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1 ARTICLE 9

1.1 Text of Article 9

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.
2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.
3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

1.2 Article 9.1: "a single panel should be established ... whenever feasible"

1.2.1 General

1. In *India – Patents (EC)*, India requested the Panel to dismiss the European Communities' complaint as inadmissible on procedural grounds. India argued that since it was "feasible" for the European Communities to have brought its complaint simultaneously with the United States' complaint (WT/DS50), the European Communities was required to do so. India contended that this was supported by a strict interpretation of Articles 9.1 and 10.4 of the DSU. The Panel considered that the terms of Article 9.1 are directory or recommendatory, not mandatory. Further to concluding that it was not feasible for the DSB to establish a single panel, the Panel found that there was no violation of Article 9.1:

"In order to assess India's argument, we need to consider: (i) the nature of the requirement contained in Article 9.1; (ii) the rights generally of Members under the DSU; and (iii) whether it was feasible to establish a single panel in this particular case.

Given their ordinary meaning, the terms of Article 9.1 are directory or recommendatory, not mandatory. They direct that a single panel *should* (not 'shall') be established, and that direction is limited to cases where it is *feasible*. We disagree with India that the addressee of Article 9.1 is not clear. Article 9.1 is clearly a code of conduct for the DSB because its provisions pertain to the establishment of a panel, the authority for which is exclusively reserved for the DSB. As such, Article 9.1 should not affect substantive and procedural rights and obligations of individual Members under the DSU.

Indeed, the text of Article 9.1, as well as the text of Article 9.2, which is part of the context of Article 9.1, make it clear that Article 9 is not intended to limit the rights of WTO Members. In our view, one of those rights is the freedom to determine whether and when to pursue a complaint under the DSU. According to Article 3.7 of the DSU, '[t]he aim of dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'. It would be inconsistent with this aim of the dispute settlement mechanism to attempt to force Members to take decisions earlier than they wish on whether to request a panel in a dispute, or to continue consultations aimed at securing a mutually acceptable solution.

As to feasibility, it is not disputed by the parties that the complaints by the United States (WT/DS50) and the EC (WT/DS79) relate to the same matter, i.e. India's compliance with Article 70.8 and 70.9 of the TRIPS Agreement. Was it then 'feasible' for the DSB to establish a single panel at the time of the United States' panel request in November 1996? The answer is no, because at that time the EC had not requested the establishment of a panel. Indeed, the EC was not even entitled to make such a request as it was not until 28 April 1997 that the EC requested consultations with India on this matter."¹

2. For an information on cases where a single panel was established under Article 9.1 to address multiple complaints, please see the chapter of the Analytical Index on "DSU information tables".

1.3 Article 9.2: separate reports

1.3.1 General

3. In *EC – Bananas III*, the European Communities requested the Panel, pursuant to Article 9 of the DSU, to prepare four panel reports in this case – one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Panel interpreted Article 9 as requiring it to grant the request and considered that one of the objectives of Article 9 was to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not challenged by one of the complaining parties participating in a panel proceeding:

"We interpret the terms of Article 9 to require us to grant the EC request. However, in light of the fact that the Complainants presented joint oral submissions to the Panel, joint responses to questions and a joint rebuttal submission, as well as the fact that they have collectively endorsed the arguments made in each other's first submissions, we must also take account of the close interrelationship of the Complainants' arguments.

In our view, one of the objectives of Article 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under

¹ Panel Report, *India – Patents (EC)*, paras. 7.13-7.16.

Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in a panel proceeding. Our reports must bear this objective in mind.

For purposes of determining whether a Complainant in this matter has made a claim, we have examined its first written submission, as we consider that document determines the claims made by a complaining party. To allow the assertion of additional claims after that point would be unfair to the respondent, as it would have little or no time to prepare a response to such claims. In this regard, we note that paragraph 12(c) of the Appendix 3 to the DSU on 'Working Procedures' foresees the simultaneous submission of the written rebuttals by complaining and respondent parties, a procedure that was followed in this case. To allow claims to be presented in the rebuttal submissions would mean that the respondent would have an opportunity to rebut the claims only in its oral presentation during the second meeting. In our view, the failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants."²

