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1 SECTION VI: SELF-DISCLOSURE REQUIREMENTS

1.1 Text of Section VI

VI. Self-Disclosure Requirements by Covered Persons

1. (a) Each person requested to serve on a panel, on the Standing Appellate Body, as an arbitrator, or as an expert shall, at the time of the request, receive from the Secretariat these Rules, which include an Illustrative List (Annex 2) of examples of the matters subject to disclosure.

(b) Any member of the Secretariat described in paragraph IV:1, who may expect to be called upon to assist in a dispute, and Standing Appellate Body support staff, shall be familiar with these Rules.

2. As set out in paragraph VI:4 below, all covered persons described in paragraph VI.1(a) and VI.1(b) shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant.

3. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels, the Standing Appellate Body, or in other dispute settlement roles.

4. (a) All panelists, arbitrators and experts, prior to confirmation of their appointment, shall complete the form at Annex 3 of these Rules. Such information would be disclosed to the Chair of the Dispute Settlement Body ("DSB") for consideration by the parties to the dispute.

(b) (i) Persons serving on the Standing Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case, shall review the factual portion of the Panel report and complete the form at Annex 3. Such information would be disclosed to the Standing Appellate Body for its consideration whether the member concerned should hear a particular appeal.

(ii) Standing Appellate Body support staff shall disclose any relevant matter to the Standing Appellate Body, for its consideration in deciding on the assignment of staff to assist in a particular appeal.

(c) When considered to assist in a dispute, members of the Secretariat shall disclose to the Director-General of the WTO the information required under paragraph VI:2 of these Rules and any other relevant information required under the Staff Regulations, including the information described in the footnote.**

(footnote original) ** Pending adoption of the Staff Regulations, members of the Secretariat shall make disclosures to the Director-General in accordance with the following draft provision to be included in the Staff Regulations:

"When paragraph VI:4(c) of the Rules of Conduct for the DSU is applicable, members of the Secretariat would disclose to the Director-General of the WTO the information required in paragraph VI:2 of those Rules, as well as any information regarding their participation in earlier formal consideration of the specific measure at issue in a dispute under any provisions of the WTO Agreement, including through formal legal advice under Article 27.2 of the DSU, as well as any involvement with the dispute as an official of a WTO Member government or otherwise professionally, before having joined the Secretariat.

The Director-General shall consider any such disclosures in deciding on the assignment of members of the Secretariat to assist in a dispute.

When the Director-General, in the light of his consideration, including of available Secretariat resources, decides that a potential conflict of interest is not sufficiently material to warrant non-assignment of a particular member of the Secretariat to assist in a dispute, the Director-General shall inform the panel of his decision and of the relevant supporting information."

5. During a dispute, each covered person shall also disclose any new information relevant to paragraph VI:2 above at the earliest time they become aware of it.

6. The Chair of the DSB, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.

1.2 The standard under Section VI

1. In *US/Canada – Continued Suspension*, the Appellate Body found that the institutional affiliation of two experts appointed by the Panel compromised their appointment and thereby the adjudicative independence and impartiality of the Panel. In the course of its analysis, the Appellate Body offered a number of observations on Section VI of the Rules of Conduct. With respect to Section VI, the Appellate Body began by noting that:

"The requirements under Section VI of the *Rules of Conduct* relate, as the title indicates, to the self-disclosure obligation of covered persons, including experts. The *Rules of Conduct* do not provide for automatic exclusion of a covered person upon the disclosure of information pursuant to Section VI and the Illustrative List of Information to be Disclosed, which is attached to the *Rules of Conduct* as Annex 2. However, we fail to see on what basis a panel, presented with information likely to affect or give rise to justifiable doubts as to the independence or impartiality of an expert, could choose to consult such an expert.

We do not agree, however, with the European Communities' characterization of Section VI.2 as setting out a 'low' standard. On the contrary, we consider the standard set forth in Section VI.2 to be a strict one. Covered persons should be encouraged to disclose any information that may be relevant for purposes of ascertaining whether there may be justifiable doubts as to their independence or impartiality. Disclosure should not lead to automatic exclusion. Whether the disclosed information is likely to affect or give rise to justifiable doubts as to the person's independence or impartiality must be objectively determined and properly substantiated. In the case of an expert, the panel should assess the disclosed information against information submitted by the parties or other information that may be available. It should then determine whether, on the correct facts, there is a likelihood that the expert's independence and impartiality may be affected, or if justifiable doubts arise as to the expert's independent or impartiality. If this is indeed the case, the panel must not appoint such person as an expert."¹

2. The Appellate Body further found that while one of the appointed expert's self-disclosure statement taken alone did not appear to fully comply with the requirements of Section VI.2 of the

¹ Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 445-446.

