

<b>1 ARTICLE 11 .....</b>	<b>1</b>
1.1 Text of Article 11.....	1
1.2 Article 11.2.....	2
1.2.1 General .....	2
1.2.2 Scope of application .....	2
1.2.3 Role and value of experts .....	2
1.2.4 Selection of experts .....	2
1.2.4.1 The need for experts .....	2
1.2.4.2 Importance of selection process.....	3
1.2.4.3 Consultation with the parties to the dispute.....	3
1.2.4.4 Individual experts or expert review group .....	3
1.2.4.5 Number of experts .....	4
1.2.4.6 International organizations.....	4
1.2.4.7 Conflict of interest.....	5
1.2.4.7.1 General.....	5
1.2.4.7.2 Disclosure requirement.....	5
1.2.4.7.3 The Panel's obligation to ensure the impartiality of selected experts .....	5
1.2.4.7.4 Affiliations that may raise doubts as to independence and impartiality .....	6
1.2.5 Obligations of individual experts .....	8
1.2.6 Consultation with experts .....	9
1.2.6.1 Significant investigative authority .....	9
1.2.6.1.1 General.....	9
1.2.6.1.2 Limitations on significant investigative authority .....	9
1.2.6.2 Due process .....	10
1.2.7 Relationships with other provisions of WTO Agreements .....	10
1.2.7.1 Article 14 of the TBT Agreement .....	10
1.2.7.2 Article 13 of the DSU.....	10
1.2.7.3 Rules of Conduct.....	11

## **1 ARTICLE 11**

### **1.1 Text of Article 11**

#### ***Article 11***

##### *Consultations and Dispute Settlement*

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.
2. In a dispute under this Agreement involving scientific or technical issues, a Panel should seek advice from experts chosen by the Panel in consultation with the parties to the dispute. To this end, the Panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

## 1.2 Article 11.2

### 1.2.1 General

1. For information on scientific experts in WTO dispute settlement proceedings, including a table of all proceedings under the SPS Agreement (and the GATT 1994) in which panels consulted with scientific experts, see the Section on Article 13.2 of the DSU.

### 1.2.2 Scope of application

2. The Appellate Body in *US/Canada – Continued Suspension* noted that Article 11.2 specifically addresses the consultation of experts in disputes under the SPS Agreement.<sup>1</sup>

### 1.2.3 Role and value of experts

3. The Panel in *US/Canada – Continued Suspension* stated that "the role of the experts was to act as an 'interface' between the scientific evidence and the Panel, so as to allow it to perform its task as the trier of fact"<sup>2</sup>. This view was reiterated by the Appellate Body who added that the experts consulted by a panel can significantly influence the decision-making process.<sup>3</sup>

4. In *Australia – Salmon (Article 21.5 – Canada)*, the Panel considered that the assistance of scientific experts in the original dispute was of utmost relevance, noting "how valuable such expert advice had been during its previous examination" of the matter before it. The Panel decided to seek further scientific and technical advice for the 21.5 proceedings as "the evidence submitted to it included several new risk analysis reports."<sup>4</sup>

### 1.2.4 Selection of experts

#### 1.2.4.1 The need for experts

5. In *EC – Approval and Marketing of Biotech Products*, the Panel chose to seek expert advice despite the complaining parties' argument that there was no need to do so. The Panel decided to seek advice after receiving the second written submissions of the parties:

"[T]he European Communities formally requested the Panel to seek advice from scientific and technical experts at an appropriate stage. In particular, the European Communities suggested that the Panel seek advice from the most relevant sources reflecting a representative spectrum of views, including individual experts and perhaps competent international organizations. Shortly thereafter, the European Communities submitted a proposal for the terms of reference for scientific and technical advice. The Complaining Parties expressed the view that they did not consider it necessary for the Panel to seek any scientific and technical advice, *inter alia* because they were not challenging the opinions or assessments of the EC scientific committees.

