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## **1 ARTICLE 11**

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

#### **Article 11**

##### *Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

### **1.2 Panel "should" make an objective assessment**

1. In *Canada – Aircraft*, the Appellate Body discussed the meaning of the word "should" in Article 11 of the DSU and more generally:

"Although the word 'should' is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used 'to express a duty [or] obligation'. The word 'should' has, for instance, previously been interpreted by us as expressing a 'duty' of panels in the context of Article 11 of the DSU. Similarly, we are of the view that the word 'should' in the third sentence of

Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense."<sup>1</sup>

### 1.3 "objective assessment of the matter before it"

2. In *Indonesia – Import Licensing Regimes*, the Appellate Body highlighted the gravity of the allegation that a panel failed to make an "objective assessment of the matter before it" and stated that a claim under Article 11 should not be presented merely as a subsidiary argument:

"We recall that, as the Appellate Body has cautioned on several occasions, a claim that a panel has failed to conduct an 'objective assessment of the matter before it' under Article 11 of the DSU is 'a very serious allegation'. Accordingly, it is incumbent on a participant raising a claim under Article 11 to identify specific errors regarding the objectivity of the panel's assessment and 'to explain *why* the alleged error *meets* the standard of review under that provision'. Importantly, a claim under Article 11 must 'stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement'."<sup>2</sup>

3. In *Korea – Pneumatic Valves (Japan)*, Korea argued that in reaching its findings under Article 6.2 of the DSU regarding Japan's claims, the Panel failed to conduct an "objective assessment of the matter" as required by Article 11 of the DSU. Specifically, Korea claimed that the Panel's reasoning was internally incoherent and inconsistent, as evidenced by the Panel's application of Article 6.2 of the DSU in assessing whether various claims presented by Japan complied with the requirements laid down in that provision. The Appellate Body reiterated the requirements for finding a violation of Article 11 and found that these were not met in this case:

"[K]orea's challenge is not directed at the Panel's alleged inconsistency in the appreciation of evidence, but rather at its alleged inconsistency in applying the legal standard under Article 6.2 of the DSU to Japan's different claims in its panel request. In this context, therefore, the Appellate Body's findings in past disputes do not lend support to Korea's argument. This is because, in those disputes, the incoherence or inconsistency that amounted to a violation of Article 11 of the DSU related to the manner in which the panel engaged with the evidence and facts before it, rather than how the panel interpreted or applied a legal provision.

...

Furthermore, we observe that in making this claim under Article 11 of the DSU, Korea essentially identifies the same alleged errors by the Panel as those developed in its claim that the Panel erred in its application of Article 6.2 of the DSU in finding that Japan's claims 4, 5, and 6 are within the Panel's terms of reference. As such, therefore, Korea's claim that the Panel acted inconsistently with Article 11 of the DSU is subsidiary to its other claims of error by the Panel, and therefore does not 'stand on its own', as a claim under Article 11 of the DSU would be required to."<sup>3</sup>

#### 1.3.1 Duty to make independent assessment

##### 1.3.1.1 General

4. In *Argentina – Footwear (EC)*, the Appellate Body considered that a panel could not make an "objective assessment of the matter", as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims":

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<sup>1</sup> Appellate Body Report, *Canada – Aircraft*, para. 187. See also Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.

<sup>2</sup> Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.28. See also Appellate Body Reports, *US – Clove Cigarettes*, para. 229; *EU – Biodiesel (Argentina)*, para. 6.200; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.191; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.244; *Peru – Agricultural Products*, para. 5.66; *India – Agricultural Products*, para. 5.179; and *US-COOL*, para. 301.

<sup>3</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.156 and 5.158.

"We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."<sup>4</sup>

5. In *Australia – Automotive Leather II (Article 21.5 – US)*, both parties argued that the task of the Panel was to choose between the position articulated by each party. The Panel disagreed and stated:

"That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute."<sup>5</sup>

6. In *Mexico – Taxes on Soft Drinks*, Mexico advanced no counter-arguments in respect of the United States' claim under Article III of the GATT 1994. The Panel indicated that it would examine the claims, arguments and evidence submitted by the parties for each legal requirement under the relevant provision of Article III "while, at the same time, being mindful of the relatively succinct analytical approach adopted by the panels in *US – Shrimp* and *Turkey – Textiles* in the absence of any counter-arguments by the respondent."<sup>6</sup>

7. In *US – Shrimp (Ecuador)*, the Panel was faced with a rather unusual dispute in that the responding party, the United States, had not contested any of the complaining party's claims. The parties had not, however, characterized their shared view of the substantive aspects of the dispute as a "mutually agreed solution", and thus Article 12.7 did not apply. In spite of the lack of any rebuttal by the respondent, the Panel, referring to the Appellate Body's findings in *EC – Hormones* and *US – Gambling*, concluded that it still had to satisfy itself that Ecuador, the complainant, had made a *prima facie* case:

"In our view, the issue of the burden of proof is of particular importance in this case. This is because Ecuador has made factual and legal claims before the Panel which the United States does not contest. Yet, the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a *prima facie* case. In *EC – Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a *prima facie* case and shifted the burden of proof to the responding party.

...

Thus, notwithstanding the fact that the United States is not seeking to refute Ecuador's claims, we must satisfy ourselves that Ecuador has established a *prima facie* case of violation, and notably that it has presented 'evidence and argument... sufficient to identify the challenged measure and its basic import, identify the relevant

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<sup>4</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 74.

<sup>5</sup> Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.19.

<sup>6</sup> Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.20.

WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."<sup>7</sup>

8. In *China – Publication and Audiovisual Products*, the Panel recalled that according to Article 11 of the DSU, "the function of panels is to make an 'objective assessment' of the matter before them. Consequently, the parties' common assessment in relation to a particular issue is, therefore, not in and of itself dispositive."<sup>8</sup>

9. The Panel in *US – Poultry (China)* followed a similar approach where the respondent did not contest a claim under Article XI of the GATT 1994:

"As indicated above, the United States has not contested China's claim under Article XI:1 of the GATT 1994. The absence of refutation of a claim raises the question of what the role of the Panel should be in such a case. We note that in *US – Shrimp (Ecuador)* and *US – Shrimp (Thailand)*, the panels found that although the respondent was not seeking to refute the claims, in order to make an objective assessment of the matter before them they had to satisfy themselves whether the complainant had established a *prima facie* case of violation. In particular, the panels considered whether the complainant had presented evidence and argument which 'was sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision'.

Although the United States has not presented arguments seeking to refute China's claims, the Panel, in order to make an objective assessment of the matter as directed by Article 11 of the DSU, will still examine whether China has established a *prima facie* case of violation of Article XI:1 of the GATT 1994."<sup>9</sup>

10. In *China – TRQs*, China acknowledged that one of the aspects of its administration of TRQs challenged by the United States was inconsistent with the relevant parts of Paragraph 116 of its Working Part Report. Yet, the Panel decided to proceed to assess the merits of the United States' claim, noting that its obligation to conduct an objective examination required it to do so.<sup>10</sup>

11. In *Turkey – Additional Duties (US)*, the Panel proceeded to assess whether the complainant had made a *prima facie* case of violation despite the fact that the respondent had not contested the claim:

"In the absence of any further argumentation on Türkiye's part concerning the consistency of the additional duties measure with Article I:1 of the GATT 1994, the Panel considers that the United States' claim under Article I:1 is uncontested. Nevertheless, in accordance with its duty to make an objective assessment of the matter before it as laid down in Article 11 of the DSU, the Panel cannot simply accept the United States' arguments without further analysis. Rather, the Panel must satisfy itself as to whether the United States has established a *prima facie* case that the additional duties measure is inconsistent with Article I:1 of the GATT 1994. To that end, the Panel commences its analysis with the text of the relevant provision."<sup>11</sup>

12. In *EC and certain member States – Large Civil Aircraft*, the Panel considered that it was for the complaining party to define the "subsidized product", and saw nothing in the SCM Agreement that required it to make an independent determination of the subsidized product, as opposed to relying on the complaining Member's identification of that product. The Appellate Body found that the Panel acted inconsistently by "deferring" to the complainant's definition of the relevant product/market at issue:

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<sup>7</sup> Panel Report, *US – Shrimp (Ecuador)*, paras. 7.9 and 7.11. See also Panel Report, *US – Shrimp (Thailand)*, para. 7.21.

<sup>8</sup> Panel Report, *China – Publication and Audiovisual Products*, para. 6.46.

<sup>9</sup> Panel Report, *US – Poultry (China)*, paras. 7.445-7.446.

<sup>10</sup> Panel Report, *China – TRQs*, para. 7.21.

<sup>11</sup> Panel Report, *Turkey – Additional Duties (US)*, para. 7.100. See also *ibid.*, para. 7.121.

"[T]he Panel committed legal error by failing to adjudicate properly the United States' subsidized product allegations and refusing to make its own independent assessment of whether all Airbus LCA compete in the same market or not. As noted above, the United States' claims of serious prejudice were premised on its assertion that there is only one subsidized product at issue in this dispute, consisting of all models of Airbus LCA. The European Communities objected to the United States' definition of the 'subsidized product', arguing that the Panel was required to make its own assessment of whether the 'identified universe of allegedly subsidized products should be treated as a *single* subsidized product, or *multiple* subsidized products.' However, in its analysis, the Panel deferred to the United States' subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product. In so doing, the Panel failed to make an objective assessment of the matter, including the 'applicability of and conformity with the relevant covered agreements', as required under Article 11 of the DSU."<sup>12</sup>

13. In *US – Countervailing Measures (China)*, the Appellate Body found that "the Panel acted inconsistently with its obligations under Article 11 of the DSU in assessing China's claims under Article 12.7 of the SCM Agreement[]"<sup>13</sup>, noting that in reviewing the investigating authority's determinations in the CVD proceedings at issue the Panel had simply relied on the language employed by the authority rather than conducting an in-depth examination of those determinations. In this context, the Appellate Body first clarified the standard of review that the Panel was required to apply:

"As we see it, China's claim under Article 11 of the DSU essentially relies on three arguments. First, China argues that the Panel failed to examine and address each of the 42 instances challenged by China. Second, China asserts that, in the instances that it did examine, the Panel's analysis falls short of the 'objective assessment' that it was required to make under Article 11. Finally, China submits that the Panel acted inconsistently with Article 11 to the extent that it relied on examples of record evidence supporting the USDOC's determinations at issue provided by the United States on an *ex post* basis. Before turning to address China's claim, we recall that panels are required to assess the consistency of facts available determinations with the SCM Agreement in accordance with the standard of review set out in Article 11 of the DSU, as informed in this case by Article 12.7 of the SCM Agreement. Article 11 of the DSU requires a panel to make an 'objective assessment of the matter before it'. The Appellate Body has stated that the 'matter' before the panel in the context of Article 11 is the same as the '*matter* referred to the DSB' for the purpose of Article 7 of the DSU, and comprises of 'the measure at issue (and the claims made by the complaining Member)'. The Appellate Body has further explained that, in accordance with Article 11 of the DSU, a panel, in reviewing an investigating authority's actions, 'must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities'".

Although the precise contours of the standard of review to be applied in a given case are a function of the substantive provisions of the covered agreements at issue, as well as the particular claims made, Article 11 of the DSU requires, *inter alia*, that panels scrutinize whether the reasoning of an investigating authority is coherent and internally consistent, and carry out an 'in-depth examination' of the explanations provided by an investigating authority. In the context of Article 12.7 of the SCM Agreement, such an 'in-depth examination' by a panel would entail, *inter alia*, assessing whether an investigating authority's published report provided an explanation that sufficiently disclosed its process of reasoning and evaluation such that the panel could assess how the authority chose from the facts available those that could reasonably replace the missing information. As we see it, China's claims in the present case do not relate to the USDOC's process of reasoning and evaluation and its consistency with the requirements of Article 12.7; instead, they focus on

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<sup>12</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1128.

<sup>13</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.198.

whether the USDOC engaged at all in a process of reasoning and evaluation in selecting reasonable replacements for the missing information."<sup>14</sup>

14. On this basis, the Appellate Body in *US – Countervailing Measures (China)* concluded that the Panel had acted inconsistently with Article 11:

"With respect to China's first argument in support of its claim under Article 11, it appears to us that, instead of examining China's arguments and evidence in relation to the 42 instances it challenged, the Panel limited its analysis to only *some* instances of the USDOC's use of 'adverse' facts available. ...

...

Yet, rather than assessing whether the USDOC had 'provided sufficient explanation of the challenged adverse facts available determinations to assess whether the USDOC based these determinations on facts', as it set out to do, the Panel focused on the language and the formulations used by the USDOC in its determinations."<sup>15</sup>

15. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the Panel had failed to make an objective assessment when it had refused to seek necessary information from the respondent, which "could have afforded the European Communities a fair opportunity to produce evidence necessary to make out its *prima facie* case".<sup>16</sup> The Appellate Body emphasized that the circumstances of the dispute required the Panel to engage in "a train of inquiry".<sup>17</sup> The Appellate Body opined:

"In our view, the extent to which Article 11 of the DSU may require a panel to exercise its authority to seek out further information is a function of the particular facts and circumstances of each dispute. It is of course indisputable that parties carry the burden of adducing evidence in support of their claims or defences. Indeed, it is because the parties have such a burden that we can conceive of circumstances in which a party cannot reasonably be expected to meet that burden by adducing all relevant evidence required to make out its case, most notably when that information is in the exclusive possession of the opposing or a third party. In such circumstances, a panel may be unable to make an objective assessment of the matter without exercising its authority under Article 13 of the DSU to seek out that information, in particular if the party that needs this evidence can show that it has diligently exhausted all means to acquire it, to the extent such means exist."<sup>18</sup>

16. In *Russia – Commercial Vehicles*, the Panel based part of its assessment of the Russian anti-dumping investigating authority's injury determination on the confidential version of the investigation report, which had not been made available to the interested parties during the course of the investigation. The Panel did not engage with the European Union's argument that the Panel should first have taken steps to ensure that the relevant parts of the confidential investigation report were indeed part of the confidential record at the time of the investigation.<sup>19</sup> The Appellate Body found that, by doing so, the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement:

"We consider that, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record at the time the determination was made, a panel has to take certain steps to assess objectively and assure itself of the report's validity and whether or not it formed part of the contemporaneous written record of the investigation. The panel may do so, for example, by posing specific questions to the respondent party submitting the investigation report about its origin and the point in time when it was incorporated into the record of the investigation. The manner in which a panel can

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<sup>14</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.188-4.189..

<sup>15</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.190 and 4.196.

<sup>16</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1143.

<sup>17</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1144.

<sup>18</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1139.

<sup>19</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.125-5.127.



assure itself of whether an investigation report, or parts of it, formed part of the investigation record will depend on the facts of the particular case and may include, in addition to posing questions to the submitting party, examining additional evidence demonstrating that the contested report, or parts of it, formed part of the investigation record.

...

On the basis of the above, we find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, on the confidential investigation report without assuring itself of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made."<sup>20</sup>

17. In *US – Steel and Aluminium Products (Turkey)*, the United States did not present arguments in response to certain claims brought by the complainant.<sup>21</sup> Yet, the Panel examined the evidence and arguments presented by the complainant, before making findings of violation. The Panel in *Turkey – Pharmaceutical Products (EU)* took the same approach:

"The Panel considers that the fact that Turkey does not present any arguments on the elements of the claims under Article III:4 of the GATT 1994 is not in and of itself a sufficient basis for the Panel to summarily conclude that the European Union's claims are well founded. In line with the approach taken by other panels in similar circumstances, the Panel will consider whether the complainant has presented evidence and argument 'sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision'."<sup>22</sup>

18. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel found that the absence of refutation by the respondent did not absolve the Panel from its obligation to contact an independent assessment with regard to the claim at issue:

"The Panel considers that, as part of its assessment of whether Malaysia has made a *prima facie* case of inconsistency under Article 2.5, the Panel may give some weight to the fact that the European Union does not contest that there was a 'request' within the meaning of Article 2.5. However, the absence of refutation from the European Union does not absolve the Panel from conducting an independent assessment of whether Malaysia made 'requests' for an explanation of the justification of the 7% maximum share and the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5."<sup>23</sup>

### **1.3.1.2 Independent assessment of the meaning of domestic law**

19. In response to India's assertion that municipal law is a fact that must be established before an international tribunal by the party relying on it and that the Panel should have sought guidance from India on matters relating to the interpretation of Indian law, the Appellate Body in *India – Patents (US)* stated:

"In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations. For example, in *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed:

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<sup>20</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.134 and 5.137.

<sup>21</sup> Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.29, 7.54, and 7.69.

<sup>22</sup> Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.121.

<sup>23</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.661.

'It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. *The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.* (emphasis added)'

... It is clear that an examination of the relevant aspects of Indian municipal law and, in particular, the relevant provisions of the Patents Act as they relate to the 'administrative instructions', is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law 'as such'; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*. To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the *WTO Agreement*. This, clearly, cannot be so.

Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930*, the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the differences between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947. This seems to us to be a comparable case."<sup>24</sup>

20. In connection with the examination of Section 301-310 of the US Trade Act of 1974, the Panel in *US – Section 301 Trade Act* stated that it would not "interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements." Rather, the Panel held that it was instead "called upon to establish the meaning of Sections 301-310 as factual elements":

"Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India – Patents (US)*, interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect."<sup>25</sup>

...

We note, finally, that terms used both in Sections 301-310 and in WTO provisions, do not necessarily have the same meaning. For example, the word 'determination' need not always have the same meaning in Sections 304 and 306 as it has in Article 23.2(a) of the DSU. Thus, conduct not meeting, say, the threshold of a 'determination' under Sections 304 and 306, is not by this fact alone precluded from

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<sup>24</sup> Appellate Body Report, *India – Patents (US)*, paras. 65-67.

<sup>25</sup> (footnote original) In this respect, the International Court of Justice ("ICJ"), referring to an earlier judgment by the Permanent Court of International Justice ("PCIJ") noted the following: "Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)" (*Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 47, para. 62).

meeting the threshold of a 'determination' under Article 23.2(a) of the DSU. By contrast, the fact that a certain act is characterized as a 'determination' under domestic legislation, does not necessarily mean that it must be construed as a determination under the covered agreements."<sup>26</sup>

21. In *US – 1916 Act (EC)*, in connection with the examination of the 1916 Act, the European Communities argued that the Panel should not be influenced by the terms used by the United States courts whereas the United States argued that "the proper interpretation of the 1916 Act is a question of fact to be established, as it is an accepted principle of international law that municipal law is a fact to be proven before international tribunals."<sup>27</sup> Referring to the Appellate Body Report in *India – Patents (US)*, the Panel stated:

"[O]ur understanding of the term 'examination' as used by the Appellate Body is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement."<sup>28</sup><sup>29</sup>

22. The Panel in *US – 1916 Act (EC)* then noted that both complaining parties and the defending party relied on United States court cases in their claims. In connection with the consideration of the case law relating to the 1916 Act, the Panel stated:

"We recall that the International Court of Justice, in the *Elettronica Sicula S.p.A (ELSI)* case, referred to the judgement of the Permanent Court of International Justice in the *Brazilian Loans* case – to which the United States also refers in its submissions – and noted that:

'Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124).'<sup>30</sup>

We are fully aware that our role is to clarify the existing provisions of the covered agreements so as to determine the compatibility of a domestic law with those agreements. We are also aware that, in the *Brazilian Loans* case, the PCIJ was asked to apply domestic legislation to a given case. We are nevertheless of the view that there is nothing in the text of the DSU, nor in the practice of the Appellate Body, that prevents us from 'weigh[ing] the jurisprudence of municipal [US] courts' if it is 'uncertain or divided'. This would not require us to develop our own independent interpretation of US law, but simply to select among the relevant judgements the

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<sup>26</sup> Panel Report, *US – Section 301 Trade Act*, paras. 7.18 and 7.20. See also Panel Report, *US – Steel Plate*, para. 90.

