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1 ARTICLE 16

1.1 Text of Article 16

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.
2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.
3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.
4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting⁹ unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

*(footnote original)*⁷ If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

1.2 Legal effect of adopted panel reports

1.2.1 In general

1. In *Japan – Alcoholic Beverages II*, the Appellate Body reversed the Panel's statement that adopted panel reports constituted subsequent practice in a specific case under Article 31.3(b) of the Vienna Convention. The Appellate Body held that:

"Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."¹

2. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clarified that panel reports are also not part of the "context" within the meaning of Article 31 of the Vienna Convention:

"We note that the definition of 'context' in Article 31(2) of the *Vienna Convention* makes no mention of jurisprudence. Panel reports in previous disputes do not form part of the context of a term or provision in the sense of Article 31(2) of the *Vienna Convention*. Rather, the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the WTO *acquis* and have to be taken into account as such."²

1.2.2 Panel findings not appealed

3. In *Canada – Periodicals*, the Appellate Body noted that "a Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal."³

1.2.3 Panel reports regarding the same subject-matter in parallel dispute by other complainant(s)

4. In *India – Patents (EC)*, the Panel addressed the question of whether, and if so to what extent, it was bound by the reports by the Panel and the Appellate Body regarding the same subject-matter in *India – Patents (US)*. The Panel concluded that:

"[P]anels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same. In examining dispute WT/DS79 we are not legally bound by the conclusions of the Panel in dispute WT/DS50 as modified by the Appellate Body report. However, in the course of 'normal dispute settlement procedures' required under Article 10.4 of the DSU, we will take into account the conclusions and reasoning in the Panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the DSU, which stresses the role of the WTO dispute settlement system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings (which concern has been referred to by both parties). In our view, these considerations form the basis of the requirement of the referral to the 'original panel' wherever possible under Article 10.4 of the DSU."⁴

¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.

² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 325.

³ Appellate Body Report, *Canada – Periodicals*, fn 28.

⁴ Panel Report, *India – Patents (EC)*, para. 7.30.

1.2.4 Substantive findings in panel reports reversed on procedural/jurisdictional grounds

5. In *Guatemala – Cement I*, the Appellate Body found that the dispute was not properly before the Panel and therefore reversed that Panel on jurisdictional grounds. The Panel in *Guatemala – Cement II* stated that:

"We note that the Appellate Body ruled in *Guatemala – Cement I* that 'the dispute was not properly before the Panel', and that it therefore could not consider any of the substantive issues raised in the alternative by Guatemala. In other words, the Appellate Body found that the panel in *Guatemala – Cement I* should never have reached the substance of the dispute. We therefore consider that the substantive findings of the panel in *Guatemala – Cement I* are in this respect similar to those of unadopted panel reports, i.e., while they have no legal status, they may nevertheless provide useful guidance to the extent that we consider them relevant and persuasive. We recall in any event Mexico's assertion that its arguments in this dispute are put before us independently of their having been supported, or not, by a previous panel."⁵

1.2.5 Failure to distinguish findings in prior panel reports

6. In *EC – Salmon (Norway)*, Norway claimed that Articles 2.1 and 2.6 of the Anti-Dumping Agreement must be interpreted to require an investigating authority to define the product under consideration to include only products that are all "like". In the course of rejecting Norway's claim, the Panel stated that:

"[T]his very issue, and many of the arguments raised by Norway, have been previously addressed by other Panels. Norway has not attempted to distinguish the views of those Panels from the circumstances of this case. While we are not bound by the decisions of other Panels, we nonetheless consider it appropriate to review those decisions to assess the similarities and differences in the underlying facts, and determine whether the analysis of those Panels is helpful in our assessment of the arguments in this case."⁶

1.2.6 As between the parties: final resolution of the dispute

7. In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body clarified that Appellate Body Reports that are adopted by the DSB must be treated by the parties to a particular dispute "as a final resolution to that dispute".⁷ In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body clarified that the same holds true with respect to adopted panel reports:

"The issue raised in this appeal is similar to the issue we resolved in *US – Shrimp (Article 21.5 – Malaysia)*. In this appeal, however, the original panel's finding on India's claim under Article 3.5 relating to 'other factors' was *not appealed* in the original dispute. Accordingly, the finding of the original panel relating to that claim was adopted by the DSB as part of a *panel* report, and, therefore, Article 17.14, which deals with the adoption of *Appellate Body Reports*, does not dispose of the issue before us.

