Interim Report. We declined to take account of these comments because they did not pertain to a 'precise aspect' of the Interim Report, and because revising the Interim Report in anticipation of one party's litigation strategy would not accord with our duty to make an objective assessment of the law and facts before us, as required by Article 11 of the DSU. We are cognisant of the broader systemic context in which Korea makes reference to its 'promising appeal'. But this broader context does not mean that we can or should revise our assessment of the law or facts due to an indication by one party that it may pursue an appeal if such revisions are not made."⁹

9. In *India – Sugar and Sugarcane*, a case involving multiple complainants, it was agreed that Brazil (a co-complainant) would not participate in the interim review meeting since its claims did not relate to the precise aspects of the interim report under review:

"[T]he complainants indicated, *inter alia*, that the interim review meeting had to be confined to the two precise aspects identified by India. On 20 August 2021, India also indicated that the scope of the interim review meeting would be confined to the two precise aspects of the Interim Report identified in its request for review. Moreover, in India's view, since these two precise aspects did not concern the claims raised by Brazil (DS579), participation in the meeting had to be limited to the parties in the other two disputes (DS580 and DS581), the Panel, and the WTO Secretariat. On 24 August 2021, Brazil stated that it did not object to the interim review meeting proceeding without its participation, provided that the meeting was limited to the two issues raised in India's request for review of precise aspects of the Interim Report dated 12 August 2021. Brazil also stated that it would not submit any comments on India's request for review. Australia and Guatemala did not provide any comments on India's view in this regard. In accordance with Article 15.2 of the DSU, the Panel held an interim review meeting with the parties in DS580 and DS581 (i.e. Australia, Guatemala, and India) on 2 September 2021, in a virtual format, via Cisco Webex."¹⁰

1.3.2 Comments on the Panel's summary of parties' arguments

10. In *US – Steel and Aluminium Products (Turkey)*, the parties, in their request for the review of the interim report, asked the Panel to provide more detailed summaries of their arguments. The Panel declined the request:

"The Panel notes that the parties' requests for review of the Interim Report include requests to provide more detailed summaries of their arguments. Throughout the Report, the Panel has summarized the parties' arguments in order to facilitate understanding of the contested issues addressed in the Panel's reasoning and findings. The Panel has not comprehensively reproduced every aspect of the parties' arguments, which are more fully reflected in the executive summaries annexed to this Report. Rather, the Panel has summarized the relevant arguments in the context of its own objective assessment of the matter before it, having regard for its mandate and discretion to make such findings as will assist the DSB in making the recommendations or rulings provided for in the relevant covered agreements. In this regard, it is generally within the discretion of a panel to decide which arguments or evidence it addresses or relies on in reaching its findings. Subject to the explanations and modifications described below, the Panel considers that the parties' arguments are adequately reflected and addressed in this Report, including the annexes thereto, to fulfil the requirements of the Panel's mandate under the DSU."¹¹

⁹ Panel Report, *Korea – Stainless Steel Bars*, Annex A-3, para. 1.3.

¹⁰ Panel Report, *India – Sugar and Sugarcane*, para. 6.3.

¹¹ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 6.3.

1.3.3 New evidence

11. In *EC – Sardines*, the Appellate Body explained that the interim review stage is not an appropriate time to introduce new evidence:

"We also reject the European Communities' contention relating to the letters it submitted at the interim review stage. The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'. At that time, the panel process is all but completed; it is only—in the words of Article 15—'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU."¹²

12. In *EC – Selected Customs Matters*, the Panel considered that "the terms of Article 15.2 preclude us from taking into consideration evidence which is not reflected in the Interim Report", and therefore declined to consider certain new evidence submitted by the European Communities.¹³ On appeal, the Appellate Body found that the Panel did not err:

"With respect to Exhibits EC-167, EC-168, and EC-169 (which relate to the adoption of EC Regulation 2171/2005 and its consequences), we are of the view that the Panel did not err in declining to consider these pieces of evidence. As the Appellate Body stated in *EC – Sardines*, '[t]he interim review stage is not an appropriate time to introduce new evidence.' The Panel's decision to decline to consider Exhibits EC-167, EC-168, and EC-169 appears to us to be in line with the Appellate Body's statement in *EC – Sardines* that 'only ... 'precise aspects' of the [interim] report ... must be verified during the interim review ... [a]nd this ... cannot properly include an assessment of new and unanswered evidence.' In any event, although Exhibits EC-167, EC-168, and EC-169 might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how these exhibits showed uniform administration at the time of the establishment of the Panel."¹⁴

13. In *EC – Approval and Marketing of Biotech Products*, the Panel declined to take into account certain information provided by the European Communities during the interim review process, noting that the European Communities could have provided the evidence earlier:

"The Panel notes that Exhibit EC-167 contains a letter dated 18 May 2004. The EC second written submission, in which the European Communities referred to the withdrawal of the application in question, dates from 19 July 2004. Thus, the European Communities could have provided the relevant letter already at the time it filed its second written submission, or at least shortly thereafter. We note that paragraph 12 of the Panel's Working Procedures states in pertinent part that '[p]arties 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 rebuttals, answers to questions or comments made for purposes of rebutting answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause.' In this instance, the European Communities has not made a showing of good cause for submitting in March 2006 what it could have submitted already in May 2004. The fact that, in the European Communities' view, 'there is no point in waiting for an eventual implementation phase to start producing the document' certainly does not amount to the requisite 'good cause', since this argument provides no justification for submitting evidence that has been available for more than two years as late as the interim review stage. We also note that in *EC – Sardines* the Appellate Body stated in unqualified terms that '[t]he interim review stage is not an appropriate time to introduce new

¹² Appellate Body Report, *EC – Sardines*, para. 301.

¹³ Panel Report, *EC – Selected Customs Matters*, para. 6.6.

¹⁴ Appellate Body Report, *EC – Selected Customs Matters*, para. 259.

evidence' For these reasons, the Panel declines to make the change requested by the European Communities."¹⁵

14. In *EC – Bananas III (Article 21.5 – United States)*, the Panel recalled that the Appellate Body "has explicitly held that the interim review stage is not the appropriate time to introduce new evidence"¹⁶ and concluded that certain evidence submitted by the European Communities at the interim review meeting was "inadmissible at this late stage in the process".¹⁷

15. The Panel in *EC and certain member States – Large Civil Aircraft* also declined to consider certain evidence submitted by the European Communities at the interim review stage:

"As the European Communities itself argues in a different context, a party cannot change its arguments at this stage of the proceeding, nor is the Panel entitled to mischaracterise a party's arguments in its report. It would, in our view, be entirely inappropriate for us to make alternative findings on the basis of these newly-submitted data, as any such findings would necessarily be based on evidence and arguments not previously before us, and to which the United States has had only the most minimal opportunity to respond. To include such newly-submitted evidence, thereby allowing it to appear as if the arguments based on that evidence had been made during the proceeding, would in our view be unfair, and would deprive the United States of the due process to which it is entitled in dispute settlement in the WTO. Thus, even were we inclined to make alternative findings on the basis of the product groupings asserted by the European Communities, at most such findings would involve consideration of the evidence originally put before the Panel by the European Communities, and not these newly-submitted tables."¹⁸

1.3.4 Re-arguing points made in the proceeding

16. In *US – 1916 Act (EC)*, the Panel observed that "[t]he limited function of the interim review stage is confirmed by the existence of an appeal procedure, where parties may address issues of law covered in the panel report and challenge legal interpretations developed by the panel (Article 17.6 of the DSU)."¹⁹

17. In *Japan – Apples (Article 21.5 – US)*, the Panel stated that interim review is not the appropriate stage for rearguing a case on new grounds:

"Japan seems to suggest that we address at this stage the process of verification that exported apples are mature and symptomless. We largely agree with the United States that Japan's suggestion amounts to re-arguing the validity of the measure at issue as a whole from a different angle, by presenting the elements of the measure at issue as a 'production process control' necessary to *verify* that the exported product is mature, symptomless apples. We believe that the interim review is not the appropriate stage for rearguing the case on new grounds."²⁰

18. Along the same lines, the Panel in *Japan – DRAMs (Korea)* noted that Korea had re-argued many of the points already advanced in its submissions:

"In addressing Korea's arguments, we note that Korea has sought to re-argue many of the points that it made during its submissions. This is not necessarily the purpose of the interim review mechanism set forth at Article 15.2 of the *DSU*. In particular, we do not consider that Article 15.2 of the *DSU* requires us to provide a defence of our findings at the Interim Review stage."²¹

¹⁵ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 6.134.

¹⁶ Panel Report, *EC – Bananas III (Article 21.5 – United States)*, para. 6.16 (citing Appellate Body Report on *EC – Sardines*, para. 301).

¹⁷ Panel Report, *EC – Bananas III (Article 21.5 – United States)*, para. 6.18.

¹⁸ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 6.311.

¹⁹ Panel Report, *US – 1916 Act (EC)*, footnote. 279.

²⁰ Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 7.23.

²¹ Panel Report, *Japan – DRAMs (Korea)*, para. 6.2.

19. The Panel in *US – Poultry (China)* considered that interim review is "not the appropriate forum for relitigating arguments already put before a panel" and refrained from engaging in a new analysis of the US arguments on a particular point:

"The United States' other argumentation in support of its position on judicial economy seems to repeat or expand its prior submissions to this Panel on its views of the substantive interpretation of the provisions of the *SPS Agreement* and the GATT 1994. We note that the interim review is not the appropriate forum for relitigating arguments already put before a panel²² and that the Panel has already addressed the United States' arguments where appropriate in its findings. We will therefore briefly address the United States' arguments and will thus refrain from engaging in a new analysis of the United States' substantive arguments on these provisions."²³

20. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* rejected several requests by the parties that it reconsider its findings during the interim review period. With respect to one such request, the Panel considered that the interim review process was not the appropriate stage for the parties to re-argue their case:

"We have carefully considered this issue in our examination of Brazil's claim concerning the positive list requirement and believe that our findings fully address this and other arguments both parties raised with respect to this measure. We also recall that the interim review process is not an appropriate stage for the parties to re-argue their case on the basis of arguments that have already been debated. Therefore, we reject Brazil's request."²⁴

21. With respect to another such request, the Panel considered that raising a new argument during the interim review period equated to raising an argument in an untimely manner:

"Indonesia's proposed language suggests that there is a sanction provision similar to Article 31 of MoT 29/2019 as amended that would have been in existence during the original proceeding and that Brazil did not challenge. This is an assertion that Indonesia, so far, had not made in this proceeding; to introduce it now means raising it in an untimely manner. Furthermore, it is not clear to us whether the assertion implies any legal procedural argument regarding Brazil's ability to challenge something that allegedly already existed during the original proceeding. Finally, Indonesia chose to make this assertion without submitting the legislative text as evidence. We note in this respect that the wording of Article 26 of MoT 59/2016 as on the record in Exhibit IDN-109 rev. of the original proceeding is different from the wording quoted by Indonesia."²⁵

22. With respect to a third request, the Panel considered that its duty under Article 11 of the DSU, due process, and the purpose of the interim review period all weighed against considering the request:

"Even assuming we were to consider the assertion as admissible, despite it being untimely, given the above questions, our duty under Article 11 of the DSU and due process would require us to reopen the procedure to properly assess Indonesia's assertion. This is not the purpose of the interim review stage; nor would it be fair on the complainant who has a right to see this proceeding come to a close. For these reasons we reject Indonesia's request."²⁶

1.3.5 Changing findings

23. In *EC and certain member States – Large Civil Aircraft*, the Panel reconsidered two findings in the light of the European Communities' request for interim review. First, the Panel stated that

²² (footnote original) Panel Report, *Japan – DRAMS*, para. 6.2.