<sup>27</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.46.

<sup>28</sup> (footnote original) This is evidenced by the examples used by the Appellate Body (*Ibid.*, para. 67): "Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930* [footnote omitted], the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the difference between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947."

<sup>29</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.51, referring to Appellate Body Report, *India – Patents (US)*, para. 66.

<sup>30</sup> (footnote original) ICJ, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), ICJ Reports 1989, p. 15, at p.47, para. 62.

interpretation most in conformity with the US law, as necessary in order to resolve the matter before us.<sup>31"32</sup>

23. The Panel in *US – 1916 Act (EC)* also examined the legislative history to determine the intent of Congress to assist their understanding of the actual scope and operation of the 1916 Act. In so doing, the Panel considered public declarations of various United States officials and stated:

"[W]e should determine whether they could actually generate legal obligations for the United States under international law. For instance, since they are subsequent to the notification by the United States of its 'grandfathered' legislation under the GATT 1947, it might be argued that they implicitly modified that notification by stating that the 1916 Act was 'grandfathered'. We recall that the International Court of Justice has developed, *inter alia* in its judgement in the *Nuclear tests* case, criteria on when a statement by a representative of a State could generate international obligations for that State. In the present case, we are reluctant to consider the statements made by senior US officials in testimonies or letters to the US Congress or to members thereof as generating international obligations for the United States. First, we recall that the constitution of the United States provides for a strict separation of the judicial and executive branches. With the exception of criminal prosecutions, the application of the 1916 Act falls within the exclusive responsibility of the federal courts. Under those circumstances, a statement by the executive branch of government in a domestic forum can only be of limited value. Second, with the possible exception of the statement of US Trade Representative Clayton Yeutter, they were not made at a sufficiently high level compared with the statements considered by the International Court of Justice in the *Nuclear Tests* case, where essentially declarations by a head of State and of members of the French government were at issue. Moreover, the statements referred to in the present case were not directly addressed to the general public. Finally, they were not made on behalf of the United States, but – at best – on behalf of the executive branch of government. This aspect would not be essential if the statements had been made in an international forum, where the executive branch represents the State. However, in the present case, the statements were addressed to the US legislative branch. Therefore, we cannot consider them as creating obligations for the United States under international law."<sup>33</sup>

24. In *US – Shrimp (Article 21.5 – Malaysia)*, the Panel had examined the United States municipal law at issue taking into account the status of such law at the time of its review. Malaysia wanted the Panel to take into account a CTI ruling (*Turtle Island*) which was still declaratory. The Appellate Body agreed with the Panel and considered that it would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Appellate Body insisted that "the Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make 'an objective assessment of the matter ... including an objective assessment of the facts of the case'".<sup>34</sup>

25. In *US – Section 211 Appropriations Act*, the Appellate Body stressed that "municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations":

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<sup>31</sup> (footnote original) We do not consider that this would be engaging into *interpreting* US law, with the risks highlighted by the United States in its submissions. Our approach is in line with the reasoning of the PCIJ in the *Brazilian Loans* case, which, even though it had to apply domestic law, was prudent in its approach of the domestic case-law:

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case" (PCIJ, Series A, Nos. 20/21, p. 124)

<sup>32</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.53.

<sup>33</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.63.

<sup>34</sup> Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 95.

"Our rulings in these previous appeals are clear: the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the *WTO Agreement*. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.

To address the legal issues raised in this appeal, we must, therefore, necessarily examine the Panel's interpretation of the meaning of Section 211 under United States law. An assessment of the consistency of Section 211 with the Articles of the *TRIPS Agreement* and of the Paris Convention (1967) that have been invoked by the European Communities necessarily requires a review of the Panel's examination of the meaning of Section 211. Likewise, that assessment necessarily requires a review also of the Panel's examination of the meaning of both the CACR and the Lanham Act, to the extent that they are relevant for assessing the meaning of Section 211. This is an interpretation of the meaning of Section 211 solely for the purpose of determining whether the United States has fulfilled its obligations under the *TRIPS Agreement*. The meaning given by the Panel to Section 211 is, thus, clearly within the scope of our review as set out in Article 17.6 of the DSU."<sup>35</sup>

26. In *Thailand – Cigarettes (Philippines)*, Thailand argued on appeal that the Panel failed to give "due deference" to Thailand's interpretation of its own law. The Appellate Body responded:

"In our view, the panel in correctly recognized that, 'objectively, a Member is normally well-placed to explain the meaning of its own law', but that this does not relieve a party of its burden to adduce arguments and evidence necessary to sustain its proposed interpretation. (Panel Report, para. 7.28) Further, a panel's duties under Article 11 of the DSU require it to conduct an objective assessment of all such arguments and evidence. In this dispute, the Panel observed, in the context of its Article III:4 analysis, that 'Thailand should normally be in a position to explain the nature' of obligations under Thai law but that, to the extent that the parties disagree on the content of such obligations, the Panel was 'required to objectively examine the question at issue based on the text of the concerned provision[s] as well as on the evidence before [the Panel]'. (Panel Report, para. 7.684 (footnote omitted)) We see no error in the Panel's approach."<sup>36</sup>

27. In *EU – Biodiesel (Argentina)*, the Appellate Body explained that, as part of its duty under Article 11 of the DSU, a panel is required to conduct a "holistic assessment" in ascertaining the meaning of municipal law, which should be guided by the particularities of each case:

"With particular regard to a panel's duties in ascertaining the meaning of municipal law, the Appellate Body has found that, '[a]s part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it'. In doing so, 'a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies'. When parties refer to elements in addition to the text of the municipal law, a panel must take account of all such elements, in order to engage in an objective assessment of the matter. ...

Thus, in ascertaining the meaning of a municipal law, a panel is required to undertake a 'holistic assessment' of all the relevant elements. At the same time, we emphasize that a review of whether a panel undertook a holistic assessment, and by so doing met its obligation under Article 11 of the DSU, should be guided by the specific circumstances of each case, the nature of the measure and the obligation at issue, and the evidence submitted by the parties. In other words, there is no single

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<sup>35</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105-106.

<sup>36</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, fn 253.

methodology that every panel must employ before it can be found to have undertaken a proper 'holistic assessment'."<sup>37</sup>

28. In *US – Carbon Steel (India)*, the Appellate Body found that the Panel had failed to make an objective assessment of the meaning of municipal law, namely Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations, by disregarding the evidence submitted by the parties beyond the text of the measure at issue:

"It was in this evidentiary context that the Panel was called upon to undertake an assessment of the meaning of the measure at issue in order to evaluate whether it is inconsistent 'as such' with Article 12.7 of the SCM Agreement. In this regard, we recall that the Panel's assessment of the measure was limited to reproducing excerpts of its text and making some rather cursory observations. The Panel did not explain the legal standard it applied in its construction of the measure at issue. The Panel's discussion of India's claim that the measure is, properly construed, mandatory in nature, is confined to the statements extracted above, including that 'our examination is limited to the US provisions 'as such', and not the USDOC's 'approach' as a 'measure', and that, having found no inconsistency on the basis of the text of the measure, 'we need not and do not address the United States' argument that the US provisions at issue are not mandatory in nature'. Beyond these statements, there is no discussion or explanation in the Panel Report as to why the Panel omitted to consider or address the evidence beyond the text of the measure that had been submitted to it.

We recall that the Appellate Body explained in *US – Hot-Rolled Steel* that it is 'essential' for a panel 'to conduct a detailed examination of ... legislation in assessing its consistency with WTO law'. In our view, in order to conduct a 'detailed examination' of the measure at issue, and to engage in an 'objective assessment of the matter', it is incumbent on a panel to engage in a thorough analysis of the measure on its face and to address evidence submitted by a party that the alleged inconsistency with the covered agreements arises from a particular manner in which a measure is applied. While a review of such evidence may ultimately reveal that it is not particularly relevant, that it lacks probative value, or that it is not of a nature or significance to establish a *prima facie* case, this can only be determined after its probative value has been reviewed and assessed ... [...] In the circumstances of this case, a 'detailed examination' of the measure at issue called for the Panel to consider and address the measure on its face and the evidence submitted beyond its text."<sup>38</sup>

29. The Appellate Body further reversed the Panel's finding on the meaning of Section 1677(7)(G) of the US Statute, on the ground that the Panel had neither analysed the text of the measure at issue nor considered any relevant practice.<sup>39</sup> In this regard, the Appellate Body explained further that "the limited nature of the parties' submissions as to the meaning of the measure at issue cannot absolve the Panel from its duties to determine the meaning of municipal law, to engage in an objective assessment of the matter, and to reflect the considerations that led to its conclusion in its report."<sup>40</sup>

### 1.3.1.3 Independent assessment of the meaning of other international conventions and treaties

30. In *EC – Bananas III*, the European Communities asserted "that the Panel should not have conducted an objective examination of the requirements of the Lomé Convention, but instead should have deferred to the 'common' EC and ACP views on the appropriate interpretation of the Lomé Convention." The Appellate Body expressly agreed with the following statement of the Panel:

"We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became

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<sup>37</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.201-6.202. See also Appellate Body Reports, *US – Shrimp II (Viet Nam)*, para. 4.32; *Ukraine – Ammonium Nitrate*, para. 6.43.

<sup>38</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.453-4.454. See also Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.43.

<sup>39</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.611.

<sup>40</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.613.

a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver."<sup>41</sup>

### 1.3.2 Other issues

#### 1.3.2.1 Panel's duty to deal with the matter before it

31. In *Mexico – Taxes on Soft Drinks*, Mexico argued that the Panel should have declined to exercise jurisdiction. In the context of addressing this issue, the Appellate Body referred to Article 11:

"Article 11 of the DSU states that panels *should* make an objective assessment of the matter before them. The Appellate Body has previously held that the word 'should' can be used not only 'to imply an exhortation, or to state a preference', but also 'to express a duty [or] obligation'. The Appellate Body has repeatedly ruled that a panel would not fulfil its mandate if it were not to make an objective assessment of the matter. Under Article 11 of the DSU, a panel is, therefore, charged with the *obligation* to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. Article 11 also requires that a panel 'make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.' It is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it."<sup>42</sup>

32. In *EC – Chicken Cuts*, the Panel decided to seek certain information from the World Customs Organization. By way of general comment in its reply to the questions posed, the World Customs Organization suggested that the settlement procedures contained in the HS Convention should be followed by the parties before the Panel made its decision. In its report, the Panel referred to Article 11 and commented that "once seized of a matter, Article 11 prevents a panel from abdicating its responsibility to the DSB. In other words, in the context of the present case, we lack the authority to refer the dispute before us to the WCO or to any other body". The Panel noted that "all the parties to this dispute, including the respondent, appear to consider that this case is appropriately adjudicated by us", and that although it was "mindful of the respective jurisdiction and competence of the WCO and the WTO ... we consider that we have been mandated by the DSB in this dispute to determine whether the European Communities has violated Article II of the GATT 1994 with respect to the products at issue."<sup>43</sup>

33. In *EU – PET (Pakistan)*, the challenged measure expired after the establishment of the Panel. At the request of the complainant, the Panel decided to make findings on the measure's consistency with the covered agreements. The Panel did not, however, issue recommendations because the measure had expired. On appeal, the European Union argued that the Panel had acted inconsistently with the obligation laid down in Article 11 of the DSU by making findings on an expired measure, and that this rendered the panel proceeding moot. The Appellate Body disagreed. In its finding, the Appellate Body noted that panels have discretion to decide how to take into account subsequent modifications to the challenged measures. According to the Appellate Body, in cases such as this, a panel should decide whether the "matter" before it has been fully resolved:

"We recall that a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. We recall that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure. Rather, among its inherent adjudicative powers is the authority of a panel to assess objectively whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be

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<sup>41</sup> Appellate Body Report, *EC – Bananas III*, para. 167.

<sup>42</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.

<sup>43</sup> Panel Report, *EC – Chicken Cuts*, paras. 7.56-759.

examined following the expiry of the measure at issue. Hence, we would draw a distinction between a situation in which a WTO panel declines to exercise its jurisdiction entirely at the outset of a proceeding in favour of a different adjudicative forum and a situation in which a panel, in the exercise of its jurisdiction, objectively assesses whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue."<sup>44</sup>

34. The Appellate Body stated that in such cases, "the measure at issue, notwithstanding its expiry, continues to serve as the framework for the panel's duty, under Article 11 of the DSU, to assess objectively 'the applicability of and conformity with the relevant covered agreements'."<sup>45</sup>

35. According to the Appellate Body, the Panel correctly found that the matter before it had not been resolved, and that therefore, under Article 11 of the DSU, the Panel had to make findings on the consistency of the expired measure with the covered agreements:

"From our consideration of the arguments of the parties before the Panel, and the Panel's reasoning as discussed above, it is apparent that there still existed a dispute between the parties on the 'applicability of and conformity with the relevant covered agreements' as regards the Commission's findings underpinning the measure at issue, despite its expiry. As noted, the Panel referred to the 'WTO inconsistencies that are alleged in this dispute' and recognized that the parties still disagreed on how investigating authorities should determine the extent to which the MBS may constitute a countervailable subsidy within the meaning of the SCM Agreement. Therefore, the 'matter' within the jurisdiction of the Panel was not fully resolved by the expiry of the measure. Given that the Panel objectively determined that a dispute still persisted between the parties as regards the 'applicability of and conformity with the relevant covered agreements' with respect to the expired measure at issue, the Panel would not have fulfilled its duty under Article 11 of the DSU if it had declined to exercise its validly established jurisdiction and abstained from making any finding on the 'matter' before it. Accordingly, we do not agree with the European Union that the Panel's reasoning, findings, and conclusions contained in its Report in relation to the expired measure at issue were made 'outside the context of resolving [this] particular dispute'."<sup>46</sup>

#### **1.3.2.2 Panel not bound by the parties' arguments in developing its own reasoning**

36. In *Brazil – Taxation*, the Appellate Body stated that "the Panel is not bound by the arguments raised by a party and can use those arguments freely to develop its own legal reasoning to support its findings and conclusions in the matter under consideration. Moreover, if the panel's analysis was shaped solely by the parties' arguments, the panel may not be able to conduct an objective assessment of the matter, as required under Article 11 of the DSU."<sup>47</sup>

37. In *Indonesia – Iron or Steel Products*, the Appellate Body pointed out that the duty to conduct an objective examination may sometimes require a panel to depart from the positions taken by the parties and develop its own reasoning, including with regard to determining the applicability of the legal provisions invoked by the complaining party to the measures at issue:

"The Agreement on Safeguards applies to the 'measures provided for in Article XIX of GATT 1994'. A panel's assessment of claims brought under the Agreement on Safeguards may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994. To the extent that the applicability of the Agreement on Safeguards is uncontested, it may well be unnecessary for a panel to include detailed reasoning in this regard in its report. However, contrary to what Indonesia appears to suggest, it does not follow from this that a panel would be precluded from determining the applicability of a particular covered agreement in cases where the issue has not been

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<sup>44</sup> Appellate Body Report, *EU – PET (Pakistan)*, para. 5.19.

<sup>45</sup> Appellate Body Report, *EU – PET (Pakistan)*, para. 5.44.

<sup>46</sup> Appellate Body Report, *EU – PET (Pakistan)*, para. 5.49.

<sup>47</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.171.



raised by the parties. As the Appellate Body has consistently stated, 'nothing in the DSU limits the faculty of a panel freely to ... *develop its own legal reasoning* – to support its own findings and conclusions on the matter under its consideration'. Indeed, the duty to conduct an 'objective assessment of the matter' may, at times, *require* a panel to depart from positions taken by the parties. A panel 'might well be *unable* to carry out an objective assessment of the matter ... if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute'. Moreover, the description of a measure proffered by a party and 'the label given to [it] under municipal law' are 'not dispositive' of the proper legal characterization of that measure under the covered agreements. Rather, a panel must assess that legal characterization for purposes of the applicability of the relevant agreement on the basis of the 'content and substance' of the measure itself.

In light of the above, we consider that a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute. The complainants in this dispute claimed that Indonesia's specific duty on imports of galvalume is inconsistent with Article XIX of the GATT 1994 and certain substantive provisions of the Agreement on Safeguards. Therefore, it was the Panel's duty, pursuant to Article 11 of the DSU, to assess objectively whether the measure at issue constitutes a safeguard measure in order to determine the applicability of the substantive provisions relied upon by the complainants as the basis for their claims."<sup>48</sup>

38. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted the overlapping arguments of the parties due in large part to the overlapping nature of the relevant legal provisions, and explained its approach to the assessment of such arguments, as follows:

"The Panel appreciates that the parties' overlapping arguments under multiple different elements of these provisions is largely a consequence of apparent overlaps in the legal standards that apply under these provisions. However, the Panel does not consider that it is under an obligation to formalistically address the same issues and arguments in the context of every analytical step or provision where they are repeated. It is well established that a panel has 'the discretion to address only those arguments it deems necessary to resolve a particular claim'. The Panel addresses disputed issues and arguments under the steps in the analysis of Article 2.2 and Article 2.1 that it considers most relevant and appropriate to the issues and arguments raised. Towards that end, the Panel engages in a holistic reading of the parties' arguments under Article 2.2 and Article 2.1 and their submissions more generally. Where appropriate and useful to enhancing the clarity of its reasoning, the Panel employs the technique of cross-referencing."<sup>49</sup>

39. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted "internal tensions and ambiguities" in the parties' arguments, and explained its approach to the treatment of such arguments, as follows:

"In these circumstances, the Panel's task is not a matter of simply choosing between one of two alternative ways of articulating the objective of the measures at issue. Rather, the Panel must undertake an independent and objective assessment of the proper characterization of the measures' objective, guided by its consideration of the main issues raised by parties in their related arguments."<sup>50</sup>

### 1.3.2.3 Failure to provide "reasoned and adequate explanation" or a "basic rationale"

40. In *Brazil – Taxation*, the Appellate Body pointed out that, in setting out the time period within which the contested prohibited subsidies had to be withdrawn, the Panel had acted inconsistently with Article 11:

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<sup>48</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.32-5.33.

<sup>49</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.195.

<sup>50</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.210.