The Panel decided to take a decision regarding the need for expert advisers only in the light of the second written submissions by the Parties, and provided the Parties with a further opportunity to comment on the need for expert advice. The European Communities repeated its request for input from experts; the Complaining Parties continued to argue that no expert advice was necessary in the circumstances of this case.

<sup>1</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 438.

<sup>2</sup> Panel Reports, *US – Continued Suspension*, para. 6.72; and *Canada – Continued Suspension*, para.

6.67.

<sup>3</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 480.

<sup>4</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 6.1.

On 4 August 2004, the Panel informed the Parties that it considered that certain aspects of the Parties' submissions raised scientific and/or technical issues in respect of which the Panel might benefit from expert advice. Accordingly, the Panel decided to consult individual experts to obtain their opinion on certain scientific and/or technical issues raised in the Parties' submissions.<sup>5</sup>

6. In *Japan – Apples*, the Panel having noted that the proceedings "involved scientific or technical issues, consulted with parties regarding the need for expert advice. Neither party objected to the Panel's intention to seek expert advice."<sup>6</sup>

#### **1.2.4.2 Importance of selection process**

7. In *US/Canada – Continued Suspension*, the Appellate Body made it clear that the selection of experts has a significant bearing in the solution of disputes within the SPS Agreement:

"Scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a Panel's consideration of the evidence and its review of a domestic measure, especially in cases like this one involving highly complex scientific issues."<sup>7</sup>

8. Having recognized the importance of scientific experts in the settlement of SPS disputes, the Appellate Body, in *US/Canada – Continued Suspension*, cautioned that although panels might face challenges when selecting experts, they should pay due consideration to this procedural step and exercise it properly:

"We understand that Panels often face practical difficulties in selecting experts who have the required level of expertise and whose selection is not objected to by the parties. We do not wish to make the expert selection process more difficult than it may already be. However, experts consulted by a Panel can have a decisive role in a case, especially when it involves highly complex scientific questions such as this one. The Panel in this case said 'the role of the experts was to act as an 'interface' between the scientific evidence and the Panel, so as to allow it to perform its task as the trier of fact.' Experts appointed by a Panel can significantly influence the decision-making process."<sup>8</sup>

#### **1.2.4.3 Consultation with the parties to the dispute**

9. In *US/Canada – Continued Suspension*, the Appellate Body ruled that a panel's obligation to consult with parties when selecting experts is a foundational requirement entitled to preserve parties' due process rights during the proceedings:

"[C]onsultation with the parties in the adoption of working procedures for selecting the experts and in the expert selection process is a means for ensuring that the parties' due process rights are respected. However, ... the obligation to afford the protection of due process to the parties is not circumscribed to the expert selection stage and does not end with the appointment of the experts. Due process protection continues to apply throughout the consultations with the experts."<sup>9</sup>

10. In all disputes to date, panels have selected experts in consultation with the parties.

#### **1.2.4.4 Individual experts or expert review group**

11. In each case where experts have been consulted, the panels have decided to consult experts on an individual basis, rather than create an expert group. In *EC – Hormones*, the Appellate Body

---

<sup>5</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.16-7.18.

<sup>6</sup> Panel Report, *Japan – Apples*, para. 6.2.

<sup>7</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 436.

<sup>8</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 480.

<sup>9</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 436 and 473.

agreed with the Panel's decision to hear from individual experts rather than to establish an expert review group:<sup>10</sup>

"[I]n disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement*, nor Article 13 of the DSU prevents Panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a Panel the determination of whether the establishment of an expert review group is necessary or appropriate."<sup>11</sup>

12. In *EC – Hormones*, with respect to the role of individual scientific experts, the Panel noted that:

"It is of particular importance that we made clear to the experts advising the Panel that we were not seeking a consensus position among the experts but wanted to hear all views."<sup>12</sup>