²³ Panel Report, *US – Poultry (China)*, para. 6.32.

²⁴ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.43. See also *ibid.* paras. 6.59 and 6.65.

²⁵ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.49.

²⁶ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 6.50.

"[i]n light of the arguments in the European Communities' request for interim review", it had "reconsidered" its decision to reject the internal rate of return (IRR) for some of the Launch Aid / Member State Financing (LA/MSF) contracts at issue. Ultimately, the Panel found that it "need not come to a firm conclusion" on that issue.²⁷ However, with respect to another separate issue, the Panel reconsidered certain evidence at the request of the European Communities, and, upon reconsideration, was persuaded by the European Communities that its original conclusion "was incorrect as a matter of fact". As a result, the Panel changed its conclusion and determined that a grant was not specific under Article 2.2 of the SCM Agreement.²⁸

24. In *US – Tuna II (Mexico)*, Mexico had argued that many of the US interim review comments were more in the nature of requests for reconsideration which are not appropriate for this phase of the proceedings. The Panel responded that requests to review precise aspects of the Panel's report may legitimately include requests for "reconsideration" of specific factual or legal findings:

"As stated on previous occasions by the Appellate Body, the interim review stage is not an appropriate moment to introduce new and unanswered evidence.²⁹ However, in our view, requests to review precise aspects of the Panel's report may legitimately include requests for 'reconsideration' of specific factual or legal findings, provided that such requests are not based on the presentation of new evidence. We therefore did not find it necessary to exclude *a priori* from consideration any request for review from either party on the sole basis that it would seek reconsideration by the Panel of some of its determinations. We note in this respect that Mexico itself requested the Panel to reconsider its decision to exercise judicial economy in relation to Mexico's claims under the GATT 1994 and sought a review of certain aspects of the Panel's determinations."³⁰

25. In *India – Export Related Measures*, India requested the Panel to review, under footnote 1 of the SCM Agreement, its analysis in the Interim Report regarding the exemption from central excise duty and to find that the exemption meets the conditions in the footnote. At the interim review stage, India clarified the modalities of the subsidy programme. In light of India's explanation of the record evidence, the Panel reconsidered its finding of violation to a finding of no violation concerning the relevant subsidy programme and thus revised the respective parts of the Interim Report.³¹

1.3.6 Jurisdictional issues

26. In *US – 1916 Act (EC)*, the Panel considered that the United States had not acted in a timely manner in raising a jurisdictional argument for the first time in the interim review stage. However, the Panel proceeded to address (and reject) the US objection on the merits:

"We agree that Article 15 of the DSU does not seem to prohibit a party from raising new arguments at the interim review stage, provided they are made in the context of a request for review of precise aspects of the interim report. However, we note that the DSU, in particular Appendix 3, provides for well defined steps in the proceedings, during which parties may raise arguments in support of their positions. The fact that the interim review takes place at the very end of those proceedings, once all submissions have been made, hearings have taken place and a draft report has been issued to the parties is evidence that this stage of the proceedings is not meant to address issues which could have been better addressed in the written and oral proceedings conducted by the Panel.³² Moreover, Article 3.10 provides that parties must engage in dispute settlement in good faith. This implies that they should not withhold until the interim review stage arguments that they could be legitimately

²⁷ Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 6.73-7.75.

²⁸ Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 6.230-6.231.

²⁹ (footnote original) See Appellate Body Report, *EC – Sardines*, para. 301.

³⁰ Panel Report, *US – Tuna II (Mexico)*, para. 6.3.

³¹ Panel Report, *India – Export Related Measures*, Annex A-2, paras. 5.12-5.20.

³² (footnote original) The limited function of the interim review stage is confirmed by the existence of an appeal procedure, where parties may address issues of law covered in the panel report and challenge legal interpretations developed by the panel (Article 17.6 of the DSU).

expected to have raised at a much earlier stage of the proceedings, in light of the claims developed in the first submissions.