Rules of Conduct, when read together with the information contained in his *curriculum vitae* it amounted to sufficient disclosure:

"In his self-disclosure statement, Dr. Boisseau stated that '[h]aving worked as a civil servant, I have no conflict of interest which could prevent me to serve as a scientific expert to these two WTO panels.' The purpose of the self-disclosure statement is to reveal relevant facts that would allow the Panel to determine whether the information is likely to affect or give rise to justifiable doubts as to the expert's independence or impartiality. Instead, Dr. Boisseau's statement draws a conclusion on a matter that was for the Panel to decide. Dr. Boisseau's statement does not identify whether he has 'worked for, been funded by, or provided advice to, the industries concerned, or to domestic or international regulatory bodies involved in issues similar to those addressed in this dispute'. The statement does not mention his affiliation with JECFA, nor the fact that he was the Chairman or Vice-Chairman of JECFA panels that evaluated some of the hormones at issue in this dispute. Also, Dr. Boisseau's position as a civil servant did not itself shield him from having a conflict of interest. Thus, we agree with the European Communities that Dr. Boisseau's statement would not appear to comply fully with the requirements of Section VI.2 of the *Rules of Conduct* or paragraph 4 of the Experts Working Procedures adopted by the Panel.

We note that, in Canada's view, the self-disclosure requirement was satisfied by the information provided on Dr. Boisseau's *curriculum vitae*, which it considers provided full disclosure of Dr. Boisseau's involvement with JECFA. While panels should insist that self-disclosure requirements under the *Rules of Conduct* are observed by potential experts, and while parties are entitled to full self-disclosure by experts, we find that the Panel did not exceed its authority in concluding that Dr. Boisseau's brief statement, when considered together with the information contained in his *curriculum vitae*, provided sufficient disclosure in this case. Dr. Boisseau's *curriculum vitae* provides information about his involvement with JECFA and his other professional activities."²

1.3 The process for disclosure under Section VI

3. In *India – Sugar and Sugarcane*, after the Panel was composed the Chairperson of the Panel was nominated for inclusion in the pool of arbitrators of the Multi-Party Interim Appeal Arbitration Arrangement. The Chairperson noted that the complainants and some third parties in the proceedings were parties to the Interim Arbitration Arrangement. Accordingly the Chairperson self-disclosed his nomination to the parties in accordance with the Rules of Conduct under the DSU (1996):

"[W]hile the first substantive meeting was postponed until further notice, the Chairperson of the Panel informed the parties, on 9 June 2020, in accordance with the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, that he had been nominated by Switzerland to be included in the pool of arbitrators of the Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (MPIA). In this communication, the Chairperson noted that the complainants, and certain third parties in these proceedings, were parties to the MPIA. In this connection, the Chairperson informed the parties of his intention to conduct himself, at all times, in a way that would fully respect his personal independence and impartiality in his role as Chairperson, as well as the confidentiality of these proceedings. In the interest of full transparency, the Chairperson invited the parties to raise any questions or concerns regarding this matter. This was followed by a number of communications that took place between the Chairperson and the parties in the period between 9 June 2020 and 1 October 2020. On 30 September 2020, India sent a final communication to the Chairperson, indicating that, notwithstanding his MPIA appointment, India believed that the Chairperson would continue to discharge his functions independently and impartially. India also indicated its trust that the proceedings would be conducted fairly and fully

² Appellate Body Reports, *US/Canada – Continued Suspension*, paras 450-451.

respecting India's due process rights as a developing country and as respondent in the present disputes."³

4. In *Australia – Apples*, the Panel recalled the process followed for selecting experts, including the process followed for self-disclosure under Section VI of the Rules of Conduct:

"When expressing their availability, all experts were asked by the Panel to provide preliminary statements regarding the absence of conflicts of interest, which were forwarded to the Parties. On 16 December 2008, the Panel contacted the identified experts to ask them to undergo a more detailed disclosure procedure. The experts were asked to sign the disclosure form included in Annex 3 of the Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes. Furthermore, the Panel directed the experts to Section VI of the Rules of Conduct (*Self-Disclosure Requirements by Covered Persons*) and asked them, if necessary, to expand on the information that they had already provided by disclosing any facts which, in their view, would be likely to affect their independence or impartiality as experts, or give rise to justifiable doubts in that regard. In particular, the Panel noted that it was interested in any relevant information regarding previous work for any of the Parties in relation to the matter at issue in this dispute or, more generally, regarding any of the items exemplified in the illustrative list of information to be disclosed, contained in Annex 2 of the Rules of Conduct. On 18 December 2008, the experts' replies and disclosure forms were forwarded to the Parties."⁴

Current as of: December 2022

³ Panel Report, *India – Sugar and Sugarcane*, para. 1.15.

⁴ Panel Report, *Australia – Apples*, para. 1.35.