#### **1.2.4.5 Number of experts**

13. In *Australia – Apples*, Australia expressed a preference for two experts to be consulted in each of the three relevant areas of expertise and complained that one area of expertise only had one expert assigned to it. The Panel acknowledged that, in general, more experts might provide more advice than just one expert and this might be useful to a panel. The Panel considered that while this does not imply that consulting one competent expert would not be sufficiently useful for a panel in a given dispute, it would necessarily narrow the range of scientific expert advice that the Panel would receive, nor that the parties would be prejudiced by the selection of only one expert on a given subject.<sup>13</sup> The Panel also noted that neither Article 13 of the DSU, nor Article 11.2 of the SPS Agreement, which jointly provide the legal basis for WTO Panels to seek the advice of experts in SPS disputes, specify the number of experts that should be selected for each particular issue.<sup>14</sup> In arriving at its decision to use only one expert for a specific area of expertise, the Panel took into account the fact that there was a limited available pool of experts as well as the inappropriateness of further delaying the selection process, given that this would have hindered the objective of seeking a prompt settlement of the dispute, contrary to Article 3.3 of the DSU and the expressed interest of both Parties.<sup>15</sup>

#### **1.2.4.6 International organizations**

14. In *EC – Approval and Marketing of Biotech Products*, although the complaining parties disagreed with the Panel's decision to consult with international organizations, the Panel found it relevant to seek assistance from certain international organizations in order to clarify certain aspects of the parties' submissions. The Panel considered that the concepts at issue "raised scientific and/or technical issues" in respect of which it might benefit from experts' advice:

"[T]he Panel decided that it would seek information from certain international organizations which might assist the Panel in determining the meaning of selected terms and concepts. Most of these terms and concepts appear in the WTO agreements at issue in this dispute (e.g., 'pest'). We note in this regard that the European

<sup>10</sup> Panel Reports, *EC – Hormones (Canada)*, para. 8.7; and *EC – Hormones (US)*, para. 8.7. The Panel ruled:

"[W]e decided to request the opinion of experts on certain scientific and other technical matters raised by the parties to this dispute. For our examination of this dispute, we considered it more useful to leave open the possibility of receiving a range of opinions from individual experts on specific scientific and technical questions, rather than to establish an expert review group which would have been required to reach a consensus view on the basis of general terms of reference given to it by the Panel. We considered that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU limits our right to seek information from *individual experts* as provided for in Article 11.2, first sentence, of the SPS Agreement and Articles 13.1 and 13.2, first sentence, of the DSU. The procedures we adopted in this respect and the views expressed by the experts are set out in paragraphs 6.1 and following."

<sup>11</sup> Appellate Body Report, *EC – Hormones*, para. 147.

<sup>12</sup> Panel Reports, *EC – Hormones (Canada)*, para. 8.9; and *EC – Hormones (US)*, para. 8.9.

<sup>13</sup> Panel Report, *Australia – Apples*, para. 7.20.

<sup>14</sup> Panel Report, *Australia – Apples*, para. 7.13.

<sup>15</sup> Panel Report, *Australia – Apples*, paras. 7.18-7.20.

Communities argued that the Panel also needed to consult scientific experts on the meaning of the relevant terms. The Complaining Parties opposed the European Communities' request, arguing that the terms in question were terms appearing in WTO agreements and that, as such, the Panel needed to determine their meaning by applying the customary rules of interpretation of public international law, as required by Article 3.2 of the DSU."<sup>16</sup>

15. The Panel in *EC – Approval and Marketing of Biotech Products*, having decided to request input from some international organizations, took into account the parties' opinions throughout its consultation with the designated organizations.<sup>17</sup>

#### **1.2.4.7 Conflict of interest**

##### **1.2.4.7.1 General**

16. See also the Section on the Rules of Conduct under the DSU.

##### **1.2.4.7.2 Disclosure requirement**

17. The Appellate Body in *US/Canada – Continued Suspension*, considered that "[t]he 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".<sup>18</sup>