As a result, we consider that there would be a number of reasons to reject the US argument as untimely. However, since Article 15.3 of the DSU provides that the final report shall include a discussion of the arguments made at the interim review stage, and since our decision to address the EC claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement may be subject to appeal, we consider that it is justifiable to explain why, in our view, the competence of the Panel to address a violation of Article VI and the Anti-Dumping Agreement is not affected by the findings of the Appellate Body in *Guatemala – Cement* and of the panel and Appellate Body in *Brazil – Desiccated Coconut*.³³

27. On appeal, the Appellate Body found that the Panel did not err in addressing the jurisdictional argument, notwithstanding that the United States had raised it for the first time at the interim review stage:

"We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.' We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner."³⁴

28. In *US – Carbon Steel*, the United States argued that a particular claim was outside of the Panel's terms of reference. The United States first advanced this argument in its comments on an EC response to a Panel question following the second meeting. The Panel proceeded to make findings on this claim in its interim report. In its request for interim review, the United States reiterated its argument that this claim was outside of the Panel's terms of reference. In response to the US request for interim review, the Panel agreed with the United States and found that the claim was indeed outside of its terms of reference.³⁵ The Panel clarified that "the United States made its objection known following the response by the European Communities that it was indeed making a separate claim in respect of this obligation. Therefore, this is not a situation in which we need to decide whether we can address an objection which could have been raised in a timely manner, but was not."³⁶

29. In *Korea – Certain Paper*, the Panel addressed certain additional arguments that Indonesia presented at the interim review stage, notwithstanding its view that these arguments could have been raised in a more coherent manner:

"We note that in our discussion of this claim in our interim report (*infra*, paras. 7.99-7.105), we addressed what we perceived to be the main arguments developed by Indonesia in this regard. At interim review, however, Indonesia drew our attention to certain additional arguments (*infra*, para. 7.108) regarding the calculation of interest expenses for CMI, which we had not addressed in our interim report. Although these arguments could, in our view, have been raised in a more coherent manner, we nevertheless felt obliged to address them and have accordingly revised our finding with respect to this claim, as contained in paragraphs 7.106-7.112 below."³⁷

³³ Panel Report, *US – 1916 Act (EC)*, paras. 5.18-519.

³⁴ Appellate Body Report, *US – 1916 Act*, para. 54.

³⁵ Panel Report, *US – Carbon Steel*, para. 7.24 and paras. 8.135-8.145.

³⁶ Panel Report, *US – Carbon Steel*, para. 7.24 and para. 8.136.

³⁷ Panel Report, *Korea – Certain Paper*, para. 6.5.

30. In *US – Zeroing (EC) (Article 21.5 – EC)*, the Panel noted that the US request for review contained a number of arguments that had not been made or developed during the proceeding, but would nonetheless address these arguments:

"The purpose of the interim review stage is not to allow a party to raise new arguments or develop arguments which were at most merely alluded to during the course of the proceeding. That said, we consider it useful to address certain of the points made by the United States in its request for review."³⁸

1.3.7 Failure to inform the panel of factual errors and omissions

31. In *EC – Asbestos*, the Panel indicated that while neither party claimed that the Panel had made any substantive error in its assessment of the facts, the letter attached to Canada's comments indicated that its request for review was "without prejudice to Canada's position on all the aspects of the Panel's Report". The Panel considered that:

"[I]f it had misunderstood or misrepresented some of the factual aspects of the case in its findings, the parties would need the interim review stage in order to make the necessary corrections or clarifications because, unlike errors of law, errors of fact cannot usually be modified on appeal. The parties should take advantage of this last opportunity to rectify the factual assessments of the Panel otherwise the Panel could unnecessarily be at risk of being accused of not having made an objective evaluation of the facts. It might be claimed that the fact that a party does not inform the Panel of a factual error in its findings may be contrary to the obligation in Article 3.10 of the Understanding, which provides *inter alia* that 'all Members will engage in these procedures [settlement of disputes] in good faith in an effort to resolve the dispute' (emphasis added)."³⁹