4. In *EC – Chicken Cuts*, the Panel, although having issued a single interim report to the complainants (Brazil and Thailand), decided to issue separate final reports following a request from the European Communities. The Panel noted that the European Communities had reserved its right to separate reports under Article 9.2 early in the proceedings, and that neither of the complainants had objected to the European Communities' request.³

1.3.2 Timing of the request for separate reports

5. In *US – Offset Act (Byrd Amendment)*, the Panel rejected a request by the United States for a separate report for the dispute brought by Mexico on the grounds that the request had been filed too late in the process (two months after the issuance of the descriptive part) and no explanation had been provided on why it was not filed earlier. The Panel considered that requests made under Article 9.2 "should be made in a timely manner, since any need to prepare separate reports may affect the manner in which a panel organises its proceedings." On appeal, the Appellate Body found that the Panel did not err in denying the United States' request:

"By its terms, Article 9.2 accords to the requesting party a broad right to request a separate report. The *text* of Article 9.2 does not make this right dependent on any conditions. Rather, Article 9.2 explicitly provides that a panel 'shall' submit separate reports 'if one of the parties to the dispute so requests'. Thus the text of Article 9.2 of the DSU contains no requirement for the request for a separate panel report to be made *by a certain time*. We observe, however, that the text does not explicitly provide that such requests may be made *at any time*.

Having made these observations, we note that Article 9.2 must not be read in isolation from other provisions of the DSU, and without taking into account the overall object and purpose of that Agreement. The overall object and purpose of the DSU is expressed in Article 3.3 of that Agreement which provides, relevantly, that the 'prompt settlement' of disputes is 'essential to the effective functioning of the WTO.' If the right to a separate panel report under Article 9.2 were 'unqualified', this would mean that a panel would have the obligation to submit a separate panel report, pursuant to the request of a party to the dispute, *at any time during the panel proceedings*. Moreover, a request for such a report could be made for whatever reason—or indeed, *without any reason*—even on the day that immediately precedes the day the panel report is due to be circulated to WTO Members at large. Such an interpretation would clearly undermine the overall object and purpose of the DSU to ensure the 'prompt settlement' of disputes."⁴

² Panel Report, *EC – Bananas III*, paras. 7.55-7.57.

³ Panel Report, *EC – Chicken Cuts*, paras. 6.19-6.21. See also Panel Report, *EC – Sugar Subsidies (Brazil)*, para. 1.13 and Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 2.13.

⁴ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 310-311 and 315-316.

6. Recalling its conclusions in *EC – Hormones* on panels' discretion in dealing with procedural issues, the Appellate Body considered that the Panel had acted within its discretion when rejecting the late request for separate reports:

"[W]e note that the first sentence in Article 9.2 provides that it is for the panel to 'organize its examination and present its findings in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired'. Our comments in *EC – Hormones* about panels' discretion in dealing with procedural issues are pertinent here:

'... the DSU and in particular its Appendix 3, leave panels a *margin of discretion* to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling. (emphasis added)'

In our view, the Panel acted within its 'margin of discretion' by denying the United States' request for a separate panel report. We do not believe that we should lightly disturb panels' decisions on their procedure, particularly in cases such as the one at hand, in which the Panel's decision appears to have been reasonable and in accordance with due process. We observe that, on appeal, the United States is not claiming that it suffered any prejudice from the denial of its request for a separate panel report. We also note that the first sentence of Article 9.2 refers to the rights of all the parties to the dispute. The Panel correctly based its decision on an assessment of the rights of all the parties, and not of one alone."⁵

7. In *US – Steel Safeguards*, the United States requested the issuance of separate reports three days before the issuance of the descriptive part to the parties. The Panel considered that the United States' request for separate panel reports "was *not necessarily* made in an *untimely* fashion". The Panel used the word "necessarily" because it considered that despite the fact that the request was made when the Panel's process was quite advanced, this "did not necessarily prevent the Panel from settling the dispute in a prompt fashion".⁶

1.3.3 Structure of separate reports

8. In *EC – Bananas III*, the European Communities requested the Panel, pursuant to Article 9 of the DSU, to prepare four panel reports in this case – one each for the claims of Ecuador, Guatemala and Honduras (who filed a joint first submission), Mexico and the United States. The Panel agreed and issued four separate reports with identical descriptive parts but with findings sections that differed according to the claims of the various complainants:

"[W]e have decided that the description of the Panel's proceedings, the factual aspects and the parties' arguments should be identical in the four reports. In the 'Findings' section, however, the reports differ to the extent that the Complainants' initial written submissions to the Panel differ in respect of alleging inconsistencies with the requirements of specific provisions of specific agreements ... [.]"⁷

9. In *US – Steel Safeguards*, further to the request by the United States to issue separate reports, the Panel issued its Reports in the form of one document constituting eight panel reports. The document included a common cover page, descriptive part and findings but individualized conclusions:

"In exercising our 'margin of discretion' under Article 9.2 of the DSU, and taking into account the particularities of this dispute, the Panel decides to issue its Reports in the form of one document constituting eight Panel Reports. For WTO purposes, this

⁵ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 315-316.

⁶ Panel Reports, *US – Steel Safeguards*, para. 7.724.

⁷ Panel Reports, *EC – Bananas III*, para. 7.58. See also Panel Report, *China – Auto Parts*, paras. 2.7 and 8.1.

document is deemed to be eight separate reports, each of the reports relating to each one of the eight complainants in this dispute. The document comprises a common cover page and a common Descriptive Part. This reflects the fact that the eight steel safeguard disputes were reviewed through a single panel process. This single document also contains a common set of Findings in relation to each of the claims that the Panel has decided to address. In our exercise of judicial economy, we have mainly addressed the complainants' common claims and on that basis, we were able to issue a common set of Findings which, we believed, resolved the dispute. Finally, this document also contains Conclusions and Recommendations that are particularised for each of the complainants, with a separate number (symbol) for each individual complainant."⁸

10. In *Canada – Wheat Exports and Grain Imports*, the DSB had successively established two panels to resolve the dispute (the "March Panel" and the "July Panel"). See paragraph 18 below in this regard. In response to a question posed by the Panel, the parties indicated that they did not wish the two Panels to issue separate reports in separate documents. The two Panels saw no compelling reason to proceed differently and therefore decided to issue their separate reports in the form of a single document.⁹

11. The Panel in *EC – Chicken Cuts* noted that the complainants to the dispute, Brazil and Thailand, endorsed each other's respective arguments in the proceeding and also that at the European Communities' request, the parties' arguments were contained in the findings section of its report. Thus, the only material difference between the separate Panel reports in respect of Brazil's and Thailand's complaints was the cover page and the conclusions; the descriptive part and the findings were common to both Reports.¹⁰

12. In *EC – Approval and Marketing of Biotech Products*, all parties agreed that the Panel could issue a single document constituting three reports; that the introductory and descriptive parts could be common to all reports; that the findings could be common to the three reports, except where the claims presented and the evidence submitted by the Complaining Parties were different; and that the conclusions and recommendations should be different for each report. The Panel explained that:

"The Panel saw no reason to disagree with the approach suggested by the Parties. Accordingly, we decided to prepare and issue one single document constituting three separate panel reports. This is why the present document bears the symbols and DS numbers of all three complaints, *i.e.*, DS291 for the complaint by the United States, DS292 for the complaint by Canada and DS293 for the complaint by Argentina. The present document comprises a common introductory part and some common annexes. The descriptive part and certain annexes contain separate sections for each Party. Thus, the description of, *e.g.*, the United States' arguments is part of the report concerning the United States' complaint. The description of the European Communities' arguments is basically relevant to all three reports, as the European Communities has provided an integrated defence in this case. However, some portions of the European Communities' arguments are relevant to only one report.

Regarding the findings section of the three reports, we have particularized the findings for each of the Complaining Parties only where we found it necessary to do so. Thus, many (although not all) of the legal interpretations developed by the Panel are common to all three reports. On the other hand, we have particularized the conclusions for each claim made by a Complaining Party. To distinguish the complaint-specific conclusions, we use the appropriate DS numbers. Hence, a conclusion which is part of the report concerning the United States' complaint is preceded by the reference 'DS291 (United States)'. Where we have made findings, or relied on materials submitted as evidence²¹⁹, which are specific to one of the three complaints, we have indicated this by using the relevant DS number, if it was not otherwise clear from the relevant context. Also, in summarizing the Complaining Parties' arguments, we have provided separate summaries for each Complaining Party where the

⁸ Panel Reports, *US – Steel Safeguards*, para. 7.725.