"In light of the above, we do not consider that the Panel established a sufficient link between the time period of 90 days specified by it for the withdrawal of the subsidies at issue and the domestic procedure within Brazil for such withdrawal. Instead, the Panel appears to have treated the practice of specifying 90 days by some prior panels as the *de facto* standard to be applied in all cases. As discussed, Article 4.7 requires a case-by-case analysis of the time period to be prescribed for the withdrawal of prohibited subsidies 'without delay'. We therefore find that by failing to provide a 'reasoned and adequate explanation' or a 'basic rationale' in recommending a time period of 90 days under Article 4.7 of the SCM Agreement in the present case, the Panel acted inconsistently with Articles 11 and 12.7 of the DSU."<sup>51</sup>

41. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*) considered it appropriate to follow the legal reasoning developed in the first Article 21.5 proceedings in resolving the same issues that arose in the second Article 21.5 proceedings:

"Having said this, and bearing in mind that the Panel is not strictly bound by any legal findings and reasoning contained in its Report in the first recourse to Article 21.5, there is nothing in the DSU that would require this Panel to treat all the legal and interpretative issues raised in this second recourse to Article 21.5 as matters of first impression. Article 11 of the DSU mandates the Panel to make an 'objective assessment of the matter'. The notion of objectivity embraces considerations of consistency and coherence. The Panel's findings and legal interpretations in the first recourse to Article 21.5 already carefully took into account and addressed all of the legal arguments presented to it by the parties and third parties in the context of the first recourse to Article 21.5. It would arguably be capricious, not objective, for the Panel to be swayed to change its earlier legal findings and reasoning on the basis of the same arguments that it found unpersuasive in the first recourse to Article 21.5, considering that this second recourse to Article 21.5 is part of the same dispute as the first recourse to Article 21.5, is between the same disputing parties, and is being adjudicated by a compliance panel composed of the same individuals. Accordingly, in the light of Article 11 of the DSU the Panel considers that it has a duty to re-examine any earlier findings and reasoning only in the light of any new arguments presented by the parties or third parties in this second recourse to Article 21.5."<sup>52</sup>

42. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*) stated that its findings regarding the relevance of the legal reasoning developed in the first Article 21.5 proceedings in the same dispute do not imply anything on the general issue of the precedential value of past panel and Appellate Body reports:

"The Panel understands that some Members hold to the view that WTO panels should follow prior interpretations by default unless there is a reason not to (i.e. the cogent reasons standard), whereas other Members hold to the view that WTO panels should reach their own interpretations more independently, and follow prior interpretations only insofar as they are found to align and be assessed as persuasive (i.e. the persuasiveness standard). These different points of view have been reflected in the submissions made by the third parties in this proceeding. The fact that this Panel would be predisposed to consider the findings it made in the first recourse to Article 21.5 as still being persuasive, in the absence of novel arguments or circumstances demonstrating otherwise, implies no view on the precedential value of other panel and Appellate Body reports more generally. It only reflects the Panel's assessment of how Articles 11 and 3.2 of the DSU apply in the circumstances of successive proceedings, raising the same or similar legal issues, argued before two panels comprised of the same three individuals, in the compliance phase of the same overall WTO dispute between the same parties."<sup>53</sup>

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<sup>51</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.460.

<sup>52</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.16.

<sup>53</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.19.

#### 1.3.2.4 Finding on a claim not made by the complainant

43. In *Chile – Price Band System*, the Appellate Body considered that the Panel had exceeded its mandate and thus acted inconsistently with Article 11 because it had made a finding on a claim that was not made by Argentina:

"In this case, the Panel made a finding on a claim that was *not* made by Argentina. Having determined that the duties resulting from Chile's price band system could not be assessed under the first sentence of Article II:1(b) of the GATT 1994, the Panel then proceeded to examine the measure under the second sentence of that provision. In so doing, the Panel assessed a provision that was not a part 'of the matter before it'. As we have explained, the terms of reference were broad enough to have included a claim under the second sentence of Article II:1(b). However, Argentina did not articulate a claim under that sentence; nor did Argentina submit any arguments on the consistency of Chile's price band system with the second sentence. Therefore, as with our finding in *US – Certain EC Products*, the second sentence of Article II:1(b) was not the subject of a claim before the Panel. Because it made a finding on a provision that was not before it, the Panel, therefore, did not make an objective assessment of the matter before it, as required by Article 11. Rather, the Panel made a finding on a matter that was *not* before it. In doing so, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU."<sup>54</sup>

#### 1.3.2.5 Internally inconsistent reasoning/assessment of evidence

44. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body found that the Panel had failed to make an objective assessment of the matter before it by assessing evidence in an internally inconsistent manner:

"The Panel's internally incoherent treatment of the same class of quantitative evidence thus vitiates the conclusion it drew based on the financial data submitted by the parties.

In sum, we find that, by dismissing the import of the re-estimates data submitted by the United States on the basis of internally inconsistent reasoning, the Panel did not make 'an objective assessment of the matter before it, including an objective assessment of the facts of the case', under Article 11 of the DSU."<sup>55</sup>

45. By the same token, the Appellate Body in *EC and certain member States – Large Civil Aircraft* found that, by treating differently pieces of evidence that shared the same features, the Panel had acted inconsistently with its obligation to make an objective assessment of the facts, as required under Article 11:

"In sum, the Panel's reasoning in relation to the United States' proposed project-specific risk premium is internally inconsistent. The Panel dismissed venture capital financing as a source from which to derive the project risk of the projects financed with LA/MSF because it considered venture capital financing to be 'inherently more risky than LA/MSF'. At the same time, the Panel used the project-specific risk premium proposed by the United States—which had been derived by Dr. Ellis from the returns of venture capital financing—as a boundary for the ranges of project-specific risk premia that it established for the three groupings of LCA projects. The Panel's error is compounded in the case of the A300 and A310 because it left the upper limit of the range of the project-specific risk premium unbounded, thus potentially going beyond the level of the risk premium associated with venture capital financing ... There are thus clear inconsistencies in the Panel's reasoning. This type of internally inconsistent reasoning cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU."<sup>56</sup>

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<sup>54</sup> Appellate Body Report, *Chile – Price Band System*, para. 173.

<sup>55</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 294-295.

<sup>56</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 894.

46. In *Russia – Commercial Vehicles*, the Appellate Body found inconsistent with Article 11 the Panel's internally incoherent reasoning in reviewing the investigating authority's assessment of the impact of dumped imports on domestic prices:

"As explained above, in its counterfactual analysis, the DIMD used target domestic prices calculated on the basis of the 2009 rate of return. The Panel had found earlier that the DIMD's construction of the target domestic price was WTO-inconsistent. The Panel's finding that the long-term price trends corroborate the DIMD's counterfactual analysis is not coherent and consistent with its earlier finding concerning the DIMD's construction of the target domestic price on the basis of the 2009 rate of return. This is because the DIMD's counterfactual analysis relied on the target domestic price, and the Panel had found earlier that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent. Thus, the Panel could not have later relied on the DIMD's counterfactual analysis as a basis for its finding concerning the price trends.

For these reasons, we consider that the Panel's finding concerning the long-term price trends is not coherent and consistent with its earlier finding that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent. Thus, we find that, in this regard, the Panel acted inconsistently with Article 11 of the DSU."<sup>57</sup>

47. In *Australia – Tobacco Plain Packaging*, in addressing the appellants' claims regarding the Panel's alleged failure to provide "reasoned and adequate explanations" or "coherent reasoning" for its findings, the Appellate Body recalled:

"[W]hen an appeal is brought under Article 11 of the DSU, the Appellate Body examines a panel's explanations, not to verify the correctness of these explanations, but as a means of checking whether the panel was objective in its assessment of the facts. To this end, the Appellate Body may consider that a panel's objectivity is implicated if the appellant successfully demonstrates that (i) the panel's reasoning was internally inconsistent or lacked coherence; (ii) the panel disregarded, distorted, or misrepresented evidence; (iii) the panel's findings lacked a sufficient evidentiary basis on the panel record; or (iv) the panel was not even-handed in its treatment of the parties' evidence."<sup>58</sup>

#### **1.3.2.6 Consultation with experts**

48. In *India – Quantitative Restrictions*, India argued in its appeal that the Panel had acted inconsistently with Article 11 of the DSU because it had delegated to the IMF its duty to make an objective assessment. The Appellate Body disagreed with India and stated:

"The Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions."<sup>59</sup>

#### **Existence of a measure at issue**

49. In *Russia – Railway Equipment*, the Appellate Body outlined the legal standard to be followed when considering whether a panel has acted inconsistently with Article 11 of the DSU in finding that a complainant had demonstrated the existence of a measure at issue. The Appellate Body stated:

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<sup>57</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.81-5.82. See also *ibid.* para. 5.84.

<sup>58</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.318.

<sup>59</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 149.

"As part of its objective assessment of the matter under Article 11 of the DSU, a panel must 'thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics'. This entails identifying 'all relevant characteristics of the measure', recognizing 'which features are the most central to that measure itself', and 'which are to be accorded the most significance for purposes of characterizing the relevant [measure]'. Exactly what is required for a panel to do so is bound to vary depending on the circumstances of each case, the evidence proffered by the parties, and the nature of the measure itself. In this regard, panels enjoy a margin of discretion to structure their assessment as they see fit, provided they proceed 'on the basis of a properly structured analysis', provide 'reasoned and adequate explanations and coherent reasoning', base their findings on a 'sufficient evidentiary basis', treat evidence with 'even-handedness', and carry out a 'holistic assessment' of all pertinent elements before reaching its conclusions.

Furthermore, the Appellate Body cannot base a finding of inconsistency under Article 11 simply on the conclusion that it might have reached a different factual finding from the one the panel reached. It is therefore not sufficient for a participant raising a claim under Article 11 simply to disagree with a panel. In addition, the Appellate Body has stated that not every error in the appreciation of a particular piece of evidence will rise to the level of a failure by a panel to comply with its duties under Article 11 of the DSU. To find that a panel acted inconsistently with Article 11, the Appellate Body would have to be satisfied that the panel's errors, taken together or singly, undermine the objectivity of the panel's assessment of the matter before it."<sup>60</sup>

50. The Appellate Body also outlined the following considerations, which pertain to the measures that can be challenged in WTO dispute settlement, the compliance of a panel with Article 11 of the DSU, and the requirements that a complainant must meet to set out a *prima facie* case. The Appellate Body stated:

"We begin by recalling that 'any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.' In identifying a measure and its characteristics, we have referred above to the standard under Article 11 of the DSU, which requires a panel to 'thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics'. Exactly what is required for a panel to do so is bound to vary depending on the circumstances of each case. Panels enjoy a margin of discretion to structure their assessment as they see fit, and they do not err under Article 11 of the DSU unless they exceed their authority as the trier of facts. In terms of the question whether a complainant has met its *prima facie* case to show the relevant features of the measure, a complainant need not definitively persuade a panel of the soundness of its position. Instead, a complainant meets its *prima facie* burden by presenting sufficient arguments and evidence 'to raise a presumption in favour of its claim'."<sup>61</sup>

#### Assessment of a matter outside of terms of reference

51. In *Russia – Railway Equipment*, the Appellate Body considered whether the Panel had conducted an assessment of a matter that was not before it. The Appellate Body considered the following legal standard:

"Article 11 of the DSU provides that a panel should make an objective assessment of the 'matter' before it. The term 'matter' is referred to in Article 7 of the DSU. The Appellate Body has stated that '[t]he measures and the claims identified in the panel request constitute the 'matter' referred to the DSB', which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU.' Article 11 of the DSU also refers to the 'matter' before the panel, and it requires a panel to make an objective assessment of that 'matter'. More specifically, Article 11 requires panels to conduct an objective assessment, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. Not every error in the appreciation of evidence will necessarily rise to the level of a failure by a

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<sup>60</sup> Appellate Body Report, *Russia – Railway Equipment*, paras. 5.67-5.68.

<sup>61</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.78.

panel to comply with its duties under Article 11 of the DSU. For example, some inconsequential inaccuracies may not necessarily constitute a violation of Article 11 of the DSU as long as they do not undermine the remainder of the panel's analysis. Only those errors that are so material that, 'taken together or singly', they undermine the objectivity of the panel's assessment of the matter lead to a violation of Article 11 of the DSU. The Appellate Body has also found that panels have not exceeded their terms of reference when making certain purely descriptive comments that did not rise to the level of legal findings or conclusions."<sup>62</sup>

52. The Appellate Body determined that the Panel had not examined a matter that fell outside of its terms of reference. The Appellate Body examined several paragraphs of the Panel's factual analysis and reached the same conclusion in each instance. With respect to one set of paragraphs, the Appellate Body stated that:

"In our view, these remarks by the Panel are descriptive comments regarding the evidence put forward by Ukraine concerning the third measure at issue. According to the Panel's examination of the evidence, particularly the 2016 letters, both the local production condition and the local registration condition were mentioned together in each letter. In this way, the local production condition and the local registration condition were part of the *same* evidence put before the Panel by Ukraine to prove the existence of the third measure. In this context, we do not consider that the Panel exceeded its terms of reference by merely describing the content of the evidence before it. As noted above, by making descriptive comments about a piece of evidence, a panel does not necessarily exceed its terms of reference, especially where such statements do not amount to legal findings or conclusions."<sup>63</sup>

53. With respect to another set of paragraphs, the Appellate Body stated that it "[did] not see that the Panel made findings regarding the local registration condition *per se* in these paragraphs".<sup>64</sup> The Appellate Body also stated, with respect to certain documents under review by the Panel, that:

"[T]hese documents supported the Panel's conclusion that Russia applied the 'non-recognition requirement' encompassing both conditions, which in turn, formed the basis of the Panel's finding that the third measure had been demonstrated to exist. Thus, we do not find that the Panel made any 'finding' regarding the local registration condition *per se*, but rather that the Panel based its conclusion regarding the existence of the third measure on its examination of the evidence before it."<sup>65</sup>

54. The Appellate Body made similar statements with respect to other paragraphs, noting that the Panel was mindful of the limitation of its terms of reference<sup>66</sup> and was describing aspects of its comparative analysis.<sup>67</sup>

### Assessment of a matter in the context of a potential appeal

55. In *Korea – Stainless Steel Bars*, the Panel noted comments made by Korea during the interim review process concerning its "promising appeal" if its desired changes were not made to the Interim Report. The Panel declined to take these comments into consideration because they did not pertain to a "precise aspect" of the Interim Report under Article 15.2 of the DSU, and because revising its Interim Report in response to a party's litigation strategy would not accord with the Panel's duty under Article 11 of the DSU. The Panel also noted the current, broader systemic context in which Korea had made reference to its "promising appeal" (i.e. a time at which no appellate mechanism had been agreed upon between the parties):

"We do not include a discussion of the comments made by Korea as part of the interim review process regarding its 'promising appeal' if its desired changes were not

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<sup>62</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.95.

<sup>63</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.98.

<sup>64</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.100.

<sup>65</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.101.

<sup>66</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.102.

<sup>67</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.105.



made to the Interim Report. We declined to take account of these comments because they did not pertain to a 'precise aspect' of the Interim Report, and because revising the Interim Report in anticipation of one party's litigation strategy would not accord with our duty to make an objective assessment of the law and facts before us, as required by Article 11 of the DSU. We are cognisant of the broader systemic context in which Korea makes reference to its 'promising appeal'. But this broader context does not mean that we can or should revise our assessment of the law or facts due to an indication by one party that it may pursue an appeal if such revisions are not made."<sup>68</sup>

#### 1.4 "objective assessment of the facts of the case"

##### 1.4.1 Burden of proof

###### 1.4.1.1 General principles

###### 1.4.1.1.1 The general rule: burden of proof rests on party asserting affirmative of claim, defence or fact

56. In *US – Wool Shirts and Blouses*, the Appellate Body held that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence:

"[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."<sup>69</sup>

57. The Panel in *Turkey – Textiles*, the Panel indicated that the Appellate Body "has confirmed the GATT practice" whereby:

- "(a) it is for the complaining party to establish the violation it alleges;
- (b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met; and
- (c) it is for the party asserting a fact to prove it."<sup>70</sup>

58. In *EC – Hormones*, the Appellate Body discussed the allocation of the burden of proof in the context of the SPS Agreement, but referred to its statement in *US – Wool Shirts and Blouses* and stated that this rule "embodies a rule applicable in any adversarial proceedings":

"The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained

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<sup>68</sup> Panel Report, *Korea – Stainless Steel Bars*, Annex A-3, para. 1.3.

<sup>69</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>70</sup> Panel Report, *Turkey – Textiles*, para. 9.57. See also Panel Report, *Argentina – Textiles and Apparel*, paras. 6.34-6.40.

about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in *United States – Shirts and Blouses*, which the Panel invokes and which embodies a rule applicable in any adversarial proceedings."<sup>71</sup>

59. In *Japan – Apples*, the Appellate Body emphasized the distinction between the two "distinct" principles relating to the burden of proof:

"It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof. In fact, the principles are distinct."<sup>72</sup>

60. The Panel in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* stated that the "normal international legal standards" governing the discharge of the burden of proof unquestionably apply to the WTO dispute settlement procedures, as an important element of its functions concerning dispute resolution under the rule of law and due process.<sup>73</sup>

61. In *Korea – Radionuclides*, the Appellate Body found that the Panel had acted inconsistently with its obligation under Article 11 of the DSU by failing to consider evidence on the record with regard to a factual issue and to clarify which party had the burden of proof on that issue:

"In our view, these exhibits submitted to the Panel could be indicative of the publication dates of the press releases on the government websites. This evidence, however, was not addressed by the Panel and is absent from its analysis. We recall that a panel's duty as the trier of facts requires it to consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that the panel's factual findings have a proper basis in that evidence. In the present case, the Panel offered no explanation of whether and how it took the evidence on record concerning the press releases into account in reaching its conclusion that it could not verify the publication dates of the press releases on the government websites. We do not believe that, by disregarding pertinent evidence on the record, the Panel could have complied with its duty under Article 11 of the DSU to conduct an objective assessment of the matter.

Furthermore, at no point during the panel proceedings did the Panel indicate that it required the archived versions of the webpages, in order to confirm the publication dates of the press releases, or request Korea to submit such evidence. We note that the Panel requested Korea to provide certain information about the publication of its measures on government websites. Korea provided a response to that request from the Panel. Despite Korea's response and without asking for information on the publication dates, the Panel based its finding on the absence of further evidence pertaining to the publication dates of the press releases. Thus, even in the absence of a contestation or refutation of the publication dates of the press releases by Japan, the Panel implicitly placed the burden of further confirming the publication dates of the press releases on Korea, and then found that Korea acted inconsistently with Annex B(1) because it had not met that burden.

As observed by the Appellate Body, 'it is not enough for a panel to leave it to the parties to guess what proof it will require.' While a panel cannot make the case for a party, Article 11 requires a panel to 'test evidence with the parties, and to seek further information if necessary, in order to determine whether the evidence satisfies a party's burden of proof'. Thus, in the present case, the Panel should not have left it to Korea to anticipate, in the absence of a contestation of the publication dates by Japan, that it would be required to submit the archived versions of the webpages to prove the publication dates of the press releases on government websites. Rather, to the extent the Panel considered it was necessary for it to have such evidence, it

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<sup>71</sup> Appellate Body Report, *EC – Hormones*, para. 98.