32. In *Chile – Price Band System (Article 21.5 – Argentina)*, Chile asserted that the Panel acted inconsistently with Article 11 of the DSU in refusing to re-assess certain aspects of the original price band system that the original panel and the Appellate Body misunderstood, and in relying on this "factual error" in its analysis of the measure at issue. The Appellate Body observed that:

"In examining this aspect of Chile's appeal, we first note that Chile did not raise this alleged misunderstanding concerning the operation of the original measure either to the original panel at the interim review stage, or during the appeal in the original proceedings."⁴⁰

33. In *US/Canada – Continued Suspension*, the European Communities indicated, in the introduction to its interim review request, that it would try to provide "some examples" of the "numerous and serious errors in the reasoning of the Panel on the scientific issues underpinning the dispute, but that it was not "not possible in the time available" to provide a "detailed and complete list of all omissions and errors" of the two interim reports, and "reserve[d] the right to make all its comments at the appeal stage". The Panel responded that:

"The Panel is surprised by the apparent choice of the European Communities to 'make all its comments' before the Appellate Body rather than before the Panel, at the procedural stage expressly designed for the purpose of considering any and all comments on the interim report. This is because the decision of the European Communities to provide only 'some examples' of errors of the Panel suggests that it has already decided to appeal the Panel report unless the Panel makes changes which the European Communities will not specify. It is also not clear whether the 'examples' given by the European Communities exhaust all its factual comments or whether it intends to make further comments on factual issues before the Appellate Body.

³⁸ Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26.

³⁹ Panel Report, *EC – Asbestos*, para. 7.2 and fn 3.

⁴⁰ Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 234.

Having regard to Article 17.6 of the DSU, we consider this to be equivalent to depriving the interim review stage of its purpose."⁴¹

1.3.8 Additional interim review meeting

1.3.8.1 General

34. An additional interim review meeting has been requested and held in a number of proceedings.⁴²

1.3.8.2 "At the request of a party"

35. In *US/Canada – Continued Suspension*, the Panel explained that it is for a party, and not for a panel, to decide whether an additional interim review meeting would be useful:

"The European Communities and Canada separately requested an interim review by the Panel of certain aspects of the interim report issued to the Parties on 31 July 2007. The European Communities stated that it stood ready to attend an interim review hearing to discuss the issues raised in its letter, 'should the Panel consider it useful'. The Panel notes that it is not for it to decide whether holding an interim review hearing would be useful. Article 15.2 of the DSU provides that it is '[a]t the request of a party [that] the panel shall hold a further meeting with the parties on the issues identified in the written comments.' The Panel does not understand the EC statement above as a request by the European Communities for the Panel to hold an additional meeting with the parties. Furthermore, the Panel notes that Canada did not request such a meeting. As a result, the Panel did not hold an interim review meeting."⁴³

36. In *Russia – Pigs*, the European Union requested a meeting with the Panel where Russia would have full opportunity to further comment on certain points and documents served by the European Union, "unless Russia and the Panel considered that unnecessary". The Panel decided to have an interim review meeting.

1.4 Other issues

1.4.1 Interim reports in cases involving multiple complainants / reports

37. In *US – Offset Act (Byrd Amendment)*, a case involving multiple complaining parties, the Panel declined a US request to issue a separate final report in the dispute brought by Mexico. The Panel rejected this request on the grounds that it was not timely. In the context of discussing this issue, Panel noted that:

"Upon considering the US request, we formed the view that the preparation of a separate report on the dispute brought by Mexico would delay issuance of the Panel's interim report. Although the United States only requested a separate final report, we are not prepared to issue a separate final report without also issuing a separate interim report. This is because we are not entitled to issue a final report on the dispute brought by Mexico without first having issued an interim report on that dispute. Otherwise Mexico would be denied its right to request a review of precise aspects of its interim report (DSU Article 15.2)."⁴⁴

⁴¹ Panel Reports, *Canada – Continued Suspension*, para. 6.14, and *US – Continued Suspension*, para. 6.15.