18. In *US/Canada – Continued Suspension*, the Appellate Body described the scope of application of the self-disclosure rules provided under Section VI of the Rules of Conduct:

"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."<sup>19</sup>

##### **1.2.4.7.3 The Panel's obligation to ensure the impartiality of selected experts**

19. In *US/Canada – Continued Suspension*, the Appellate Body held that the qualifications and relevant knowledge of selected experts or their membership to an international recognized scientific body, are not by themselves sufficient guarantees of their independence and impartiality:

"An expert could be very qualified and knowledgeable and yet his or her appointment could give rise to concerns about his or her impartiality or independence, because of that expert's institutional affiliation or for other reasons. Similarly, the fact that JECFA may select its experts according to strict procedures does not in itself ensure that these experts are independent and impartial in respect of the issues that may arise in a WTO dispute."<sup>20</sup>

20. In emphasizing the Panel's obligation to observe the principles of fairness and impartiality in the selection of experts and consultations with scientific experts, the Appellate Body in *US/Canada – Continued Suspension* stated:

---

<sup>16</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.19.

<sup>17</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.31.

<sup>18</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 450.

<sup>19</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 446.

<sup>20</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 459.

"Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a Panel's ability to act as an independent adjudicator. For these reasons, we agree with the view of the European Communities that the protection of due process applies to a Panel's consultations with experts. This due process protection applies to the process for selecting experts and to the Panel's consultations with the experts, and continues throughout the proceedings."<sup>21</sup>

21. The Appellate Body in *US/Canada – Continued Suspension* held that a panel, presented with information likely to raise doubts as to the independence or impartiality of an expert, should not select that expert:

"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."<sup>22</sup>

#### **1.2.4.7.4 Affiliations that may raise doubts as to independence and impartiality**

22. In *US/Canada – Continued Suspension*, the Appellate Body considered that the affiliation of the appointed experts with the institution that performed the risk assessment at issue may diminish their independence and impartiality. The Appellate Body rejected the Panel's reasoning related to the decision-making process within the scientific body where the experts served previously<sup>23</sup>:

"We recognize that JECFA involves a decision-making process based on consensus and that the outcome of the process need not necessarily reflect the views of its individual members. However, the fact that this process involves several individuals and that the outcome may be the result of a compromise does not mean that the joint outcome of the process can be disconnected from the experts that participated in the process. On the contrary, one would expect that the views of the experts that participated in the process would be reflected, in various degrees, in the outcome. As noted earlier, Drs. Boisseau's and Boobis' participation was not indirect or marginal. Rather, both would be expected to have had particular influence in the process given their respective roles as Chairman and Vice-Chairman, and Joint Rapporteur. Moreover, irrespective of their degree of influence in the process, both would be expected to have a natural inclination to identify with JECFA's evaluation as participants in the consensus. Therefore, we do not consider that the fact that JECFA reaches its conclusions by consensus dispels our concerns regarding the propriety of the Panel asking Drs. Boisseau and Boobis to evaluate the European Communities' risk assessment."<sup>24</sup>

23. The Appellate Body in *US/Canada – Continued Suspension* also disagreed with the Panel's statements that scientists could be considered objective when assessing their own work, particularly where the stated work has been used as a benchmark by the Panel:

---

<sup>21</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 436.

<sup>22</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 445.

<sup>23</sup> In its report, the Panel reasoned that Drs. Boisseau and Boobis (the experts in question) may have contributed to the development of JECFA reports, but the nature of their participation ensured that they could remain independent and impartial. In response to objections from the European Communities during the interim review, the Panel explained:

"Moreover, JECFA reaches its conclusions by consensus. So the opinions expressed by the two experts were given with regard to the consensual view of JECFA on this matter, not just their own personal positions in the past. This does not mean, however, that JECFA's work is these particular experts' own work: it is a joint work by several experts."

Panel Reports, *US – Continued Suspension*, para. 6.62; and *Canada – Continued Suspension*, para.

6.57.