<sup>72</sup> Appellate Body Report, *Japan – Apples*, para. 157.

<sup>73</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.13.



should have sought it from both parties to the dispute and should only then have drawn appropriate inferences."<sup>74</sup>

62. In *Australia – Tobacco Plain Packaging*, in addressing the appellants' claims under Article 11 of the DSU, the Appellate Body underlined that the burden of demonstrating that the TPP measures were inconsistent with Article 2.2 of the TBT Agreement rested on the complainants. The Appellate Body rejected the appellants' claims to the extent that they were premised on the reversal of the burden of proof. According to the Appellate Body:

"The fact that the complainants bore the burden of proving that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement implies, inter alia, that, in order to prevail on their main contention of no contribution, the complainants were required to adduce sufficient evidence to persuade the Panel that the TPP measures are not apt to, and do not, make any contribution to Australia's legitimate objective. Given that the burden of proof rests on the complainant, where a panel finds that a complainant's proposition that the challenged measures makes no contribution is contradicted by evidence (e.g. because the respondent has presented credible evidence suggesting that the measure does make some contribution), then the panel is required to reject the complainant's proposition of no contribution."<sup>75</sup>

#### **1.4.1.1.2 Presumption against the reversal of the burden of proof**

63. In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body indicated that it would "not readily find" that the usual rules on burden of proof are inapplicable:

"[W]e have consistently held that, as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary. We will not readily find that the usual rules on burden of proof do not apply, as they reflect a 'canon of evidence' accepted and applied in international proceedings."<sup>76</sup>

#### **1.4.1.1.3 Where evidence and arguments remain in equipoise**

64. In *US – Section 301 Trade Act*, the Panel clarified, in the light of the allocation of the burden of proof, which party would benefit in case of uncertainty (i.e. in case all evidence and arguments were to remain in "equipoise"):

"Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party."<sup>77</sup>

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<sup>74</sup> Appellate Body Report, *Korea – Radionuclides*, paras. 5.184-5.186.

<sup>75</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.278.

<sup>76</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.

<sup>77</sup> Panel Report, *US – Section 301 Trade Act*, para. 7.14. See also Panel Reports, *US – 1916 Act (EC)*, paras. 6.38 and 6.58; *US – 1916 Act (Japan)*, paras. 6.25 and 6.57; *Guatemala – Cement II*, paras. 1.38 and 8.196; *Argentina – Hides and Leather*, para. 11.2; *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.19; *US – Section 211 Appropriations Act*, para. 8.18; *EC – Sardines*, para. 7.49; and *US – Textiles Rules of Origin*, para. 6.17.

#### 1.4.1.1.4 Establishing a *prima facie* case

##### 1.4.1.1.4.1 What is a *prima facie* case?

65. In *EC – Hormones*, the Appellate Body specified what is meant by the term "*prima facie* case":

"It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>78</sup>

66. In *US – Gambling*, the Appellate Body indicated that "[a] panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case"<sup>79</sup> and noted that:

"A *prima facie* case must be based on 'evidence and legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.

In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:

'... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.'

Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case—made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."<sup>80</sup>

##### 1.4.1.1.4.2 Source of evidence for a *prima facie* case

67. In *US – Wool Shirts and Blouses*, the Appellate Body stated that the nature and scope of evidence required to establish a *prima facie* case "will vary from measure to measure, provision to provision, and case to case."<sup>81</sup>

68. In *Korea – Dairy*, Korea argued in its appeal that the Panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof of making a *prima facie* case. The Appellate Body disagreed and stated:

"Korea appears to suggest that the Panel, in evaluating Korea's actions leading up to the adoption of its safeguard measure, should have looked solely to the evidence submitted by the European Communities as complaining party. We do not agree with Korea in this respect. It is, of course, true that the European Communities has the *onus* of establishing its claim that Korea's safeguard measure is inconsistent with the requirements of Article 4.2 of the *Agreement on Safeguards*. However, under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has

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<sup>78</sup> Appellate Body Report, *EC – Hormones*, para. 104. This was confirmed by the Appellate Body in its Reports *Japan – Agricultural Products II*, paras. 98 and 136 and *Japan – Apples*, para. 159.

<sup>79</sup> Appellate Body Report, *US – Gambling*, para. 139.

<sup>80</sup> Appellate Body Report, *US – Gambling*, paras. 140-141. See also Appellate Body Report, *US – Zeroing (EC)*, para. 217.

<sup>81</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. ... The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.

We note that in examining the [Report of the Korean Authority], the Panel did not do anything out of the ordinary. The European Communities' claim was that Korea had disregarded certain requirements of Article 4.2 of the *Agreement on Safeguards* in its actions preceding and accompanying the adoption of its safeguard measure. The [Report of the Korean Authority] was issued by the Korean authorities which, *inter alia*, investigated and evaluated the assertions of serious injury to the domestic industry involved. Thus, that Report was clearly relevant to the task of the Panel to determine the facts, and the Panel was within its discretionary authority in deciding whether or not, or to what extent, it should rely upon the Report in ascertaining the facts relating to Korea's injury determination."<sup>82</sup>

69. Likewise, in *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body found that the Panel had not erred by taking into account certain laws and regulations cited by the complainants in the course of finding that the challenged measure was justified under Article XX(d) of the GATT 1994:

"Before the Panel, all of the parties—India, Thailand, and the United States—referred to laws and regulations with which they considered the EBR was designed to secure compliance. Whilst the United States cited Section 1673e(a)(1) of the Tariff Act, governing the assessment of anti-dumping duties, as well as, more generally, Section 113.13(c) of the United States Regulations, Thailand and India argued that the provisions cited by the United States do not exclusively govern the obligation to require payment of duties owed to the United States Treasury; rather, Thailand and India referred to additional provisions which they alleged constitute the laws and regulations governing the collection of anti-dumping duties. The Panel took all of these laws and regulations cited by the parties into account and, on this basis, decided that the relevant laws and regulations for considering the United States' defence is Section 1673e(a)(1) of the Tariff Act in combination with Sections 1673e(b)(1) and 1673 of the Tariff Act and Sections 351.212(b)(1) and 351.211(c)(1) of the United States Regulations."<sup>83</sup>

70. The Panel in *Colombia – Textiles* set out the evidentiary elements for establishing a *prima facie* case where a measure is challenged "as such":

"In cases where a measure is challenged 'as such' (i.e. independently of any application), the complaining party bears the burden of introducing evidence as to the scope and meaning of the measure in order to substantiate its assertion. As the Appellate Body pointed out, 'in some cases the text of the relevant legislation may suffice to clarify the scope and meaning of the relevant legal instruments'. In other cases the complaining party will also need to support its understanding of the scope and meaning of the legal instruments challenged with 'evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars'. In any event, the complaining party has to prove that the measure challenged 'not only in a particular instance that has occurred, but in future situations as well ... will necessarily be inconsistent with that Member's WTO obligations'. "<sup>84</sup>

71. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel pointed out that "in cases concerning measures challenged as such, it may not be necessary for the complainant to prove

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<sup>82</sup> Appellate Body Report, *Korea – Dairy*, paras. 137-138.

<sup>83</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 301.

<sup>84</sup> Panel Report, *Colombia – Textiles*, para. 7.116.

that the application of a measure in fact 'result[s] in a breach ... for *each and every* import transaction'."<sup>85</sup> The Panel explained:

"We note that this approach to the standard of proof was recently followed by the Appellate Body in its report on *EC – Seal Products*. In that case, the Appellate Body accepted the complainants' argument that the so-called IC exception in the European Communities seal measure was inconsistent with the chapeau of Article XX of the GATT 1994 because 'seal products derived from what should in fact be properly characterized as 'commercial' hunts *could potentially* enter the EU market under the IC exception'. The Appellate Body did not examine whether there had been actual instances of incorrect entry; rather, it focused its analysis on the design and structure of the measure. Ultimately, it found a violation on the basis of evidence concerning the *possible* WTO-inconstant operation of the measure, as well as evidence that there was no way to prevent or identify such operation."<sup>86</sup>

#### 1.4.1.1.4.3 No need to state explicitly that a *prima facie* case has been made

72. In *Thailand – H-Beams*, the Appellate Body stated that "a panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case. Thus, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof."<sup>87</sup>

73. In *Korea – Dairy*, Korea argued in its appeal that a panel must evaluate and make a finding on whether the complaining Member has established a *prima facie* case of a violation before requiring the respondent to submit evidence of its own case or defence. The Appellate Body stated:

"We find no provision in the DSU or in the Agreement on Safeguards that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence."<sup>88</sup>

#### 1.4.1.1.4.4 No need to state expressly which party carries burden of proof

74. In *India – Quantitative Restrictions*, the Appellate Body stated that "we do not consider that a panel is required to state *expressly* which party bears the burden of proof in respect of every claim made".<sup>89</sup>

#### 1.4.1.1.4.5 Establishing a *prima facie* case as an unavoidable step

75. In *EC – Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a *prima facie* case and shifted the burden of proof to the responding party:

"In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel. ... Only after such a *prima facie* determination had been made by the Panel may

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<sup>85</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.63.

<sup>86</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.64.

<sup>87</sup> Appellate Body Report, *Thailand – H-Beams*, para. 134. See also Appellate Body Report, *Canada – Aircraft*, para. 185.

<sup>88</sup> Appellate Body Report, *Korea – Dairy*, para. 145.

<sup>89</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 137.

the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim."<sup>90</sup>

76. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* opted not to address the respondent's arguments regarding the consistency of the complainant's panel request with Article 6.2 of the DSU, on the ground that the complainant had failed to establish a *prima facie* case:

"In sum, Malaysia has effectively left to the Panel the task of identifying which specific provision(s) of Lithuanian Law No XI-1375 on renewable energy should be analysed in light of which legal claims, and has not provided the Panel with the text of the Lithuanian legislation in a WTO working language in accordance with paragraph 6(1) of the Working Procedures. While Malaysia has not formally abandoned its claims against the Lithuanian measure(s), the foregoing establishes that it has made no effort to develop or argue its claims and has patently failed to present a *prima facie* case. In light of this, the Panel sees no reason to rule on the host of interrelated issues regarding the consistency of Malaysia's panel request with Article 6.2.

...

Similarly, here, it would be entirely futile to resolve the host of interrelated issues regarding the consistency of Malaysia's panel request with Article 6.2 of the DSU only to conclude that Malaysia had failed to establish a *prima facie* case. The Panel, therefore, leaves these issues open and, for the purposes of a finding on the non-existence of a *prima facie* case, assumes consistency with Article 6.2 on an *arguendo* basis."<sup>91</sup>

#### 1.4.1.1.4.6 Standard of proof in WTO dispute settlement proceedings

77. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body articulated a "more likely than not" standard in the context of analysing the issue before it:

"The Panel's finding on the structure, design, and operation, in the light of the two plausible outcomes with similar probabilities that emerge from the quantitative evidence, provides a sufficient evidentiary basis for the conclusion that it is more likely than not that the revised GSM 102 programme operates at a loss. Therefore, we consider that Brazil has succeeded in establishing that the revised GSM 102 programme is provided at premiums that are inadequate to cover its long-term operating costs and losses."<sup>92</sup>

#### 1.4.1.1.5 Panel making a case for a party

78. In *Japan – Agricultural Products II*, the Appellate Body held that while a panel had a broad and "comprehensive authority" to engage in fact-finding under Article 13 of the DSU, it could not use this authority so as to effectively relieve the complaining party of making a *prima facie* case of inconsistency:

"Article 13 of the DSU allows a panel to seek *information* from any relevant source and to consult individual experts or expert bodies to obtain their *opinion* on certain aspects of the matter before it. In our Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*United States – Shrimp*'), we noted the 'comprehensive nature' of this authority, and stated that this authority is 'indispensably necessary' to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* ... '.

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<sup>90</sup> Appellate Body Report, *EC – Hormones*, para. 109. See also, Appellate Body Report in *Japan – Agricultural Products II*, paras. 122 and 130.

<sup>91</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.1435 and 7.1437.

<sup>92</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 321.

Furthermore, we note that the present dispute is a dispute under the *SPS Agreement*. Article 11.2 of the *SPS Agreement* explicitly *instructs* panels in disputes under this Agreement involving scientific and technical issues to 'seek advice from experts'.

Article 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>93</sup>

79. The Panel in *Japan – Agricultural Products II* then turned to the case at hand and found error in the Panel's approach:

"In the present case, the Panel was correct to seek information and advice from experts to help it to understand and evaluate the evidence submitted and the arguments made by the United States and Japan with regard to the alleged violation of Article 5.6. The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a *prima facie* case of inconsistency with Article 5.6 based on claims relating to the 'determination of sorption levels'. The United States did not even *argue* that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6."<sup>94</sup>

80. In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body recalled that, as established by the WTO jurisprudence, "a panel cannot make a *prima facie* case for a party who bears that burden".<sup>95</sup> However, the Appellate Body concluded that:

"[T]he Panel was free to use the arguments made and provisions cited by all the parties—including Thailand and India—in order to assess objectively which laws and regulations were relevant to the United States' defence. We do not believe that, in doing so, the Panel exceeded its jurisdiction."<sup>96</sup>

81. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, China argued that the Panel had made a case for the complainants "by finding that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement on the grounds not alleged by the complainants in their first written submissions, contrary to paragraph 7 of the Joint Working Procedures of the Panels".<sup>97</sup> The Appellate Body disagreed with China's contention, noting that the complainants were free to elaborate the claims after receiving the questions from the Panel. The Appellate Body further explained that the "panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them." Moreover, it is within the competence of a panel 'freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration'.<sup>98</sup>

82. The Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, made a distinction between a panel's discretion to develop its reasoning and a party's burden of proof to establish a *prima facie* case:

"In addressing this issue, we first recall that, while panels enjoy latitude to develop their reasoning and to decide which evidence on the record they wish to rely upon in reaching their findings, such discretion is not unfettered. Instead, it is limited by the requirement that the complainant satisfy its burden of proof by adducing

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<sup>93</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 127-129.

<sup>94</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 130.

<sup>95</sup> Appellate Body on *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 300.

<sup>96</sup> Appellate Body Report on *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 302.

<sup>97</sup> Appellate Body Reports *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.111.

<sup>98</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.116.

evidence and arguments sufficient to make a *prima facie* case in relation to each of the elements of its claims. This does not mean that a complainant must necessarily put forward *all* evidence and arguments relevant to the question of the measure's consistency with the covered agreements. However, at a minimum, it must adduce arguments and evidence that, in the absence of effective refutation by the respondent, would enable a panel to rule in its favour. A panel may not use its interrogative powers to make the case for the complainant, nor to make good the absence of argumentation on a party's behalf.

Where, however, the complainant has made out a *prima facie* case, a panel may in principle draw from arguments and evidence on the record, or develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process. While arguments may be progressively refined throughout the course of the proceedings, each party must be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. Finally, a panel is not required to test its intended reasoning with the parties. However, due process could be compromised in circumstances where the panel adopts an approach that departs so radically from the cases put forward by the parties that the parties are left guessing as to what proof they would have needed to adduce."<sup>99</sup>

83. The Panel in *Korea – Stainless Steel Bars* addressed a concern raised by Korea that the Panel had applied a "double standard of proof" to the parties during the panel proceedings. In Korea's view, the Panel had asked questions to Japan that appeared to help Japan unduly to make its case, and the Panel had asked questions to Korea that appeared to apply greater scrutiny to its case and to unduly shift the burden onto it to make a *prima facie* case. In response to this concern, the Panel noted that its task was not to debate with the parties as to how it exercised its discretion in accordance with the DSU and the Working Procedures. Nevertheless, the Panel made several observations that were relevant to the respondent's concerns.<sup>100</sup>

84. The Panel noted that, while Japan and Korea each had the burden of proving their respective cases in a WTO dispute, a panel is not "frozen into inactivity" during this process. The Panel noted that it can request information from any source and put questions to the parties to inform itself of the relevant facts and the legal considerations in the dispute:

"Our primary task is to help the parties resolve their dispute in a prompt and effective manner. Ordinarily, this involves making findings as to whether a complaining party has presented a *prima facie* case of inconsistency with the applicable obligations of the WTO Agreements and whether, in response, a responding party has effectively rebutted the *prima facie* case of the complaining party. While a panel may develop its own reasoning in arriving at its findings, it is of course not for a panel to make the case for either party.

The fact that it is for the complaining party to discharge its burden of proof by establishing a *prima facie* case at first instance, and then for the responding party to effectively refute that case, does not mean that a panel is frozen into inactivity. The extensive discretionary authority of a panel to request information from any source (including a Member that is a party to the dispute) is not conditional upon a party having established, on a *prima facie* basis, a claim or defence. The same is true for a panel's extensive discretionary authority to put questions to the parties in order to inform itself of the relevant facts of the dispute and the legal considerations applicable. It would thus be erroneous for a party to suggest that we can ask a question of the responding party only upon arriving at an initial determination that the complaining party has established a *prima facie* case. It would further be erroneous for a party to seek to divine from the existence or formulation of a given question that

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<sup>99</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.176-7.177.

<sup>100</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.22-7.23.

it is reflective of a position already adopted by the Panel, for instance that we had already determined that the complaining party established a *prima facie* case.<sup>101</sup><sup>102</sup>

85. The Panel recalled that it had explained to the parties that its questions were intended to facilitate its work, were not reflective of a predetermined position, and were without prejudice to its resolution of the parties' claims and arguments. The Panel also noted that, where a determination by one authority of one party is the matter at issue, more questions may be directed toward that party. Such a party would, in the Panel's view, be in the best position to answer certain questions, such as those concerning any "implicit" findings made or uncited record evidence used by that authority:

"Indeed, in all instances during the proceedings where the Panel posed questions to the parties orally and in writing, we explained that our questions were intended to facilitate our work, and that our questions did not in any way prejudge our findings on the matter before us. For the avoidance of doubt, the purpose of this explanation was to assure the parties that the inclusion of a certain proposition in a question was not reflective of a predetermined position adopted by the Panel regarding that question. While it should be self-evident, we additionally explained that '[a]ll questions are without prejudice to the Panel's resolution of the claims and arguments of the parties, including objections pertaining to the Panel's terms of reference or the admissibility or relevance of certain evidence'.

To reiterate, we explained throughout the proceedings that the Panel's questions were intended to 'facilitate its work'. The 'work' of the Panel is guided at all times by the standard of review prescribed in Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. It should be unsurprising that where a determination by the authority of one party is the matter at issue, more questions may be directed towards that party. For instance, that party may be in a better position to shed light on the evidence and reasoning underpinning the determination made by its own authority, and what may or may not have been taken into account by its own authority in that regard. That is especially so in circumstances where the responding party relies on 'implicit' findings or uncited record evidence as part of its defence of its authority's determination."<sup>103</sup>

86. The Panel added that, in examining the facts in these proceedings, it focused on how the investigating authority had solicited and had examined the facts in its determination. The Panel noted that this focus merely reflected the obligation of the authority to properly establish the facts and evaluate them in an objective and unbiased manner in the underlying investigation. The Panel considered that an authority may be best placed to explain why it did not address a matter raised by an interested party. For this reason, the Panel noted that it directed questions to a particular party that the opposing party was not precluded from answering:

"Likewise, with respect to our examination of the facts, it should be unsurprising that our focus is on how the *authority* solicited and examined the facts, including whether and where such an examination might be reflected in the authority's determination. Such a focus is not indicative of a 'double standard of proof', but merely reflects that '[t]he *authority* is under an obligation to properly establish the facts and evaluate them in an objective and unbiased manner' in the underlying investigation.