⁴² See, e.g. Panel Reports, *US – Gasoline*, para. 5.1; *Japan – Alcoholic Beverages II*, para. 5.1; *US – Underwear*, para. 6.1; *Mexico – Corn Syrup*, para. 6.1; *Thailand – Cigarettes (Philippines)*, para. 6.1; and *Russia – Pigs*, paras. 6.1-6.2.

⁴³ Panel Report, *Canada – Continued Suspension*, para. 6.2. See also Panel Report, *US – Continued Suspension*, para. 6.2.

⁴⁴ Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.5.

38. On appeal, the Appellate Body rejected the United States' claim that the Panel acted inconsistently with Article 9.2 of the DSU by not issuing a separate panel report in the dispute brought by Mexico. However, the Appellate Body noted that:

"We express no view on the question whether the Panel was correct in concluding, in paragraph 7.5 of the Panel Report, that it was 'not entitled to issue a final report on the dispute brought by Mexico without first having issued an interim report on that dispute'. In this respect, we note moreover that the United States has not requested a finding with respect to whether the Panel erred in its interpretation of Article 15.2 of the DSU."⁴⁵

39. In *US – Steel Safeguards*, a case involving multiple complaining parties, the United States requested that the panel issue eight separate panel reports pursuant to Article 9.1 of the DSU. The United States made this request a few days before the scheduled issuance of the descriptive part of the report. The Panel indicated that, in the circumstances of that case, it would issue a single descriptive part:

"[A]s indicated in Article 15 of the DSU, a Panel Report shall contain a Descriptive Part which includes a description of the factual and legal allegations and arguments of the parties to the dispute. The Panel believes that the Descriptive Part of any panel report should include an objective reflection of the relevant panel process. Therefore, in light of (i) the circumstances of the single panel process followed for the disputes WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258 and WT/DS259; (ii) the timing of the US request, that is, a few days before the issuance of the Descriptive Part; (iii) the fact that the Panel is examining a series of safeguard measures that are in place for only three years; (iv) the need to ensure due process, the Panel is of the view that a single Descriptive Part should, in any case, be issued by the Panel. Should the Panel reach the conclusion that multiple Panel Reports are to be issued, all such Panels Report will have the same Descriptive Part.

The parties will note when they receive the draft Descriptive Part of the Panel Report this week, that the Panel has tried to ensure that collective and individual complainant's claims, allegations and arguments are properly reflected, together with the relevant United States' defenses. As provided for in Article 15.1 of the DSU, all parties will be invited to comment and suggest changes to this draft Descriptive Part to ensure that it is an objective reflection of all the parties' legal and factual allegations and arguments."⁴⁶

1.4.2 Request for separate interim report on particular issue

40. In *US – Upland Cotton*, the Panel rejected a US request for a separate interim report concerning Article 13 of the Agriculture Agreement:

"Article 15.2 of the DSU only envisages one interim report in respect of the entire matter before a panel. It appears to us that this is because multiple interim report procedures would unduly delay the panel process without benefiting the quality of the final panel report. We therefore rejected this suggestion."⁴⁷

1.4.3 Confidentiality of the interim report

41. A number of panels have expressed disappointment over apparent breaches, by disputing parties, of the confidentiality of the interim report. For example, in *US – Underwear*, the Panel "expressed its disappointment about the apparent breach of confidentiality and reiterated the utmost importance of maintaining confidentiality so as to preserve the credibility and integrity of the dispute settlement process, particularly at the interim review stage."⁴⁸

42. In *US – Steel Safeguards*, the Panel expressed its disappointment as follows:

⁴⁵ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, fn 267.

⁴⁶ Panel Reports, *Steel – Safeguards*, para. 2.18.

⁴⁷ Panel Report, *US – Upland Cotton*, para. 7.298.

⁴⁸ Panel Report, *US – Underwear*, para. 6.3.