⁹ Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 6.1-6.2.

¹⁰ Panel Report, *EC – Chicken Cuts*, para. 6.21.

arguments were different; where the Complaining Parties' arguments were identical or very similar, we have generally prepared an integrated argument summary for all Complaining Parties. With regard to the final section of this document, entitled 'Conclusions and Recommendations', we note that the conclusions we reached and the recommendations we made have been particularized for each Complaining Party. Accordingly, this document contains three independent sets of conclusions and recommendations.

In our view, the approach outlined above satisfies the requirement contained in Article 9.2 that a single panel present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. We also consider that this approach is consistent with the approach followed in a similar situation by the panel in *US – Steel Safeguards*.¹¹

13. Similarly, the panel in *EC – IT Products* issued the report as a single document with "the conclusions and recommendation for each of the disputes be set out on separate pages with each page bearing only the Report Symbol relating to that dispute".¹²

14. In *Philippines - Taxes on Distilled Spirits*, the Panel explained that its findings were "issued in the form of a single document, containing two separate reports. The Panel's conclusions and recommendations for each of the disputes are set out on separate pages, with each page bearing only the report symbol relating to that dispute."¹³

1.3.4 Separate Appellate Body reports

15. In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body issued a single document with separate Findings and Conclusions in respect of each dispute.¹⁴

16. In *US/Canada – Continued Suspension*, the United States and Canada confirmed their preference for two separate Appellate Body reports. The Appellate Body issued separate reports, which are identical except for the Findings and Conclusions section.¹⁵

17. In *China – Auto Parts*, the United States requested the Appellate Body to issue three separate reports in this appeal, setting out its conclusions and recommendations separately for each panel report under appeal. The other participants and the third participants were afforded an opportunity to comment on this request at the oral hearing. They made no objection to the United States' request.¹⁶ The Appellate Body issued the report as a single document, with separate Findings and Conclusions sections for each report.

1.4 Article 9.3: multiple panels established to examine complaints relating to the same matter

1.4.1 "to the greatest extent possible the same persons shall serve as panelists on each of the separate panels"

18. For an information on cases where the same panelists served on separate panels pursuant to Article 9.3, see the chapter of the Analytical Index on "DSU information tables".

¹¹ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.5-7.9.

¹² Panel Report, *EC – IT Products*, para. 2.4.

¹³ Panel Report, *Philippines - Taxes on Distilled Spirits*, fn 10.

¹⁴ Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 320-325.

¹⁵ Appellate Body Report, *US/Canada – Continued Suspension*, fn 62.

¹⁶ Appellate Body Report, *China – Auto Parts*, para. 12.

1.4.2 "to the greatest extent possible ... the timetable for the panel process in such disputes shall be harmonized"

19. In *US – Shrimp (Thailand)* and *US – Customs Bond Directive*, the DSB established two different Panels, which later on were composed of the same panellists. At the DSB, Thailand had stated that it had expected the establishment of a single Panel for both proceedings in accordance with Article 9.1 of the DSU and that, in the absence of that single Panel, it expected that the same persons would be appointed as panelists in the two disputes and that the timetables would be harmonized, pursuant to Article 9.3 of the DSU. The representative of the United States responded that, although the Panel in DS343 had already been established, the same persons could be appointed to serve as panelists in the two proceedings and the timetables of the separate Panels could be harmonized. On 23 February 2007, the Panel sent to the parties a joint Timetable as well as separate, albeit similarly worded, Working Procedures. In this joint communication, the Panel informed the parties that it had decided the following:

"[The Panel] intends to conduct both proceedings so as to ensure that the parties who are also third parties in each other's proceedings, have adequate opportunity and ability to participate to the fullest extent in a manner which is compatible with the provisions of the *DSU*. To this end, after having heard the parties' views, the Panel intends to take the following steps:

- (i) holding consolidated substantive meetings with the parties (Thailand, India and US);
- (ii) allowing the complainants during the joint meetings to comment on each others' argumentation, provided they limit themselves to those claims they have in common;
- (iii) holding separate Third-Party Sessions, starting with DS343 and asking the Members which are not third-parties to DS345 (i.e., Chile, Mexico, Korea and Viet Nam) to leave the meeting room once the Third-Party Session for DS343 is over. Note that since Thailand and India are third parties to each other's cases, and parties in their own, they would be in the room during the entirety of the joint meetings, including third party sessions;
- (iv) *not* allowing submissions in one case to be deemed to be submitted in the other case. The parties could however attach to their third party submissions, their submissions made as parties in the case in which they are complaining party;
- (v) issuing separate reports;
- (vi) allowing all parties to respond to all questions posed by the Panel in writing."¹⁷

20. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the European Communities claimed that, by maintaining different timetables for the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States, the Panel had acted inconsistently with Article 9.3 of the DSU. The Appellate Body found that the Panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the two Article 21.5 proceedings initiated by Ecuador and the United States. The Appellate Body stated that:

"Article 9.3 may appear to be cast in the way of an obligation, but the word 'harmony' is defined as the combination or adaptation of parts, so as to form a 'consistent and orderly whole'. Quite distinct from 'synchrony', 'harmony' does not require that elements coincide exactly in time. Therefore, we consider that the use of the word 'harmonized' rather than 'synchronized' in Article 9.3 confers to panels a judgement of

¹⁷ Panel Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 7.3-7.4.

degree and practicality. It rests with panels to organize the steps of the proceedings in a way that will ensure that they form a consistent and orderly whole. Whereas the use of the word 'shall' ordinarily connotes an obligation, here, while the panel must seek to harmonize, the extent to which that is possible lies within its power. We do not consider that 'harmonization' requires adoption of identical timetables in multiple proceedings. As we see it, this provision addresses a practical concern that each timetable must be framed in the light of the other.

The phrase 'to the greatest extent possible' in Article 9.3 lends further support to our interpretation. This phrase introduces the main clause of the sentence. The phrase 'to the greatest extent possible' qualifies both elements of the main clause—the selection of the same persons as panelists and the harmonization of the panel processes—and thus qualifies what the panel must do to harmonize the timetables. We therefore disagree with the European Communities' reading that Article 9.3 'does not allow panels any discretion in deciding whether the timetables should be harmonized'.¹⁸

21. The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* further noted the margin of discretion that panels have in drawing up their own working procedures as per Articles 12.1 and 12.2 of the DSU. Given the fact that the panel in question was a compliance panel, the Appellate Body also referred to Article 21.5 of the DSU to confirm its understanding of the panels' discretion not to harmonise the timetables in these parallel proceedings:

"Furthermore, we note that Articles 12.1 and 12.2 of the DSU confer a margin of discretion on panels to draw up their working procedures. Article 12.1 authorizes panels to establish their own working procedures in the event that the panel decides, after consulting the parties, not to follow the Working Procedures for panels set out in Appendix 3 to the DSU. Pursuant to Article 12.2, panel procedures should provide 'sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. By virtue of this provision, panels are vested with a degree of discretion and flexibility to take the necessary procedural decisions to strike a balance between providing 'high-quality panel reports' and avoiding delays in the panel process. The panel's margin of discretion, in turn, informs our standard of review of the panels' application of its obligations under Article 9.3.

As this Panel was established pursuant to Article 21.5 of the DSU, we consider that the obligations of Article 9.3 must be read in the context of Article 21.5, which requires a compressed timeframe. Article 21.5 provides that a panel *shall* circulate its report within 90 days after the date of referral of the matter to it. If an Article 21.5 panel considers that it cannot provide its report within that timeframe, it must notify the DSB, specifying the reasons for the delay together with an estimate of the period within which it will issue its report. By contrast, Articles 12.8 and 12.9 of the DSU prescribe that original panel proceedings 'shall, as a general rule, not exceed six months' and 'should' in no case exceed nine months. We therefore consider that Article 21.5 and, in particular, the obligation to circulate the compliance panel report within 90 days after the date of referral of the matter to it, frames a compliance panel's discretion."¹⁹

Current as of: December 2023

¹⁸ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, paras. 192-193.

¹⁹ Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, paras. 194-195.