Indeed, the party of the authority may be best placed to explain why it did not address, in its determination (or any other document), a matter that an interested party raised during the underlying investigation, for instance because the matter was unsubstantiated or irrelevant.

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<sup>101</sup> (footnote original) Moreover, the DSU does not contemplate that a party can decide *for itself* whether a question posed by a panel is relevant for the resolution of the dispute, nor whether the other party has already established a *prima facie* case on a given point that would in turn justify a question by a panel to the other party on that point. (Panel Reports, *Argentina – Import Measures*, para. 6.59).

<sup>102</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.24-7.25.

<sup>103</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.26-7.27.



Accordingly, for some questions, we chose to direct the question to a particular party, e.g. where it appeared that this party might be better placed to respond. However, the Panel explained that '[t]he fact that a question may be primarily directed towards one party does not preclude a response from the other party'. It would therefore be erroneous for a party to draw any inferences from whether the Panel addressed a question to one party or another."<sup>104</sup>

87. The Panel continued to explain that, of the multiple purposes that a question can serve, none is indicative of a panel having reached a predetermined conclusion on any point or having decided to adopt a particular approach. In the Panel's view, the posing of questions is intended to build a sufficient understanding of the legal arguments and evidence at issue to "facilitate [the Panel's] work". The Panel noted that, because not all responses to questions may be relevant in resolving a dispute or need to be addressed, it would be irrelevant for a party to extrapolate anything from the posing of a given question:

"We also observe that the posing of questions in panel proceedings can serve multiple purposes. One purpose can be to obtain missing information or fill gaps in the panel record. Another purpose can be to clarify the precise nature and scope of a party's legal claim or defence. A further purpose can be to scrutinize the credibility or reliability of the contested materials before the panel. The way in which a question is framed can depend on the purpose for which it is asked. None of these purposes, however, are indicative of a panel having reached any predetermined conclusions on any point, nor having decided to adopt a particular approach. Indeed, a panel's discretion concerning the form, nature, and content of its questions to parties is unfettered in the DSU. In all instances, the posing of questions is intended to build a sufficient understanding of the legal arguments and evidence at issue to 'facilitate [the Panel's] work'. It may well emerge from the response to a question that it is not a relevant consideration in resolving the dispute; it may also emerge that it is unnecessary for the Panel to address the substance of the response, for instance due to the exercise of judicial economy over the relevant claim, or because the Panel ultimately finds that the other side did not make a *prima facie* case. It would therefore be erroneous for a party to extrapolate anything from the posing of a given question, other than that the Panel seeks a response."<sup>105</sup>

88. The Panel noted, finally, that the parties' respective positions in these proceedings were not prejudiced by the specific formulation of a question. According to the Panel, the parties had had exhaustive opportunities to present their respective cases and rebuttals, and the Panel had taken into account all of the parties' materials during the proceedings:

"Finally, we note that the parties' respective positions in panel proceedings are not prejudiced by the specific formulation of a question posed by a panel when, as in the present case, each party is allowed to comment on responses to the panel's questions received from the other side, to pose its own questions to the other side at multiple junctures during the proceedings, and to comment on the responses received from the other side to its own questions. The parties in the present dispute have had exhaustive opportunities to present their respective cases and rebuttals. As affirmed above, we have taken into account all of the materials submitted by the parties during these proceedings in arriving at a resolution to the dispute that is as effective and prompt as possible."<sup>106</sup>

#### 1.4.1.1.6 Drawing adverse inferences

##### 1.4.1.1.6.1 Panels routinely draw inferences from the facts and evidence

89. In *Argentina – Textiles and Apparel*, the Panel said the following in respect of "inferences":

"For international disputes it seems normal that tribunals, in evaluating claims, are given considerable flexibility. Inference (or judicial presumption) is a useful means at

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<sup>104</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.28-7.30.

<sup>105</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.31.

<sup>106</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.32.

the disposal of international tribunals for evaluating claims. In situations where direct evidence is not available, relying on inferences drawn from relevant facts of each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met. It would therefore appear to be the prerogative of an international tribunal, in each given case, to determine whether applicable and unrebutted inferences are sufficient for satisfying the burden of proof. In this respect, the International Court of Justice, in some cases, found it difficult to assert stringent rules of evidence."<sup>107</sup>

90. In *Canada – Aircraft*, the Appellate Body confirmed panels may draw inferences from facts placed on the record, and routinely do so:

"The DSU does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts. Yet, in all cases, in carrying out their mandate and seeking to achieve the 'objective assessment of the facts' required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example, the ensemble of facts found to exist warrants the characterization of a 'subsidy' or a 'subsidy contingent ... in fact ... upon export performance'. The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute."<sup>108</sup>

91. The Panel in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* quoted this passage from the Appellate Body in *Canada – Aircraft*, in the context of inferring the effect of certain subsidies on the pricing of LCA:

"The Panel considers that in these circumstances, it is necessary and appropriate to deduce the effects of the FSC/ETI subsidies and the B&O tax subsidies on Airbus' sales and prices over the 2004 – 2006 period, based on common sense reasoning and the drawing of inferences from conclusions regarding the nature of these subsidies as subsidies that increase the profitability of LCA sales in a way that enables Boeing to price its LCA at a level that would not otherwise be commercially justified, the duration of the FSC/ETI subsidies, as well as from what we understand of the nature of competition between Airbus and Boeing, particularly the price-sensitive nature of certain significant LCA sales campaigns and the pricing advantage afforded to incumbent suppliers through the phenomenon of buyer switching costs. We consider this approach to be consistent with our obligation under Article 11 of the DSU to make an objective assessment of the facts. In this regard, we note that the Appellate Body, in *Canada – Aircraft*, indicated that drawing inferences from facts on the record is a routine and inherent aspect of a panel's discharging its obligation under Article 11 of the DSU[.] ...

The other option potentially open to us is to decline to make a serious prejudice finding because of the difficulty of calculating with mathematical certitude the precise degree to which Boeing's pricing of the 737NG and 777 families of aircraft was affected by the FSC/ETI subsidies and B&O tax subsidies. In our view, such an approach would be inconsistent with our obligations under Article 11 of the DSU, as well as contrary to considerations of basic common sense and reason."<sup>109</sup>

92. In *Argentina – Import Measures*, the Panel, after noting its authority to draw the appropriate inferences in the absence of collaboration from the parties and Argentina's refusal to provide the relevant documents, in spite of an explicit request from the Panel, concluded that the Trade-Related Requirements (TRRs) measure "as such" was inconsistent with Articles III:4 and

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<sup>107</sup> Panel Report *Argentina – Textiles and Apparel*, para. 6.39.

<sup>108</sup> Appellate Body Report, *Canada – Aircraft*, para. 198.

<sup>109</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 7.1820-7.1821.

XI:1 of the GATT 1994.<sup>110</sup> On appeal, Argentina argued that "in addressing Japan's 'as such' claims against the TRRs measure, the Panel acted inconsistently with its duties under Article 11 of the DSU because it found that Japan had established the existence of the TRRs measure without properly examining whether Japan had presented sufficient evidence of its 'precise content' and of its 'general and prospective application'."<sup>111</sup> The Appellate Body upheld the Panel's findings, noting that the TRRs was an unwritten measure and had Argentina provided the necessary documents after an explicit request from the Panel, the decision would have been based on a more concrete evidentiary basis:

"In previous disputes, the Appellate Body has held that 'the refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU', and that, as part of its objective assessment of the facts under Article 11 of the DSU, a panel is entitled to draw adverse inferences from a party's refusal to provide information. Therefore, '[w]here a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn'.

The Panel observed that Argentina did not deny that it was in possession of these documents, but refused to provide them to the Panel, notwithstanding an explicit request from the Panel that it do so. We note that the TRRs are unwritten and that they are not contained in any law, regulation, or administrative act. Thus, the primary source of direct evidence of the content and nature of the TRRs would appear to be the agreements between the economic operators and the Argentine Government and the letters addressed by economic operators to the Government. The Panel acknowledged that it had limited direct evidence, due to the lack of cooperation or inability of the parties to provide documentation, and also drew inferences from Argentina's refusal to provide evidence. Had the Panel been provided with the documents it requested, it might have been able to rely upon a more robust evidentiary basis to support its findings regarding the content of the measure, and its general and prospective application. The Panel nevertheless supported its findings with the evidence available, together with the inferences that it drew from Argentina's refusal to provide the relevant agreements and letters. Argentina has not, on appeal, challenged either the Panel's finding that Argentina refused to provide evidence or the Panel's consequential decision to draw inferences from such refusal in reaching its findings.

In the light of the above, we are of the view that our consideration of Argentina's claims on appeal under Article 11 of the DSU cannot ignore that Argentina bore at least some responsibility for the evidentiary difficulties faced by the Panel."<sup>112</sup>

#### 1.4.1.1.6.2 The concept of "adverse inferences"

93. In *Canada – Aircraft*, the Appellate Body addressed the issue whether panels have the authority to draw adverse inferences from a party's refusal to provide information. In this dispute, Canada refused to provide Brazil, during consultations, with information on the financing activities of a particular agency, such information being subsequently also requested by the Panel. On appeal, Brazil submitted that the Panel erred by not drawing the inference that the information withheld by Canada was adverse to Canada and supportive of Brazil's claim that the agency's debt financing was a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. The Appellate Body held that it is within the discretion of panels to draw adverse inferences and that in this particular case the Panel, in deciding not to draw adverse inferences, had not abused this discretion inconsistently with the provisions of the DSU:

"There is no logical reason why the Members of the WTO would, in conceiving and concluding the *SCM Agreement*, have granted panels the authority to draw inferences in cases involving actionable subsidies that *may* be illegal *if* they have certain trade

<sup>110</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.32-6.36.

<sup>111</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.151.

<sup>112</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.159-5.161.

effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs *a fortiori* also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.

Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel.

...

Yet, we do not believe that the record provides a sufficient basis for us to hold that the Panel erred in law, or abused its discretionary authority, in concluding that Brazil had not done enough to compel the Panel to make the inferences requested by Brazil. For this reason, we let the Panel's finding of *not proven* remain, and we decline Brazil's appeal on this issue."<sup>113</sup>

94. In *US – Wheat Gluten*, the European Communities argued that the Panel had failed to draw the necessary adverse inferences from the United States' refusal to submit requested information; the European Communities claimed that this was an error of law and that the Panel consequently had violated Article 11 of the DSU. The Appellate Body rejected this ground of the appeal. In its analysis, it stated that:

"We ... characterized the drawing of inferences as a 'discretionary' task falling within a panel's duties under Article 11 of the DSU. In *Canada – Aircraft*, which involved a similar factual situation, the panel did not draw any inferences 'adverse' to Canada's position. On appeal, we held that there was no basis to find that the panel had improperly exercised its discretion since 'the full *ensemble* of the facts on the record' supported the panel's conclusion.

In its appeal, the European Communities places considerable emphasis on the failure of the Panel to draw 'adverse' inferences from the refusal of the United States to provide information requested by the Panel. As we emphasized in *Canada – Aircraft*, under Article 11 of the DSU, a panel must draw inferences on the basis of *all of the facts of record* relevant to the particular determination to be made. Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn. However, if a panel were to ignore or disregard other relevant facts, it would fail to make an 'objective assessment' under Article 11 of the DSU. In this case, as the Panel observed, there were other facts of record that the Panel was required to include in its 'objective assessment'. Accordingly, we reject the European Communities' arguments to the extent that they suggest that the Panel erred in not drawing 'adverse' inferences simply from the refusal of the United States to provide certain information requested from it by the Panel under Article 13.1 of the DSU.

In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel's assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full *ensemble* of the facts, the appellant should, at least: identify the facts on the record from which the Panel should have drawn inferences; indicate the factual or legal inferences that the panel should

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<sup>113</sup> Appellate Body Report, *Canada – Aircraft*, paras. 202-203, and 205. With respect to the drawing of adverse inferences under the SCM Agreement, see also the Section on Annex V of the SCM Agreement.

have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU."<sup>114</sup>

95. The Appellate Body in *US – Wheat Gluten* then turned to the case at hand and concluded:

"In this appeal, the European Communities makes, what we regard to be, broad and general statements that the Panel erred by not drawing 'adverse' inferences from the facts. Besides the fact that the United States refused to provide certain information requested by the Panel under Article 13.1 of the DSU, the European Communities does not identify, in any specific manner, *which facts* supported a particular inference. Nor does the European Communities identify *what inferences* the Panel should have drawn from those facts, other than that the inferences should have been favourable to the European Communities. Besides the simple refusal of the United States to provide information requested by the Panel, which we have already addressed, the European Communities does not offer any other specific reasons why the Panel's failure to exercise its discretion by drawing the inferences identified by the European Communities amounts to an error of law under Article 11 of the DSU. Therefore, we decline this ground of appeal."<sup>115</sup>

#### 1.4.1.1.6.3 Drawing adverse inferences vs. operation of normal rules on burden of proof

96. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the European Communities requested the Panel to draw adverse inferences on a number of issues (relating to the amounts of the alleged subsidies) in the light of alleged non-co-operation by the United States in disclosing certain information regarding the amounts of some alleged subsidies. The Panel suggested that effectively the same result would be reached through the operation of the normal rules on burden of proof:

"For each of the challenged measures, the European Communities has presented the Panel with evidence and arguments in support of its estimate of the amount of the subsidy allegedly provided to Boeing. Where the United States disputes the European Communities' estimate of the amount of an alleged subsidy, it has provided the Panel with its own evidence and/or arguments to support its own, generally lower, estimate. If the Panel were to consider the evidence and/or arguments advanced by the United States to be insufficient to rebut the evidence and arguments presented by the European Communities, then the Panel would accept the European Communities' estimate. In such a situation, the Panel would accept the European Communities' estimate not by virtue of United States 'non-cooperation', and not as a matter of drawing 'adverse inferences', but simply by virtue of the operation of the normal principles regarding the burden of proof in WTO dispute settlement proceedings. Likewise, if the Panel were to consider the evidence and/or arguments advanced by the United States to be sufficient to rebut the evidence and arguments presented by the European Communities, then the Panel would accept the United States' estimate not by virtue of United States 'cooperation', but simply by virtue of the operation of the normal principles regarding the burden of proof in WTO dispute settlement proceedings."<sup>116</sup>

#### 1.4.1.1.7 Impossible burden of proof

##### 1.4.1.1.7.1 General

97. In *US – Line Pipe*, the Appellate Body criticized the Panel for imposing an "impossible burden" of proof on Korea in respect of a particular issue in dispute:

"In our view, Korea has demonstrated that the USITC considered imports from all sources in its investigation. Korea has also shown that exports from Canada and Mexico were excluded from the safeguard measure at issue. And, in our view, this is enough to have made a *prima facie* case of the absence of parallelism in the line pipe

<sup>114</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 173-175.

<sup>115</sup> Appellate Body Report, *US – Wheat Gluten*, para. 176.

<sup>116</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.38.

measure. Contrary to what the Panel stated, we do not consider that it was necessary for Korea to address the information set out in the USITC Report, or in particular, in footnote 168 in order to establish a *prima facie* case of violation of parallelism. Moreover, to require Korea to rebut the information in the USITC Report, and in particular, in footnote 168, would impose an impossible burden on Korea because, as the exporting country, Korea would not have had any of the relevant data to conduct its own analysis of the imports."<sup>117</sup>

98. In *US – Gambling*, the Appellate Body confirmed that the general exceptions in the GATT 1994 and GATS cannot be interpreted as imposing an impossible burden of proof on the party invoking the exception:

"[T]he responding party must show that its measure is 'necessary' to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden."<sup>118</sup>

#### 1.4.1.1.7.2 Impossibility of proving a negative

99. In *Japan – Agricultural Products II*, the United States appealed the Panel's finding under Article 2.2 of the SPS Agreement, arguing that under the Panel's interpretation of the burden of proof, complaining parties would have the impossible task of proving a negative, i.e. that there is no scientific evidence which supports a measure. The Appellate Body suggested that requiring a complaining party to prove a negative would be an "erroneous burden of proof", but disagreed that the Panel had done so in that case:

"[W]e disagree with the United States that the Panel imposed on the United States an impossible and, therefore, erroneous burden of proof by requiring it to prove a negative, namely, that there are *no* relevant studies and reports which support Japan's varietal testing requirement. In our view, it would have been sufficient for the United States to raise a presumption that there are no relevant studies or reports. Raising a presumption that there are no relevant studies or reports is *not* an impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the *SPS Agreement*, to provide 'an explanation of the reasons' for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports. The United States could also have asked the Panel's experts specific questions as to the existence of relevant scientific studies or reports or it could have submitted to the Panel the opinion of experts consulted by it on this issue. The United States, however, did not submit *any* evidence relating to apricots, pears, plums and quince."<sup>119</sup>

100. In *Guatemala – Cement II*, the Panel noted the impossibility of proving a negative:

"In principle, Mexico bears the burden to prove that the Ministry failed to inform it of the inclusion of non-governmental experts in the Ministry's verification team. As a practical matter, this burden is impossible for Mexico to meet: one simply cannot prove that one was not informed of something. Although Mexico cannot establish definitively that it was not informed by the Ministry of the Ministry's intention to include non-governmental experts in its verification team, there is sufficient evidence before us to suggest strongly that it was not so informed. Although an investigating authority should normally be able to demonstrate that it complied with a formal requirement to inform the authorities of another Member, Guatemala has failed to

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<sup>117</sup> Appellate Body Report, *US – Line Pipe*, para. 187.

<sup>118</sup> Appellate Body Report, *US – Gambling*, para. 309.