"We would like to address the issue of confidentiality of the Interim Reports. When, on 26 March 2002, we transmitted our Interim Reports to the parties, we clearly indicated that such Reports were confidential. Indeed, pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. We had also explicitly emphasized at all our meetings with the parties that the panel proceedings were confidential. This was accepted by the parties and reflected in the Panel's working procedures and in all our relevant correspondence with the parties. Therefore, we are concerned to discover that parties have not respected this confidentiality obligation and have disclosed aspects of the Panel's Interim Reports. We consider that this lack of respect of a specific requirement imposed by the DSU and the Panel's working procedures is regrettable and should not remain unmentioned."⁴⁹

43. In *EC – Approval and Marketing of Biotech Products*, the Panel stated that:

"[E]ach Party formally stated that it had no involvement in the leaks of the confidential interim findings and conclusions. It is plain to see that these statements cannot easily be reconciled with the fact that these leaks did occur. However, as is apparent from the above summary of the Parties' responses to the Panel's letters, the Panel was not provided sufficient reliable information to determine the origin(s) of the leaks. The Panel subsequently sent a letter to the Parties to inform them that it intended to take appropriate action to try to avoid further leaks of the reports upon issuance of the final reports (see the Panel's letter to the Parties contained in Annex K).

It should be noted, in addition, that the Institute for Agriculture and Trade Policy and Friends of the Earth submitted *amicus curiae* (friend-of-the-court) briefs, requesting the Panel to accept and consider their briefs. The Panel acknowledged receipt of these briefs, shared them with the Parties and Third Parties, and accepted them as such. In the light of this, it is surprising and disturbing that the same NGOs which claimed to act as *amici*, or friends, of the Panel when seeking to convince the Panel to accept their unsolicited briefs subsequently found it appropriate to disclose, on their own websites, interim findings and conclusions of the Panel which were clearly designated as confidential."⁵⁰

1.4.4 Additional set of comments in the light of a new Appellate Body Report

44. In *US – Zeroing (Japan)*, the Panel submitted its interim report to the parties on 8 March 2006, the requests for interim review were received on 22 March 2006, and the parties' comments on one another's interim review requests were received on 5 April 2006. On 20 April 2006, the Panel informed the parties that it had completed its review of the comments made during the interim review process, and was in a position to issue its final report to the parties. However, the Panel indicated that it was aware that the Appellate Body Report in *US – Zeroing (EC)* had been circulated on 18 April 2006, and recognized that those findings had a direct bearing on the contents of its interim report. After consulting with the parties, the Panel invited the parties to submit written comments on any relevant issues of law addressed in the Appellate Body Report, and decided to hold an additional meeting with the parties.⁵¹

1.4.5 Translation issues

45. In *EC and certain member States – Large Civil Aircraft*, the Panel denied a request by the European Communities to translate the entire interim report into French and Spanish.⁵²

46. The Panel in *EC and certain member States – Large Civil Aircraft* also rejected an EC request to translate certain quotations appearing in the interim report, taken from Spanish or French language exhibits, into English.⁵³

⁴⁹ Panel Reports, *US – Steel Safeguards*, para. 9.41.

⁵⁰ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 6.195-6.196.

⁵¹ Panel Report, *US – Zeroing (Japan)*, para. 6.2.

⁵² Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.177.

1.4.6 Changes to the interim report in the absence of a request from a party

47. In *Turkey – Rice*, the United States objected to the Panel adding certain statements to the final report that had not appeared in the interim report. At issue was an additional section on "Special and Differential Treatment", in which the Panel noted that Türkiye "is a developing country Member" and explained how the Panel had taken Türkiye's status into account when preparing and revising the timetable for the proceeding. The United States considered this to be a "new finding", and noted that neither party had raised or commented on this issue as part of the interim review stage. The Panel declined the US request to delete this section from its final report, and indicated that the section at issue was "only a statement that reflects what occurred during the panel proceedings and does not affect the rights and obligations of either party in the current dispute".⁵⁴

Current as of: December 2023

⁵³ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 6.19.

⁵⁴ Panel Report, *Turkey – Rice*, Annex K-3.