<sup>24</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 472.

"The Panel ... expressed the view that Drs. Boisseau and Boobis, by virtue of their work as scientists, could be relied upon to be objective in their assessment of critiques of their work, as well as of new scientific evidence that might require altering the conclusions of their prior work. ...

We recognize that scientists will often be asked to review studies performed by other scientists and that the scientific community must constantly reassess theories in the light of scientific progress. However, ... the Panel did not simply ask Drs. Boisseau and Boobis about JECFA's work and risk assessments. In the consultations with experts, the Panel asked Drs. Boisseau and Boobis to evaluate the European Communities' risk assessment and they did so using JECFA's evaluations as a benchmark. This is problematic in this case because the European Communities' risk assessment called into question the validity of JECFA's evaluations and explicitly stated that it would not follow them. In the light of this, it was improper for the Panel to consult with Drs. Boisseau and Boobis, who were directly involved in JECFA's evaluations. The concerns raised in this situation are not addressed by the fact that scientists regularly conduct 'peer reviews' or may recognize that science evolves. Nor are the concerns addressed by the Panel's explanation that JECFA's work is linked to Codex, which is expressly recognized by the *SPS Agreement* as having responsibilities for the 'establishment of international standards, guidelines and recommendations'.<sup>25</sup>

24. In *Australia – Apples*, Australia objected to the Panel's decision to consult with a particular expert, arguing that the expert had a connection to New Zealand. In overruling Australia's objection, the Panel noted that panels are responsible for ensuring that the selected experts have the necessary qualifications and expertise, and comply with the requirements for independence, impartiality and avoidance of conflicts of interest. Conversely, it is not enough for a party to simply assert an objection regarding the selection of a particular expert. Any party raising such an objection is expected to explain in what manner the expert's independence or impartiality have been or may be compromised.<sup>26</sup> The Panel stated:

"Under the Rules of Conduct for the DSU applicable to all covered persons in WTO dispute settlement, experts 'shall be independent and impartial, shall avoid direct or indirect conflicts of interest ... pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.' ... like other persons covered by the Rules of Conduct, experts '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.' According to the Illustrative List annexed to the Rules of Conduct, this disclosure shall include information relating to:

- '(a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

---

<sup>25</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 474, 475 and 477.

<sup>26</sup> Panel Report, *Australia – Apples*, para. 7.32.

(e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).'  
...

According to Australia, Dr Cross's alleged connection to the New Zealand Government results from his 'research projects and publications with researchers from HortResearch New Zealand.' As a matter of fact, HortResearch is wholly owned by the New Zealand Government. However, participation in joint research with other scientists who may be affiliated with a government-funded institution does not itself imply a connection with that Government. There is no indication that Dr Cross has worked for the Government of New Zealand, nor that he has received any monetary compensation from that Government. The extent of his collaboration with New Zealand scientists at HortResearch and the fact that he did not have 'any jointly funded research projects' with these scientists was disclosed by Dr Cross, when initially approached by the Panel.

Australia does not submit any additional arguments, nor any specific evidence for the alleged connection of Dr Cross with the New Zealand Government. In the light of the Illustrative List of the *Rules of Conduct* cited above, there is no indication that Dr Cross has any financial, business or property interests 'relevant to the dispute in question', nor that he has any professional, other active, employment or family interests in the dispute, under paragraphs (a), (b), (c) and (e) of that List.<sup>27</sup>

### **1.2.5 Obligations of individual experts**

25. In *US/Canada – Continued Suspension*, the Appellate Body noted that the experts were not only bound by the obligations in the ad hoc Working Procedures adopted by the Panel, but also by the Rules of Conduct:

"Paragraph 9 of the Experts Working Procedures adopted by the Panel prescribes that experts will be selected 'on the basis of their qualification and the need for specialized scientific or technical expertise'. Paragraph 11 additionally provides:

The selected experts shall act in their individual capacities and not as representatives of any entity. They shall be subject to the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (WT/DSB/RC1), including the self-disclosure requirement set out in Section VI of the *Rules of Conduct*.<sup>28</sup>

26. In *US/Canada – Continued Suspension*, the Appellate Body adduced the rules providing for independence and impartiality of the scientific experts advising the Panel:

"[E]xperts advising Panels are specifically covered by the *Rules of Conduct* and, pursuant to Section II (Governing Principle), they 'shall be independent and impartial, [and] shall avoid direct or indirect conflicts of interest ..., so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved'.