<sup>119</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 137.

rebut the strong suggestion that it failed to do so. In fact, Guatemala has simply referred to the very letter which suggests strongly that Mexico was not notified by Guatemala. In these circumstances, we do not consider that the evidence and arguments of the parties 'remain in equipoise'. Accordingly, we find that the Ministry violated paragraph 2 of Annex I of the AD Agreement by failing to inform the Government of Mexico of the inclusion of non-governmental experts in the Ministry's verification team."<sup>120</sup>

101. In *Canada – Pharmaceutical Patents*, the Panel recognized that one of the conditions for justification under Article 30 of the TRIPS Agreement would involve proving a negative:

"The third condition of Article 30 is the requirement that the proposed exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties'. Although Canada, as the party asserting the exception provided for in Article 30, bears the burden of proving compliance with the conditions of that exception, the order of proof is complicated by the fact that the condition involves proving a negative. One cannot demonstrate that no legitimate interest of the patent owner has been prejudiced until one knows what claims of legitimate interest can be made. Likewise, the weight of legitimate third party interests cannot be fully appraised until the legitimacy and weight of the patent owner's legitimate interests, if any, are defined. Accordingly, without disturbing the ultimate burden of proof, the Panel chose to analyse the issues presented by the third condition of Article 30 according to the logical sequence in which those issues became defined."<sup>121</sup>

102. In *US – Softwood Lumber VI (Article 21.5 – Canada)*, the Appellate Body found that the Panel was too deferential in its standard of review of an investigating authority's analysis of injury under the Anti-Dumping Agreement. The Appellate Body criticized the Panel because, among other things, its "approach also imposes on complaining parties an unduly high burden of proving a negative; of proving that an unbiased and objective investigating authority *could not* have reached the particular conclusion".<sup>122</sup>

#### 1.4.1.1.7.3 Burden of proof and difficulty in collecting information

103. In *Argentina – Hides and Leather*, the Panel stated that "[i]t may be the case that it will be difficult for one Member to prove that there is a cartel operating within the jurisdiction of another Member. Nonetheless, we cannot ignore the need for sufficient proof of a party's allegations simply because obtaining such proof is difficult."<sup>123</sup>

104. In *EC – Sardines*, the Appellate Body found that there is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that might possibly be encountered by the complainant and the respondent in collecting information to prove a case:

"The degree of difficulty in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. But, in both of those situations, the complainant must prove its claim. There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison

<sup>120</sup> Panel Report, *Guatemala – Cement II*, para. 8.196.

<sup>121</sup> Panel Report, *Canada – Pharmaceutical Patents*, para. 7.60.

<sup>122</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 130.

<sup>123</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.51.



between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case."<sup>124</sup>

105. However, in *US/Canada – Continued Suspension*, the Appellate Body took into account, as one consideration, which party may be expected to be in a position to prove a particular issue:

"The allocation of the burden of proof in the context of claims arising under Article 22.8 is a function of the following considerations. First, what is the nature of the cause of action that is framed under Article 22.8. Second, the practical question as to which party may be expected to be in a position to prove a particular issue. Third, consideration must be given to the requirements of procedural fairness."<sup>125</sup>

#### 1.4.1.1.8 Necessary collaboration of the parties

106. In *Argentina – Textiles and Apparel*, the Panel made the following statement regarding burden of proof and the requirement of collaboration of the parties in presenting facts and evidence to the panel:

"Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case. It should be stressed, however, that 'discovery' of documents, in its common-law system sense, is not available in international procedures'."

... Before an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession."<sup>126</sup>

#### 1.4.1.2 Application of the burden of proof in particular contexts

##### 1.4.1.2.1 Burden of proof with respect to questions of WTO law

107. In *EC – Tariff Preferences*, the Appellate Body clarified that the burden of proof does not apply to questions of law or legal interpretation:

"Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause."<sup>127</sup>

108. In a footnote to this passage, the Appellate Body quoted the International Court of Justice's interpretation of *jura novit curia*, namely:

"It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court."<sup>128</sup>

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<sup>124</sup> Appellate Body Report, *EC – Sardines*, para. 281.

<sup>125</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 361.

<sup>126</sup> Panel Report, *Argentina – Textiles and Apparel*, paras. 6.40 and 6.58. See also Panel Reports, *Argentina – Import Measures*, paras. 6.31-6.34.

<sup>127</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 105.

<sup>128</sup> Appellate Body Report, *EC – Tariff Preferences*, fn 220.



109. The Appellate Body's reasoning in *EC – Tariff Preferences* was referred to by the Panel in *EC – Export Subsidies on Sugar*, which stated that:

"In the Panel's view, what constitutes a Member's 'reduction commitment level' for the purpose of Article 10.3 of the *Agreement on Agriculture* or the 'reduction commitment within the meaning of Article 9 or the 'commitment levels' within the meaning of Article 3.3 or the 'commitment as specified in a Member's schedule' within the meaning of Article 8 of the *Agreement on Agriculture* is an issue of legal interpretation, for which there is no burden of proof as such."<sup>129</sup>

110. The Panel in *US – Zeroing (Japan) (Article 21.5 – Japan)* referred to this prior jurisprudence and stated that "[w]e agree that there is no burden of proof for issues of legal interpretation of provisions of the covered agreements".<sup>130</sup>

#### 1.4.1.2.2 Burden of proof with respect to the meaning of domestic law

111. In *US – Carbon Steel*, the Appellate Body explained that a Member's law will be treated as WTO-consistent unless proven otherwise.<sup>131</sup> It then went on to note that:

"The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."<sup>132</sup>

#### 1.4.1.2.3 Burden of proof in Article 21.3(c) arbitrations

112. In *EC – Bananas III (Article 21.3(c))*, the Arbitrator implicitly found that it was up to the complaining parties to persuade him "that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU [15 months]." In the case at issue, the Arbitrator found that he had not been so persuaded by the complaining parties:

"When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'.

The Complaining Parties have not persuaded me that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU. At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline, with a slight modification, so that the 'reasonable period' of time for implementation would expire by 1 January 1999."<sup>133</sup>

<sup>129</sup> Panel Reports, *EC – Export Subsidies on Sugar*, para. 7.121 and fn 437.

<sup>130</sup> Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.8.

<sup>131</sup> Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>132</sup> Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>133</sup> Award of the Arbitrator, *EC – Bananas III (Article 21.3(c))*, paras. 18-19. See also the Awards of the Arbitrator in *Australia – Salmon (Article 21.3(c))*, para. 30; *Canada – Autos (Article 21.3(c))*, para. 39; *US – 1916 Act (Article 21.3(c))*, paras. 38-39; and *Chile – Price Band System (Article 21.3(c))*, para. 38.

113. In *EC – Hormones (Article 21.3(c))*, the Arbitrator held that the burden of proof concerning the existence of particular circumstances falls on any party arguing for a period longer or shorter than 15 months:

"In my view, the party seeking to prove that there are 'particular circumstances' justifying a shorter or a longer time has the burden of proof under Article 21.3(c). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable."<sup>134</sup>

114. The Arbitrator in *Colombia – Ports of Entry (Article 21.3(c))* placed the burden of proof "on the implementing Member to demonstrate that, if immediate compliance is impracticable, the period of time it proposes constitutes a 'reasonable period of time'. However, this do not absolve the other Member from producing evidence in support of its contention that the period of time requested by the implementing Member is not 'reasonable', and a shorter period of time for implementation is warranted."<sup>135</sup>

#### 1.4.1.2.4 Burden of proof in Article 21.5 compliance panel proceedings

115. In *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body confirmed that the general rules on burden of proof are applicable in Article 21.5 proceedings:

"Neither Chile nor Argentina suggests that the general rules on burden of proof, which imply that a responding party's measure will be treated as WTO-consistent unless proven otherwise, do not apply in proceedings under Article 21.5 of the DSU. We observe, in this regard, that Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the 'measures taken to comply' with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background. Thus, the adopted findings from the original proceedings may well figure prominently in proceedings under Article 21.5, especially where the measure taken to comply is alleged to be inconsistent with WTO law in ways similar to the original measure. In our view, these considerations may influence the way in which the complaining party presents its case, and they may also be relevant to the manner in which an Article 21.5 panel determines whether that party has discharged its burden of proof and established a *prima facie* case."<sup>136</sup>

116. In *US – Tuna II (Mexico) (Article 21.5 - US)/US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, the DSB, after receiving the requests from the United States and Mexico, established two compliance panels pursuant to Article 21.5 of the DSU to examine whether the 2016 Tuna Measure was consistent with Article 2.1 of the TBT Agreement and justified under Article XX of the GATT 1994. Given that both parties were the complainant and the respondent at the same time in two compliance proceedings dealing with the same issue, the Panel opined that it would apply burden of proof in a holistic fashion:

"However, we note that these proceedings are somewhat unusual, in that both the original complaining party and the original responding party have requested the establishment of panels under Article 21.5 of the DSU to determine the consistency with the WTO Agreement of a measure taken to comply by the original responding party. The parties' written and oral submissions have not clearly distinguished between claims and arguments made in respect of the proceedings brought by the United States, on the one hand, and those made in respect of the proceedings brought

<sup>134</sup> Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 27.

<sup>135</sup> Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 67.

<sup>136</sup> Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

by Mexico, on the other hand. This is perhaps inevitable given that the parties agree as to what is the measure taken to comply, namely the 2016 Tuna Measure, and both proceedings focus on two issues, namely, whether the 2016 Tuna Measure (a) complies with the requirement to provide 'treatment no less favourable' under Article 2.1 of the TBT Agreement and (b) meets the conditions laid down in the chapeau of Article XX of the GATT 1994.

...

Given the special nature of these proceedings, while we will follow the basic principles on burden of proof that have emerged from WTO dispute settlement, we will avoid applying those principles in a mechanistic fashion, because doing so would not only cause unnecessary confusion, but would also risk not respecting parties' due process rights. Given that both parties address overlapping legal issues and present the same sets of exhibits, in both proceedings, and given the narrowly defined nature of the claims before us, we find it appropriate to apply the above-referenced principles on burden of proof in a cumulative or holistic fashion. That is, since both parties are at the same time the complainant and the respondent in these proceedings, in resolving these issues, we will assess both parties' claims and arguments in a holistic fashion."<sup>137</sup>

#### 1.4.1.2.5 Burden of proof in Article 22.6 arbitrations

##### 1.4.1.2.5.1 General

117. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, the Arbitrators addressed the issue of the burden of proof and concluded that, as the European Communities was challenging the conformity of the United States' proposal with the Article 22.4, it was for the European Communities to prove that the United States' proposal was inconsistent with Article 22.4:

"WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.

The same rules apply where the existence of a specific *fact* is alleged; in this case, for example, where a party relies on a decrease of beef consumption in the EC or the use of edible beef offal as pet food. It is for the party alleging the fact to prove its existence.

The duty that rests on *all* parties to produce evidence and to collaborate in presenting evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof – is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, the US is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence – such as data on trade with third countries, export capabilities and affected exporters – may,

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<sup>137</sup> Panel Reports, *US – Tuna II (Mexico) (Article 21.5 - US) / US – Tuna II (Mexico) (Article 21.5 - Mexico II)*, paras. 7.133 and 7.137.

indeed, be in the sole possession of the US, being the party that suffered the trade impairment."<sup>138</sup>

118. In *US – 1916 Act (EC) (Article 22.6 – US)*, the Arbitrators, after referring to the above statement from *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, confirmed their agreement that that statement was an accurate presentation of the burden of proof applicable in Article 22.6 proceedings. The Arbitrators clarified that "the fact that this case relates to the suspension of "obligations", as opposed to the suspension of tariff concessions, in no way alters the applicable burden of proof."<sup>139</sup>

119. In *US – COOL (Article 22.6 – United States)*, the Arbitrator stated that "[i]n the absence of a demonstration that the proposing party's methodology is incorrect, the mere submission of an alternative methodology would not meet the objecting party's burden of proof".<sup>140</sup>

#### **1.4.1.2.5.2 Burden of proof in subsidy arbitrations under Article 4.11 of the SCM Agreement**

120. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrators considered that the general principles of the burden of proof also apply to arbitrations under Article 4.11 of the *SCM Agreement*:

"In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency. ... Brazil challenges the conformity of this proposal [from Canada] with Article 22 of the DSU and Article 4.10 of the *SCM Agreement*. It is therefore up to Brazil to submit evidence sufficient to establish a *prima facie* case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case."<sup>141</sup>

121. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the Arbitrator summarized the burden of proof rules applicable in the case of arbitration proceedings under Article 4.11 of the *SCM Agreement* as follows:

"We recall that the general principles applicable to burden of proof, as stated by the Appellate Body, require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. We find these principles to be also of relevance to arbitration proceedings under Article 4.11 of the *SCM Agreement*. In this procedure, we thus agree that it is for Canada, which has challenged the consistency of Brazil's proposed level of countermeasures under Articles 4.10 of the *SCM Agreement*, to bear the burden of proving that the proposed amount is not consistent with that provision. It is therefore up to Canada to submit evidence sufficient to establish a *prima facie* case or 'presumption' that the countermeasures that Brazil proposes taking are not 'appropriate'. Once Canada has done so, it is for Brazil to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrator would conclude that the claim has not been established.

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<sup>138</sup> Decisions by the Arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 9-11. See also Decisions by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 37-38; *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8 and fn 12; *US – FSC (Article 22.6 – US)*, paras. 2.10 and fn 18; and *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 3.2 and 3.5.

<sup>139</sup> Decision by the Arbitrators, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 3.3.

<sup>140</sup> Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, para. 4.12.

<sup>141</sup> Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8. See also Decision by the Arbitrators, *US – FSC (Article 22.6 – US)*, para. 2.10.

We note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it is also for Brazil to provide evidence for the facts which it asserts.

Finally, both parties have claimed that, in respect of certain issues, the other party is in sole possession of the information necessary to establish the appropriateness of the proposed level of suspension of concessions or other obligations. In this regard, we recall that both parties generally have a duty to cooperate in these arbitral proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information. This is why, even though Canada bears the original burden of proof, we also requested Brazil to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes. Later, we asked it to come forward with evidence supporting various factual assertions made in its 'methodology paper'.<sup>142</sup>

#### **1.4.2 Standard of review**

##### **1.4.2.1 Standard of review applied by panels when reviewing factual findings of national authorities under particular agreements**

###### **1.4.2.1.1 Agreement on Safeguards**

122. See the Section on Article 14 of the Agreement on Safeguards.

###### **1.4.2.1.2 Transitional safeguard measure under the Agreement on Textiles and Clothing**

123. See the Section on Article 8.3 of the Agreement on Textiles and Clothing.

###### **1.4.2.1.3 SCM Agreement**

124. See the Section on Article 30 of the SCM Agreement.

###### **1.4.2.1.4 Anti-Dumping Agreement**

125. See the Section on Article 17.6 of the Anti-Dumping Agreement.

###### **1.4.2.1.5 SPS Agreement**

126. See the Sections on Articles 2.2, 5, 5.5, 5.7, and Annex A(4) of the SPS Agreement.

###### **1.4.2.1.6 Customs Valuation Agreement**

127. See the General Section of the Customs Valuation Agreement.

##### **1.4.2.2 Standard of review applied by the Appellate Body when reviewing a WTO panel's factual findings**

###### **1.4.2.2.1 General**

128. As regards the standard of review applied by the Appellate Body when reviewing a WTO panel's factual findings, the Appellate Body summarized some of its prior pronouncements in *EC and certain member States – Large Civil Aircraft*:

"The Appellate Body has repeatedly emphasized that Article 11 of the DSU requires a panel to 'consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence. 'Within these parameters, 'it is generally within the discretion of the Panel to decide

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<sup>142</sup> Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.6-2.8.

which evidence it chooses to utilize in making findings', and panels 'are not required to accord to factual evidence of the parties the same meaning and weight as do the parties'. In this regard, the Appellate Body has stated that it will not 'interfere lightly' with a panel's fact-finding authority, and has also emphasized that it 'cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have reached a different factual finding from the one the panel reached'. Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts. As an initial trier of facts, a panel must provide 'reasoned and adequate explanations and coherent reasoning'. It has to base its findings on a sufficient evidentiary basis on the record, may not apply a double standard of proof, and a panel's treatment of the evidence must not 'lack even-handedness'.<sup>143</sup>

129. In *Australia – Tobacco Plain Packaging*, the Panel's analysis under Article 2.2 of the TBT Agreement regarding the contribution of the challenged measures to the respondent's objective "was quite detailed, covering 166 pages in its Report, and 125 pages in Appendices A-D to its Report".<sup>144</sup> On appeal, the appellants' claims under Article 11 of the DSU formed the bulk of their appeals, comprising nearly 450 pages of their submissions. In particular, the appellants challenged almost all of the Panel's intermediate findings, as well as the Panel's overall conclusion, on the contribution of the TPP measures to Australia's objective.<sup>145</sup> The Appellate Body recalled its earlier findings on the exceptional nature of challenges that may be presented under Article 11:

"The sheer volume of the appellants' claims under Article 11 of the DSU in these appellate proceedings is unprecedented. We recall that a claim that a panel has failed to conduct an objective assessment of the matter before it is 'a very serious allegation'. Not every error by a panel amounts to a failure by the panel to comply with its duties under Article 11, only those which, taken together or singly, undermine the *objectivity* of the panel's assessment of the matter before it. Indeed, as an example of the grave implications of claims brought under Article 11, the Appellate Body has considered that a panel's '[d]isregard', 'distortion', and 'misrepresentation' of evidence, 'in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an *egregious error* that calls into question the good faith of a panel'. For these reasons, the Appellate Body has urged Members to consider carefully 'when and to what extent to challenge a panel's assessment of a matter pursuant to Article 11'. This is in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members "exercise judgement in deciding whether action under the WTO dispute settlement procedures would be fruitful".

Furthermore, the Appellate Body has said that, in carrying out its duty to make an objective assessment of the facts of the case, a panel is required to 'consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence'. Within these parameters, 'it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings.' Moreover, when assessing the probative value of the evidence, a panel is not required to 'accord to factual evidence ... the same meaning and weight as do the parties'. As such, a challenge under Article 11 of the DSU 'cannot be made out simply by asserting that a panel did not agree with arguments or evidence'.

In this vein, we emphasize that we will not entertain attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case. In our view, entertaining such factual arguments would undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement. To our minds, entertaining the appellants' factual arguments would not only fail to respect the role, and discretion, of the Panel as the trier of facts, but it would also not be in line with the Appellate Body's

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<sup>143</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317.

<sup>144</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.47.

<sup>145</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.47.



caution that we: (i) will not 'interfere lightly' with the panel's fact-finding authority; (ii) will not 'second-guess the [p]anel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]'; and (iii) will not reach 'a finding of inconsistency under Article 11 simply on the conclusion that [we] might have reached a different factual finding from the one the panel reached'."<sup>146</sup>

#### 1.4.2.2.2 Distinction between an error in application of law versus a failure to make an objective assessment

130. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body discussed the distinction between an error in application of law versus a failure to make an objective assessment:

"[A] failure to make a claim under Article 11 of the DSU on an issue that the Appellate Body determines to concern a factual assessment may have serious consequences for the appellant. An appellant may thus feel safer putting forward both a claim that the Panel erred in the application of a legal provision *and* a claim that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU. In most cases, however, an issue will *either* be one of application of the law to the facts or an issue of the objective assessment of facts, and not both."<sup>147</sup>

131. In *Australia – Tobacco Plain Packaging*, one of the appellants made arguments that the Panel erred under Article 2.2 of the TBT Agreement, which arguments "overlap[ed] entirely with those made in support of its claims under Article 11 of the DSU".<sup>148</sup> The Appellate Body considered that "Honduras' claims implicate the Panel's appreciation of the facts and evidence, rather than its application of the legal standard under Article 2.2 to the facts of this case", and concluded that Honduras had not "substantiated its claim that the Panel erred in its application of Article 2.2 to the facts of this case".<sup>149</sup> The Appellate Body explained that:

"In certain circumstances, some of the issues identified by Honduras' allegations may implicate a panel's application of the legal standard under Article 2.2 to the facts of the case. Moreover, as the Appellate Body has said in the past, it is sometimes difficult to distinguish clearly between issues that are purely legal or purely factual or are mixed issues of law and fact. However, in most cases, an issue will be *either* one of application of the law to the facts *or* an issue of the objective assessment of facts, but not both.