All the same, in our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim. This conclusion is supported by Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1 of the DSU. Where a panel concludes that a measure is inconsistent with a covered agreement, that panel shall *recommend*, according to Article 19.1, that the Member concerned bring that measure into conformity with that agreement. A panel report, including the *recommendations* contained therein, shall be *adopted* by the DSB within the time period specified in Article 16.4—unless appealed. Members are to *comply* with

⁵ Panel Report, *Guatemala – Cement II*, para. 8.15.

⁶ Panel Report, *EC – Salmon (Norway)*, para. 7.69.

⁷ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

recommendations and rulings *adopted* by the DSB promptly, or within a reasonable period of time, in accordance with paragraphs 1 and 3 of Article 21 of the DSU. A Member that does not comply with the recommendations and rulings adopted by the DSB within these time periods must face the consequences set out in Article 22.1, relating to compensation and suspension of concessions. Thus, a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB—with respect to the particular claim and the specific component of the measure that is the subject of the claim. Indeed, the European Communities and India agreed at the oral hearing that both panel reports and Appellate Body Reports would have the same effect, in this respect, once adopted by the DSB.

On this point, we recall that we resolved the question of the effect of findings adopted by the DSB as part of a *panel* report in the same vein in *Mexico – Corn Syrup (Article 21.5 – US)*. In that implementation dispute, we relied on Article 3.2 of the DSU, which emphasizes the need for security and predictability in the trading system, and on Article 3.3 of the DSU, which stresses the necessity for the prompt settlement of disputes. There, we treated certain findings of the original panel that had *not* been appealed in the original proceedings, and that had been adopted by the DSB, as a final resolution to the dispute between the parties in respect of the particular claim and the specific component of the measure that was the subject of the claim. We observed there that 'Mexico seems to seek to have us revisit the original panel report', and added that:

'... the original panel report, regarding the *initial* measure (SECOFI's original determination), has been adopted and that these Article 21.5 proceedings concern a *subsequent* measure (SECOFI's redetermination). We also note that Mexico did not appeal the original panel's report, and that Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes. We see no basis for us to examine the original panel's treatment of the alleged restraint agreement.' (original italics)

We, therefore, agree with the Panel in this dispute that:

'... the same principle [as that expressed in Article 17.14] applies to those aspects of the Panel's report that are not appealed and are thus not addressed by the Appellate Body. Thus, the portions of the original Report of the Panel that are not appealed, together with the Appellate Body report resolving the issues appealed, must, in our view, be considered as the final resolution of the dispute, and must be treated as such by the parties, and by us, in this proceeding. (footnote omitted)''⁸

1.3 Article 16.4: 60-day deadline for adopting / appealing panel report

1.3.1 Circumvention of 60-day deadline

8. In *EC – Sardines (2002)*, the European Communities withdrew its original Notice of Appeal, and re-filed a new one on the same day. The European Communities withdrew its Notice of Appeal on the condition that its amended, re-filed Notice of Appeal be accepted. The appellee (Peru) objected to the appellant (European Communities) "conditionally" withdrawing its Notice of Appeal and filing a new one. In that case, the Appellate Body considered that the manner in which the European Communities had proceeded was reasonable and permissible. However, the Appellate Body stated that:

⁸ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 92-95.

"[W]e believe there are circumstances that, although not constituting 'abusive practices', would be in violation of the DSU, and would, thus, compel us to disallow the conditional withdrawal of a notice of appeal as well as the filing of a replacement notice. For example, if the conditional withdrawal or the filing of a new notice were to take place after the 60-day deadline in Article 16.4 of the DSU for adoption of panel reports, this would effectively circumvent the requirement to file appeals within 60 days of circulation of panel reports. In such circumstances, we would reject the conditional withdrawal and the new notice of appeal."⁹

9. In *US – COOL* and *US – Tuna II (Mexico)*, following the joint requests by the parties, the DSB extended the adoption period of the panel reports to 126 and 127 days, respectively, "in view of the 'current workload of the Appellate Body' and in order to 'provide greater flexibility in scheduling any possible appeal of the panel report[s] in this dispute'."¹⁰

1.3.2 Table showing length of time taken in WTO proceedings to date

10. For a table providing information on the length of time taken in WTO proceedings to date from: (i) the date of circulation of a panel report to the date of its appeal (Article 16.4 of the DSU); and (ii) the date of circulation of a panel report to the date of its adoption without an appeal (Article 16.4 of the DSU), see the chapter of the Analytical Index on "DS information tables".

Current as of: December 2023

⁹ Appellate Body Report, *EC – Sardines*, para. 147.

¹⁰ Appellate Body Reports, *US – COOL*, para. 10; and *US – Tuna II (Mexico)*, para. 4, fn 11.