Selected experts are also subject to certain self-disclosure and confidentiality obligations set out elsewhere in the *Rules of Conduct*, and procedures exist for the referral of a 'material violation' of these obligations to the Chairman of the DSB for appropriate action."<sup>29</sup>

---

<sup>27</sup> Panel Report, *Australia – Apples*, paras. 7.24-7.28.

<sup>28</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 441.

<sup>29</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 442-443.

## 1.2.6 Consultation with experts

### 1.2.6.1 Significant investigative authority

#### 1.2.6.1.1 General

27. In *US/Canada – Continued Suspension*, the Appellate Body stated that Panels are understood to have significant investigative authority under Article 13 of the DSU and Article 11.2 of the SPS Agreement and broad discretion in exercising this authority.<sup>30</sup>

28. In *Australia – Apples*, the Panel noted that a panel has a broad right to seek information and technical advice from scientific experts to help the Panel make an objective assessment of the matter before it. The Panel recalled that a panel has significant investigative authority and one way of exercising this authority was through expert consultation:

"Under Articles 13.1 of the DSU and 11.2 of the SPS Agreement, a Panel has a broad right to seek information and technical advice from scientific experts. Indeed, under Article 11.2 of the SPS Agreement, a Panel engaged in dispute settlement proceedings involving scientific or technical issues under that agreement should 'seek advice from experts chosen by the Panel in consultation with the parties to the dispute'. Expert consultation is part of the broad right of a Panel 'to seek information and technical advice from any individual or body which it deems appropriate'" and to 'seek information from any relevant source' and 'consult experts to obtain their opinion on certain aspects of the matter' under Article 13 of the DSU. Ultimately, the purpose of expert consultation is to allow a Panel to exercise its duty to 'make an objective assessment of the matter before it', pursuant to Article 11 of the DSU.

...

As noted above, in the *US/Canada – Continued Suspension* dispute, the Appellate Body confirmed the 'significant investigative authority' of Panels under Article 13 of the DSU and Article 11.2 of the SPS Agreement and the broad discretion of Panels in exercising this authority, including through expert consultation."<sup>31</sup>

#### 1.2.6.1.2 Limitations on significant investigative authority

29. In *Japan – Agricultural Products II*, the Appellate Body stressed that the investigative authority of a panel did not stretch so far as to "make the case for a complaining party":

"[A]rticle 13 of the DSU and Article 11.2 of the SPS Agreement suggest that Panels have a significant investigative authority. However, this authority cannot be used by a Panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A Panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party."<sup>32</sup>

30. In *Australia – Apples*, in the context of the Panel's consultation with experts, the Panel held that a panel is precluded from considering issues that fall outside the terms of reference approved by the DSB.<sup>33</sup>

<sup>30</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 439.

<sup>31</sup> Panel Report, *Australia – Apples*, paras. 7.52-7.54.

<sup>32</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 126 and 129.

<sup>33</sup> Panel Report, *Australia – Apples*, para. 7.81.

### **1.2.6.2 Due process**

31. The Panel in *Australia – Apples* acknowledged that due process fully applies to the selection and consultation of experts by panels but noted that it is difficult to state in the abstract whether a specific type of procedural concern affects due process. The Panel found that such concerns are to be addressed on a case-by-case basis:

"The concept of due process is implicit in WTO dispute settlement. ...