In these appellate proceedings, several factors contribute to our view that Honduras' challenges to the Panel's analysis relate to the Panel's appreciation of the evidence before it, rather than to the Panel's application of the legal standard under Article 2.2 to the facts of this case. We highlight Honduras' use of the following terminology in the arguments that it makes in support of its claim that the Panel erred in applying the legal standard under Article 2.2 to the facts of this case: (i) 'the Panel ... gave equal or more weight to perceptions and intentions not corroborated by evidence on actual behaviour'; (ii) '[t]he Panel [did not evaluate] 'the relevance and probative force of each piece thereof'; (iii) '[the Panel] simply summarised the evidence presented and noted certain weaknesses without drawing any conclusions from these weaknesses in terms of the weight to be attached to this evidence, ultimately giving equal weight to all evidence'; (iv) '[t]he Panel did not engage in any serious or objective assessment of the 'scientific and methodological rigor' of the evidence'; and (v) the Panel 'conduct[ed] its own (flawed) econometric assessment of the evidence'. Moreover, the arguments raised by Honduras are accompanied by footnotes referencing Honduras' arguments made in support of its claims under Article 11 of the DSU. In the same vein, Honduras indicates that the 'Panel's actions', which are the subject of the claim that the Panel erred in its application of Article 2.2, 'also amount

<sup>146</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.48-6.50.

<sup>147</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

<sup>148</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.22.

<sup>149</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.25.

to a failure to undertake an objective assessment of the matter' under Article 11 of the DSU."<sup>150</sup>

132. Having found that Honduras had failed to substantiate its claim of error with respect to Article 2.2 of the TBT Agreement, the Appellate Body explained that it would proceed to address the entirety of Honduras' claims exclusively under Article 11 of the DSU:

"[A]s mentioned ... above, in elaborating its claims that the Panel erred under Article 2.2 of the TBT Agreement in its analysis of the contribution of the TPP measures to Australia's objective, Honduras makes arguments that overlap entirely with those made in support of its claims under Article 11 of the DSU. Given the complete overlap between these two sets of arguments, and the focus of both sets of arguments on the Panel's engagement with the facts and appreciation of the evidence before it, we address all of Honduras' challenges to the Panel's contribution analysis under the rubric of its claims under Article 11 of the DSU."<sup>151</sup>

133. In *Australia – Tobacco Plain Packaging*, the Appellate Body considered that Honduras' line of argumentation invited the Appellate Body to engage in a factual assessment of the evidence that was before the Panel in order to determine whether the Panel provided a "reasoned and adequate explanation" of its findings. The Appellate Body stated:

"Such a proposition fails to recognize the differences between: (i) the role of the Appellate Body and its scope of appellate review, as governed by Article 17.6 of the DSU, on the one hand; and (ii) the role of a panel, as trier of fact, when reviewing an investigating authority's determinations under the SCM Agreement and the Anti-Dumping Agreement, on the other hand. Given these differences, we reject Honduras' assertion that the standard of review that applies to a panel's factual assessment, when a panel is reviewing the determinations of domestic authorities, applies equally to the scope of appellate review 'in cases where a panel operates as the initial trier of facts, such as this one'."<sup>152</sup>

#### 1.4.2.2.3 Errors not rising to the level of a violation of Article 11

134. In *US – Steel Safeguards*, the Appellate Body concluded that "not every error of law or incorrect legal interpretation attributed to a panel constitutes a failure on the part of the panel to make an objective assessment of the matter before it."<sup>153</sup>

135. In this regard, in *EC and certain member States – Large Civil Aircraft* the Appellate Body identified two elements to a claim of violation of Article 11:

"[N]ot every error in the appreciation of a particular piece of evidence will rise to the level of a failure by the Panel to comply with its duties under Article 11 of the DSU. In order for us to reverse the Panel's finding in respect of the A380 on the basis of Article 11 of the DSU, we would have to be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment of whether Airbus would have been able to launch the A380 in 2000 without LA/MSF. Thus, the question before us is whether the Panel did commit the errors alleged by the European Union and, if so, whether they demonstrate that the Panel's conclusion that LA/MSF was a 'necessary precondition' for the launch of the A380 in 2000, no longer had a sufficient evidentiary and objective basis."<sup>154</sup>

#### 1.4.2.2.4 Duty to examine all evidence

136. In the first appeal presenting an Article 11 challenge to a Panel's fact-finding, *EC – Hormones*, the Appellate Body stressed that "[t]he duty to make an objective assessment of the

<sup>150</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.23-6.24.

<sup>151</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.26.

<sup>152</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.320.

<sup>153</sup> Appellate Body Report, *US – Steel Safeguards*, para. 497. See also Appellate Body Report, *Japan – DRAMS (Korea)*, para. 184.

<sup>154</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.



facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts." The Appellate Body further considered that "[t]he wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts".<sup>155</sup>

137. In *Korea – Dairy*, Korea argued in its appeal that the Panel should have looked solely at the evidence submitted by the European Communities as the complaining party to determine whether the European Communities had met its burden of proof of making a *prima facie* case. The Appellate Body disagreed and stated that "under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."<sup>156</sup> With respect to the burden of proof issue in this context, see also paragraph 78 above.

138. In *Japan – DRAMs (Korea)*, the Appellate Body found that the Panel had not conducted an objective assessment of the matter before it, as required by Article 11 of the DSU, because it had failed to examine whether the Japanese authority (JIA)'s evidence *in its totality* supported the JIA's finding of entrustment or direction.<sup>157</sup>

139. In *Australia – Tobacco Plain Packaging*, Honduras claimed on appeal that the Panel had disregarded certain evidence, inconsistently with Article 11 of the DSU. Specifically, Honduras highlighted a sentence from an exhibit submitted to the Panel. The Appellate Body rejected Honduras' argument, noting in the process that "a panel could not be expected to reflect each and every aspect of every argument set forth in every exhibit submitted by every party in order to comply with the obligation to make an objective assessment of the matter before it."<sup>158</sup>

#### 1.4.2.2.5 Panel's discretion as trier and weigher of the facts

140. In *EC – Hormones*, the Appellate Body stressed the role of the Panel as the trier of the facts and considered that the "[d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts."<sup>159</sup> It further stated that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."<sup>160</sup> It also said that "[t]he Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly."<sup>161</sup>

141. In *Australia – Salmon*, with respect to the evaluation of evidence, the Appellate Body considered that panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>162</sup>

142. In *Korea – Alcoholic Beverages*, the Appellate Body reiterated the role of panels as the trier of the facts with the corresponding discretion to examine and weigh the evidence. The Appellate Body however held that this discretion "is not, of course, unlimited" since it is always subject to the panel's duty to render an objective assessment of the matter before it:

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<sup>155</sup> Appellate Body Report, *EC – Hormones*, para. 133. See also Appellate Body Reports, *Japan – Apples*, para. 221; *EC – Asbestos*, para. 161; *Australia – Salmon*, para. 266; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Agricultural Products II*, paras. 141 and 142; *Korea – Dairy*, para. 138; *Korea – Alcoholic Beverages*, paras. 161 and 162; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *US – Gambling*, para. 363; *EC – Selected Customs Matters*, para. 258; *US – Carbon Steel*, para. 142; *Brazil – Retreaded Tyres*, para. 185.

<sup>156</sup> Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>157</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 131-139.

<sup>158</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.210.

<sup>159</sup> Appellate Body Report, *EC – Hormones*, para. 132.

<sup>160</sup> Appellate Body Report, *EC – Hormones*, para. 135.

<sup>161</sup> Appellate Body Report, *EC – Hormones*, para. 138.

<sup>162</sup> Appellate Body Report, *Australia – Salmon*, para. 267.

"The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies, methods of production, taste, colour, places of consumption, consumption with 'meals' or with 'snacks', and prices.

A panel's discretion as trier of facts is not, of course, unlimited. That discretion is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it. In *European Communities – Hormones*, we dealt with allegations that the panel had 'disregarded', 'distorted' and 'misrepresented' the evidence before it."<sup>163</sup>

143. The Panel in *Australia – Automotive Leather II* observed that any evidentiary rulings that the Panel makes must be consistent with its obligation under Article 11 to conduct "an objective assessment of the matter before it". In the Panel's view, "a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfil our obligation to conduct an 'objective assessment' of the matter before us."<sup>164</sup>

144. In *US – Wheat Gluten*, the Appellate Body again referred to the Panel as the trier of facts in respect of its discretion to consider the evidence in a given case and recalled its prior jurisprudence on the scope of the review that the Appellate Body can undertake of the Panel's findings pursuant to Article 17.6 of the DSU:

"[W]e recall that, in previous appeals, we have emphasized that the role of the Appellate Body differs from the role of panels. Under Article 17.6 of the DSU, appeals are 'limited to *issues of law* covered in the panel report and *legal* interpretations developed by the panel'. (emphasis added) By contrast, we have previously stated that, under Article 11 of the DSU, panels are:

'... charged with the mandate to determine the *facts* of the case and to arrive at *factual findings*. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.' (emphasis added)

We have also stated previously that, although the task of panels under Article 11 relates, in part, to its assessment of the *facts*, the question whether a panel has made an 'objective assessment' of the facts is a *legal* one, that may be the subject of an appeal. (emphasis added) However, in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, 'within the *scope of the panel's discretion as the trier of facts*'. (emphasis added) ... a panel's appreciation of the evidence falls, in principle, 'within the *scope of the panel's discretion as the trier of facts*'. (emphasis added) In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion."<sup>165</sup>

145. In *US – Carbon Steel*, the Appellate Body summarized its previous jurisprudence on the extent of panels' duty to examine the evidence:

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<sup>163</sup> Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161-162.

<sup>164</sup> Panel Report, *Australia – Automotive Leather II*, para. 9.25.

<sup>165</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 150-151. See also Appellate Body Report, *EC – Sardines*, para. 299.

"As we have observed previously, Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record. Provided that panels' actions remain within these parameters, however, we have said that 'it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings', and, on appeal, we 'will not interfere lightly with a panel's exercise of its discretion'." <sup>166</sup>

146. In *US – Carbon Steel*, the Appellate Body further underlined that "although panels enjoy a *discretion*, pursuant to Article 13 of the DSU, to seek information 'from any relevant source', Article 11 of the DSU imposes no *obligation* on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties." <sup>167</sup>

147. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body ruled that it is not "an error, let alone an egregious error", for a panel to decline to accord to the evidence the weight that one of the parties sought to have accorded to it. <sup>168</sup> In this regard, see paragraph 159 below. Specifically, India had argued that the Panel had not made an objective assessment of the facts of the case because the Panel had distorted the evidence by placing greater weight on the statements made by the European Communities than on those made by India. The Appellate Body stressed that "the weighing of the evidence is within the discretion of the Panel as the trier of facts, and there is no indication in this case that the Panel exceeded the bounds of this discretion." <sup>169</sup>

148. The Appellate Body in *Japan – Apples* considered that a panel was not obliged to give precedence to the *importing* Member's approach to scientific evidence and risk over the views of the experts when analysing and assessing scientific evidence to determine whether a complainant established a *prima facie* case under Article 2.2. <sup>170</sup> As regards the examination of scientific evidence by panels in SPS disputes, see the relevant Sections on the *SPS Agreement*. In addition, the Appellate Body summarized its previous jurisprudence on the panels' discretion as trier and weigher of the evidence:

"Since *EC – Hormones*, the Appellate Body has consistently emphasized that, within the bounds of their obligation under Article 11 to make an objective assessment of the facts of the case, panels enjoy a 'margin of discretion' as triers of fact. Panels are thus 'not required to accord to factual evidence of the parties the same meaning and weight as do the parties' and may properly 'determine that certain elements of evidence should be accorded more weight than other elements'.

Consistent with this margin of discretion, the Appellate Body has recognized that 'not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts.' When addressing claims under Article 11 of the DSU, the Appellate Body does not 'second-guess the Panel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]'. Indeed:

'[i]n assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.'

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<sup>166</sup> Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>167</sup> Appellate Body Report, *US – Carbon Steel*, para. 153.

<sup>168</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 177.

<sup>169</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 181.

<sup>170</sup> Appellate Body Report, *Japan – Apples*, paras. 165-166.

Where parties challenging a panel's fact-finding under Article 11 have failed to establish that a panel exceeded the bounds of its discretion as the trier of facts, the Appellate Body has not 'interfere[d]' with the findings of the panel. <sup>171</sup>

149. In *Canada – Wheat Exports and Grain Imports*, the Appellate Body, referring to its prior jurisprudence, ruled that the Panel's decision not to rely on some of the facts submitted by one of the parties "would not, by itself, constitute legal error":

"As we said earlier, the Appellate Body has previously held that 'it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings'. Accordingly, the Panel's decision not to rely on some of the facts that the United States claims to have submitted would not, by itself, constitute legal error. To succeed in its claim that the Panel disregarded the evidence submitted to it, the United States would have to demonstrate that the Panel exceeded its discretion and that the Panel made, in effect, an 'egregious error'." <sup>172</sup>

150. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body rebutted the US claims against the Panel's analysis and endorsed the Panel's reliance on previous findings of the Appellate Body:

"Regarding the arguments presented by the United States relating to Article 11 of the DSU, we disagree with the United States that the Panel did not assess objectively whether the SPB is a measure. In our view, such an assessment is a legal characterization and not just a factual one, and the Panel correctly conducted its analysis. The Panel referred first to the SPB, which formed the factual information needed to conduct the exercise of legal characterization. The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same. Although the Panel may have expressed itself in a concise manner, we find no fault in its analysis that could justify ruling that the Panel failed to observe its obligations under Article 11 of the DSU." <sup>173</sup>

151. In *US – Zeroing (Japan)*, the United States claimed that the Panel had failed to make an objective assessment of the matter before it—including an objective assessment of the facts of the case—as required by Article 11 of the DSU, when it had concluded that a single rule or norm existed by virtue of which the USDOC will apply zeroing in any anti-dumping proceeding, regardless of the comparison methodology used. According to the United States, the evidence relied on by the Panel did not support such proposition. The Appellate Body, after recalling its prior jurisprudence, upheld the Panel's handling of the evidence:

"As we see it, the United States' challenge under Article 11 of the DSU is directed at the Panel's appreciation and weighing of the evidence. The Appellate Body has stated on several occasions that panels enjoy a certain margin of discretion in assessing the credibility and weight to be ascribed to a given piece of evidence. At the same time, the Appellate Body has underscored that Article 11 of the DSU requires panels 'to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence.' Moreover, panels must not 'make affirmative findings that lack a basis in the evidence contained in the panel record.' Provided that a panel's assessment of evidence remains within these parameters, the Appellate Body will not interfere with the findings of the panel.

...

In sum, we agree with the Panel's understanding of the Appellate Body's previous jurisprudence and the manner in which the Panel framed the question before it.

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<sup>171</sup> Appellate Body Report, *Japan – Apples*, paras. 221-222.

<sup>172</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 186.

<sup>173</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

We also consider that the Panel had sufficient evidence before it to conclude that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm. The Panel also examined ample evidence regarding the precise content of this rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States. In our view, the Panel properly assessed this evidence. We therefore disagree with the United States that the Panel did not assess objectively the issue of whether a single rule or norm exists by virtue of which the USDOC applies zeroing 'regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated.'"<sup>174</sup>

152. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body pointed out that:

"[A] panel's mandate under Article 11 of the DSU does not require it to accord to factual evidence of the parties the same meaning and weight as do the parties. Moreover, the mere fact that a panel does not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11. Instead, for a claim under Article 11 to succeed, an appellant must explain why the evidence that it relies on is so material to its case that the panel's failure to address explicitly and rely upon that evidence has a bearing on the objectivity of the panel's factual assessment."<sup>175</sup>

153. In *Russia – Railway Equipment*, the Appellate Body pointed out that:

"[I]n reviewing a panel's assessment of the measure at issue, the Appellate Body 'will not lightly interfere' with the panel's factual findings, including those concerning 'how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts'. Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel 'has exceeded its authority as trier of facts'. In the present case, the Panel thoroughly examined both parties' evidence, assessed the credibility of that evidence, and reached its findings on this basis. For its part, Ukraine does not explain how a different approach by the Panel to examining the evidence on the record would have led to a different conclusion."<sup>176</sup>

#### 1.4.2.2.6 Egregious error calling into question the good faith of a panel

154. In *EC – Hormones*, the European Communities argued on appeal that the Panel had disregarded or distorted the evidence submitted by the European Communities as well as the testimony provided by the experts advising the Panel. The European Communities claimed that the Panel had failed to make an objective assessment of the facts as required by Article 11 of the DSU. The Appellate Body disagreed with the European Communities and set forth the standard, for a violation of Article 11, as "an egregious error that calls into question the good faith of a panel.":

"Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.

The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the

<sup>174</sup> Appellate Body Report, *US – Zeroing (Japan)*, paras. 82 and 88.

<sup>175</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61. See also Appellate Body Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.219 and 7.223; *US – Clove Cigarettes*, para. 210; *US – Tuna II (Mexico)*, para. 254; *India – Agricultural Products*, para. 5.182; and *US – COOL*, paras. 299-300.

<sup>176</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.248.

opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. 'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.

...

[I]t is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."<sup>177</sup>

155. The Appellate Body in *EC – Hormones* concluded its analysis by underlining a panel's task in the assessment of statements made by experts:

"The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly."<sup>178</sup>

156. In *Australia – Salmon*, Australia argued in its appeal that the Panel had failed to make an objective assessment of the matter before it and had not applied the appropriate standard of review pursuant to Article 11 of the DSU. The Appellate Body noted Australia's argument that the Panel "partially or wholly ignored relevant evidence placed before it, or misrepresented evidence in a way that went beyond a mere question of the weight attributed to it, but constituted an egregious error amounting to an error of law." The Appellate Body stated:

"[I]n response to Australia's contention that the Panel failed to accord 'due deference' to matters of fact it put forward, we note that Article 11 of the DSU calls upon panels to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. Therefore, the function of this Panel was to assess the facts in a manner consistent with its obligation to make such an 'objective assessment of the matter before it'. We believe the Panel has done so in this case. Panels, however, are not required to accord to factual evidence of the parties the same meaning and weight as do the parties."<sup>179</sup>

157. In *Korea – Alcoholic Beverages*, Korea argued in its appeal that the Panel had breached its obligation under Article 11 of the DSU by applying a "double standard" in assessing the evidence before it. The Appellate Body again referred to the "egregious error" standard:

"We are bound to conclude that Korea has not succeeded in showing that the Panel has committed any egregious errors that can be characterized as a failure to make an objective assessment of the matter before it. Korea's arguments, when read together with the Panel Report and the record of the Panel proceedings, do not disclose that the Panel has distorted, misrepresented or disregarded evidence, or has applied a 'double standard' of proof in this case. It is not an error, let alone an egregious error,

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<sup>177</sup> Appellate Body Report, *EC – Hormones*, paras. 132-133, and 135.