According to the Appellate Body, due process fully applies to the selection and consultation of experts by Panels: '[T]he protection of due process applies to a Panel's consultations with experts. This due process protection applies to the process for selecting experts and to the Panel's consultations with the experts, and continues throughout the proceedings.'

If a procedural concern puts at risk the purpose and role of due process in WTO dispute settlement, it is effectively a due process concern, to which Panels need to pay special attention. However, it is difficult to state in the abstract whether a specific type of procedural concern affects due process. Only by taking into account the specific circumstances of the case, can a Panel assess whether a procedural concern affects due process and thus merits such special attention."<sup>34</sup>

32. In *Australia – Apples*, Australia raised concerns about how some questions to the experts were framed. The Panel found that when each party has been allowed to pose its own questions, to comment on responses received from the experts and to pose subsequent questions to the experts in a meeting with the Panel, the parties' respective positions in the proceedings and their due process rights are not prejudiced by the specific formulation of a question posed by a panel to the experts.<sup>35</sup>

### **1.2.7 Relationships with other provisions of WTO Agreements**

#### **1.2.7.1 Article 14 of the TBT Agreement**

33. In *EC – Approval and Marketing of Biotech Products*, the Panel adduced the provisions of Article 14 of the TBT Agreement along with those of Article 13.1 of the DSU and Article 11.2 of the SPS Agreement as bases for an eventual request for assistance from scientific experts:

"Articles 14.2 and 14.3 of the *TBT Agreement* provides that:

14.2 At the request of a party to a dispute, or at its own initiative, a Panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2. ...

In light of the claims of the Complaining Parties that the measures at issue violated, *inter alia*, the *SPS Agreement* and/or the *TBT Agreement*, at the time of the organizational meeting the Panel established a deadline for the Parties to request the Panel to seek appropriate scientific and technical advice pursuant to the provisions of these agreements."<sup>36</sup>

#### **1.2.7.2 Article 13 of the DSU**

34. In *EC – Hormones*, the Panel consulted individual experts on the bases of Article 11.2 of the SPS Agreement and Article 13.2 of the DSU:

<sup>34</sup> Panel Report, *Australia - Apples*, paras. 7.7-7.9.

<sup>35</sup> Panel Report, *Australia – Apples*, para. 7.67.

<sup>36</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.13 and 7.15.

"For our examination of this dispute, we considered it more useful to leave open the possibility of receiving a range of opinions from individual experts on specific scientific and technical questions, rather than to establish an expert review group which would have been required to reach a consensus view on the basis of general terms of reference given to it by the Panel. We considered that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU limits our right to seek information from *individual* experts as provided for in Article 11.2, first sentence, of the SPS Agreement and Articles 13.1 and 13.2, first sentence, of the DSU."<sup>37</sup>

35. The Appellate Body in *EC – Hormones* stated: "[b]oth Article 11.2 of the SPS Agreement and Article 13.2 of the DSU require Panels to consult with the parties to the dispute during the selection of the experts".<sup>38</sup>

36. As regards the Panel's authority to seek information from scientific experts, the Appellate Body in *US/Canada – Continued Suspension* made reference to Article 13.1 of the DSU and Article 11.2 of the SPS Agreement noting that "[p]anels are understood to have 'significant investigative authority' under Article 13 of the DSU and Article 11.2 of the SPS Agreement and broad discretion in exercising this authority".<sup>39</sup>

#### **1.2.7.3 Rules of Conduct**

37. See the Section on the Rules of Conduct under the DSU.

38. For a discussion of the relationship between Article 11.2 of the SPS Agreement and the Rules of Conduct, please refer to paragraphs 25 and 26 above.

---

Current as of: December 2023

---

<sup>37</sup> Panel Reports, *EC – Hormones (Canada)*, paras. 8.7-8.8; and *EC – Hormones (US)*, paras. 8.7-8.8.

<sup>38</sup> Appellate Body Report, *EC – Hormones*, para. 148.

<sup>39</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 437-439.