<sup>178</sup> Appellate Body Report, *EC – Hormones*, para.138. See also Appellate Body Report, *Japan – Apples*, para. 222.

<sup>179</sup> Appellate Body Report, *Australia – Salmon*, para. 267.

for the Panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."<sup>180</sup>

158. In *Japan – Agricultural Products II*, the Appellate Body examined Japan's claim that the Panel had not complied with Article 11 of the DSU when it made a finding under Article 2.2 of the SPS Agreement concerning the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts. More specifically, Japan claimed the Panel had not properly examined evidence, had treated expert views in an arbitrary manner and had not properly evaluated the evidence before it. The Appellate Body referred to its previous decision in *EC – Hormones* and reiterated that "[o]nly egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU":

"As we stated in our Report in *European Communities – Hormones*, not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts as required by Article 11 of the DSU. Only egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU.

In our view, Japan has not demonstrated that the Panel, in its examination of the consistency of the varietal testing requirement with Article 2.2, has made errors of the gravity required to find a violation of Article 11 of the DSU. We, therefore, conclude that the Panel did not abuse its discretion contrary to the requirements of Article 11 of the DSU."<sup>181</sup>

159. In *EC – Bed Linen (Article 21.5 – India)*, India claimed in appeal that the Panel had failed to meet its obligation under Article 11 of the DSU to examine the facts of the case objectively. The Appellate Body ruled that it is not "an error, let alone an egregious error", for a panel to decline to accord to the evidence the weight that one of the parties sought to have accorded to it.

"India has not persuaded us that the Panel in this case exceeded its discretion as the trier of facts. In our view, the Panel assessed and weighed the evidence submitted by both parties, and ultimately concluded that the European Communities had information on all relevant economic factors listed in Article 3.4. It is not 'an error, let alone an egregious error' <sup>182</sup>, for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it. We, therefore, reject India's argument that, by failing to *shift* the burden of proof, the Panel did not properly discharge its duty to assess objectively the facts of the case as required by Article 11 of the DSU."<sup>183</sup>

#### 1.4.2.2.7 Duty to accord due process

160. In *Chile – Price Band System*, the Appellate Body concluded that the Panel had made a finding on a claim that had not been made by Argentina. Chile had claimed that, by making a finding on that claim, the Panel had deprived Chile of a fair right to response. The Appellate Body agreed with Chile and found that Panel had acted inconsistently with Article 11 of the DSU by denying Chile the due process of a fair right of response. In support of this finding, the Appellate Body considered that "in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected":

"Article 11 imposes duties on panels that extend beyond the requirement to assess evidence objectively and in good faith ... This requirement is, of course, an indispensable aspect of a panel's task. However, in making 'an objective assessment of the matter before it', a panel is also duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. In this case, because the Panel did not give Chile a fair right of response

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<sup>180</sup> Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

<sup>181</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 141-142.

<sup>183</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 177.

on this issue, we find that the Panel failed to accord to Chile the due process rights to which it is entitled under the DSU."<sup>184</sup>

161. In *US/Canada – Continued Suspension*, the Appellate Body found that the Panel infringed the due process right of one of the parties:

"[W]e consider that there was an objective basis to conclude that the institutional affiliation with JECFA of Drs. Boisseau and Boobis, and their participation in JECFA's evaluations of the six hormones at issue, was likely to affect or give rise to justifiable doubts as to their independence or impartiality given that the evaluations conducted by JECFA lie at the heart of the controversy between the parties."<sup>185</sup>

162. The Appellate Body thus concluded that "[t]he appointment and consultations with Drs. Boisseau and Boobis compromised the adjudicative independence and impartiality of the Panel" and that "the Panel infringed the European Communities' due process rights as a result of the Panel having consulted with Drs. Boisseau and Boobis as scientific experts."<sup>186</sup> Consequently, according to the Appellate Body, the Panel could not "be said to have made 'an objective assessment of the matter' as required by Article 11 of the DSU".<sup>187</sup> The Appellate Body thus found that "the Panel failed to comply with its duties under Article 11 of the DSU, as a result of the appointment and consultations with Drs. Boisseau and Boobis in the circumstances of th[e] case."<sup>188</sup> With reference to the violation of the obligation under Article 11 of the DSU, the Appellate Body added as follows:

"We have found that the Panel did not apply the proper standard of review. This is a legal error and does not fall within the authority of the Panel as the trier of facts. Moreover, we have found instances in which the Panel exceeded its authority in the assessment of the testimony of the scientific experts. By merely reproducing testimony of some experts that would appear to be favourable to the European Communities' position, without addressing its significance, the Panel effectively disregarded evidence that was potentially relevant for the European Communities' case. This cannot be reconciled with the Panel's duty to make an 'objective assessment of the facts of the case' pursuant to Article 11 of the DSU."<sup>189</sup>

163. In *Thailand – Cigarettes (Philippines)*, the Appellate Body concluded that the Panel did not fail to ensure due process and, thus, to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter, by accepting and relying on certain evidence without having afforded Thailand an opportunity to comment on that evidence.<sup>190</sup>

164. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*) stated that it would be inconsistent with the requirements of due process for a panel to rule on a claim identified in the panel request but which the complainant has failed to articulate in a clear and timely manner in its subsequent submissions.<sup>191</sup>

165. In *Australia – Tobacco Plain Packaging*, the appellants argued that the Panel had acted inconsistently with Article 11 of the DSU, when assessing certain post-implementation econometric evidence submitted by the parties.<sup>192</sup> In particular, the Dominican Republic claimed that the Panel's assessment of two robustness criteria – non-stationarity and multicollinearity – was conducted without respecting the Dominican Republic's due process rights because the Dominican Republic was not given an opportunity to comment on the Panel's analysis of those criteria. In addressing the appellants' concerns, the Appellate Body observed:

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<sup>184</sup> Appellate Body Report, *Chile – Price Band System*, para. 176.

<sup>185</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 481.

<sup>186</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 481.

<sup>187</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 482.

<sup>188</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 482.

<sup>189</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 615.

<sup>190</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 147-161.

<sup>191</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.61.

<sup>192</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.45.



"[I]n its examination of the post-implementation evidence of smoking prevalence and consumption, multicollinearity and non-stationarity were two of the concerns identified by the Panel pertaining to certain evidence provided by the complainants.<sup>748</sup> Moreover, the Panel relied on, inter alia, the fact that certain pieces of Australia's evidence did not suffer from these concerns, in order to conclude that the TPP measures contributed to reducing smoking prevalence and consumption. Our review of the Panel record suggests that these concerns were not identified by the parties, but were introduced by the Panel itself. Furthermore, the Panel did not pose questions to the parties or otherwise invite them to comment on the use of these robustness criteria in addressing the parties' evidence. It appears that the parties first became aware of possible concerns relating to multicollinearity and non-stationarity when the Panel issued its Interim Report to the parties on 2 May 2017. At the interim review stage, the complainants did not raise concerns regarding the Panel's identification of these concerns."<sup>193</sup>

166. Having underlined the technical complexity associated with reliance on multicollinearity and non-stationarity as well as the degree of discretion in the Panel's assessment of this issue, the majority of the Appellate Division found that:

"Given that these concerns were not introduced by the parties, but emanated from the Panel itself, and in light of their highly technical nature and of the Panel's discretion in relying on these concerns, we consider that the Panel should have explored these issues with the parties."<sup>194</sup>

167. Moreover, the majority of the Appellate Division in *Australia – Tobacco Plain Packaging* rejected Australia's argument that the appellants' due process claim was undermined by the fact that they could have commented on the issue of multicollinearity and non-stationarity at the interim review stage, but chose not to do so. The majority considered that:

"In our view, although Honduras and the Dominican Republic could have raised their concerns regarding the Panel's reliance on these econometric tools during the interim review stage, in the circumstances of the present dispute, their failure to do so does not detract from the Panel's due process violation in its treatment of certain evidence submitted by the complainants. While the interim review affords parties an opportunity to raise and address numerous aspects of a Panel's findings, in our view, the interim review process contemplated under Article 15 would not have been sufficient to enable the parties to adequately explore these issues, given the review's limited nature and late stage."<sup>195</sup>

168. One Division member in *Australia – Tobacco Plain Packaging* disagreed with the majority's view regarding the Panel's introduction of multicollinearity and non-stationarity:

"In my view, the Panel's reliance on multicollinearity and non-stationarity to test the robustness of the parties' evidence was part of the Panel's reasoning, with respect to which a panel enjoys considerable discretion. The parties to this case submitted to the Panel a large amount of econometric evidence. It was appropriate for the Panel to assess the probative value of that evidence. The Panel tested the robustness of the econometric studies submitted by the parties by taking into account, inter alia, whether the models suffered from multicollinearity and non-stationarity. The mere fact that these two so-called 'criteria' were not specifically mentioned by the parties is not sufficient to warrant a different scrutiny of the Panel's reliance on them, as compared to the Panel's reliance on other econometric concepts (e.g. overfitting and endogeneity) that the parties had identified. I therefore consider that the Panel acted within the bounds of its discretion as a trier of facts by not only examining the parameters used by each party, but also by going further in its evaluation and testing

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<sup>193</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.245.

<sup>194</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.246.

<sup>195</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.256.

the robustness of the parties' econometric evidence for multicollinearity and non-stationarity."<sup>196</sup>

169. That Division member also disagreed with the majority's view regarding the role of the interim review:

"[S]ince the complainants had an opportunity to raise these issues and did not do so, I do not agree with their claim that the Panel denied them due process by not 'giving the parties any opportunity whatsoever to comment'. Since the complainants did not attempt to raise their concerns regarding the Panel's reliance on multicollinearity and non-stationarity at the interim review stage, it is unnecessary to speculate about whether the alleged limited nature of the interim review process, which I do not find to be expressed in the text of Article 15.2, would have been sufficient. Consequently, I disagree with the majority's interim conclusion on this point."<sup>197</sup>

### 1.4.3 Selected issues relating to evidence

#### 1.4.3.1 Timing of submission of evidence

170. In *Argentina – Textile and Apparel*, Argentina argued that the Panel had acted inconsistently with Article 11 of the DSU by allowing certain evidence offered by the United States two days before the second substantive meeting of the Panel with the parties. The Appellate Body noted that "the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence" and, accordingly, did not find a violation of Article 11:

"Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the presentation of evidence by a party to the dispute. It is true that the Working Procedures 'do not prohibit' submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. ...

Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties.

As noted above, however, the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional documentary evidence of the United States. Argentina also did not submit any countering documents or comments in respect of any of the additional documents of the United States.

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<sup>196</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.538.

<sup>197</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.542.

[W]hile another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the DSU."<sup>198</sup>

171. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling rejecting certain evidence submitted by the European Communities after the second substantive meeting. Korea alleged that its rights of defence had been violated by the late submission of such evidence:

"Korea complains that its rights of defense were violated by the late submission of a market study (the Trendscape survey) by the European Communities. Korea had submitted a study done by the AC Nielsen Company as part of its responses to questions arising from the first substantive meeting of the Panel. The European Communities responded to this with, among other things, the Trendscape survey presented at the Second Meeting of the Panel. The Panel gave Korea a week to respond to this and critique the results, methodology and questions used in the Trendscape survey. Korea argues that this time was insufficient, that it did not have copies in Korean of all the questions -asked, and that it did not have time to provide further questions or comments based upon the answers.

We do not consider that Korea's rights under the DSU were violated. The European Communities submitted its rebuttal survey at the next available opportunity after receiving Korea's Nielsen survey. Had Korea chosen to submit its survey at the first substantive meeting and the European Communities failed to respond at the next opportunity (in such a case, it would have been in the rebuttal submission), there obviously would have been more merit to the claim because then the European Communities, it could have been argued, delayed submitting their evidence. As it transpired, the European Communities submitted a new piece of evidence at the next available opportunity which Korea then was able to examine for a week in order to provide comments. The survey was not of a particularly complex type and, in our view, Korea had adequate time to respond given the nature of the evidence. The Trendscape survey is not critical evidence to the complainants' case; it serves as a supplement to arguments already made. If we considered that it represented critical evidence, Korea's request for further time for comment would have been given greater weight. While all parties to litigation might prefer open-ended potential for rebutting the other side's submissions, we believe that for practical reasons submissions must be cut-off at some point and such a point was reached in this case. Thus, neither the timing nor the importance of the evidence in question support a finding that Korea's rights have been violated in this instance."<sup>199</sup>

172. In *Canada – Aircraft*, Canada requested the Panel to issue a preliminary ruling on the question of whether the complaining party may adduce new evidence or allegations after the end of the first substantive meeting. Canada argued that it would suffer prejudice under the accelerated procedure under Article 4 of the SCM Agreement as a result of the late submission of allegations or evidence. The Panel, in a finding not addressed by the Appellate Body, ruled that it was not bound to exclude the submission of new allegations after the first substantive meeting and that it could not see any legal basis for so doing:

"[A]n absolute rule excluding the submission of evidence by a complaining party after the first substantive meeting would be inappropriate, since there may be circumstances in which a complaining party is required to adduce new evidence in order to address rebuttal arguments made by the respondent. Furthermore, there may be instances, as in the present case, where a party is required to submit new evidence at the request of the panel. For these reasons, we rejected Canada's request for a preliminary ruling that the Panel should not accept new evidence submitted by Brazil after the first substantive meeting.

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<sup>198</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 79-81.

<sup>199</sup> Panel Report, *Korea – Alcoholic Beverages*, paras. 5.24-5.25.

[W]e are not bound to exclude the submission of new allegations after the first substantive meeting. We can see nothing in the DSU, or in the Appendix 3 Working Procedures, that would require the submission of new allegations to be treated any differently than the submission of new evidence. Indeed, one could envisage situations in which the respondent might present information to a panel during the first substantive meeting that could reasonably be used as a basis for a new allegation by the complaining party. Provided the new allegation falls within the panel's terms of reference, and provided the respondent party's due process rights of defence are respected, we can see no reason why any such new allegation should necessarily be rejected by the panel as a matter of course, simply because it is submitted after the first substantive meeting with the parties. We consider that this approach is consistent with the Appellate Body's ruling in *European Communities – Bananas* that '[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.'<sup>200</sup>

173. In *US – Offset Act (Byrd Amendment)*, Canada asked the Panel to accept as evidence a letter which it submitted after the first substantive meeting. In spite of the United States' objections, the Panel issued a preliminary ruling accepting the evidence. The Panel noted that the letter at issue did not come into the possession of Canada until after the first substantive meeting. The Panel also noted that the information contained in the letter was in the public domain, and that the information was pertinent to the proceedings since it related to an issue which it had been asked to consider.<sup>201</sup>

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

"The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'. At that time, the panel process is all but completed; it is only—in the words of Article 15—'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU."<sup>202</sup>

175. The Panel in *Japan – Apples* accepted evidence that became available only after the establishment of the Panel, as the other party had had an opportunity to comment:

"A related question is whether the Panel should consider evidence that became available only after the establishment of the Panel. Our approach in this regard should be pragmatic. Besides the situation contemplated in paragraph 11 of our Working Procedures, we decided not to reject evidence submitted by a party on which the other party had had an opportunity to comment, whether it took advantage of such an opportunity or not. This is without prejudice to the admissibility of such evidence on other grounds or the weight that we might eventually give to such evidence.

...

... We are of the view that our obligation, pursuant to Article 11 of the DSU, to make an objective assessment of the matter before us, including an objective assessment of the facts of the case, imposes on us an obligation not to exclude *a priori* any evidence submitted in due time by any party. However, the fact that we accepted the evidence at issue as a matter of principle is, as stated in the latter above, without prejudice to

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<sup>200</sup> Panel Report, *Canada – Aircraft*, paras. 9.73-9.74.

<sup>201</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.2.

<sup>202</sup> Appellate Body Report, *EC – Sardines*, para. 301.

the weight that we will ultimately give to these exhibits in our discussion of the substance of this case. We also note that, consistent with the practice of panels, we provided Japan with the opportunity to comment on the substance of these documents."<sup>203</sup>

176. In *US – Steel Safeguards*, the Panel sent a letter to all parties that included a series of preliminary rulings on organizational matters. Among the issues, the Panel referred to the United States' request to substitute the terms "rebuttal submissions" in paragraph 11 of the Panel's Working Procedures regarding the timing of the submission of evidence, with the word "rebuttals". For the United States the word "submission" is ordinarily taken to mean written submissions and thus the reference to "rebuttal submissions" would exclude the application of that paragraph to evidence in rebuttals made orally. The complainants disagreed and argued that the suggested amendment would allow, for example, new arguments and evidence to be adduced orally at the Panel's second substantive meeting. The Panel, after referring to the Appellate Body Report in *Argentina – Textile and Apparel* (see paragraph 170 above), redrafted paragraph 11 "to ensure due process and to ensure that new evidence is not adduced at a late stage in the panel process, while simultaneously ensuring that all parties and the Panel are fully informed of all relevant evidence".<sup>204</sup> The new paragraph 11 read as follows:

"Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party(ies) shall be accorded a period of time for comment, as appropriate."

177. In *Russia – Pigs (EU)*, *US – OCTG (Korea)*, *China – GOES (Article 21.5 – US)* and *EC – Seal Products*, the Panels noted the relevant case law and stated that the interim review stage is not an appropriate time to introduce new evidence.<sup>205</sup>

178. In *China – Autos (US)*, the Panel accepted evidence submitted after the first substantive meeting:

"We note that nothing in the DSU or our working procedures precludes us from accepting evidence after the first Panel meeting. The DSU does not address the timing of submission of evidence. Nor do our working procedures, which do address the timing of submission of evidence by the parties, establish inflexible barriers to our ability to accept evidence, even if such evidence is not submitted in compliance with the procedures. While our working procedures are to be respected, the principal goal of those procedures is to enable us to resolve the dispute presented to us on the basis of an objective evaluation of relevant evidence, while respecting the due process rights of the parties involved. Thus, the particular circumstances must be considered in deciding whether we will consider evidence which is not submitted in conformity with the normal timeline provided for in our working procedures. Indeed, this is clear in the working procedures themselves, which provide that, while factual evidence should be submitted no later than during the first meeting, exceptions shall be granted upon a showing of good cause, in which case the other party must be given an opportunity for comment. This is, in our view, the situation here."<sup>206</sup>

179. In *China – Rare Earths*, the Panel, taking into account the due process requirements, did not admit Exhibits that were submitted after the second substantive meeting. The Panel noted that "the vast majority of this evidence could and should have been submitted at an earlier date".<sup>207</sup> The Panel further explained that allowing new expert evidence would have prolonged the proceedings, contrary to Article 3.3 of the DSU.<sup>208</sup>

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<sup>203</sup> Panel Report, *Japan – Apples*, paras. 8.49 and 8.56.

<sup>204</sup> Appellate Body Report, *US – Steel Safeguards*, para. 5.3.

<sup>205</sup> Panel Reports, *Russia – Pigs (EU)*, para. 6.16; *US – OCTG (Korea)*, Annex F-1, para. 2.88; *China – GOES (Article 21.5 – US)*, para. 6.21; *EC – Seal Products*, para. 6.55.

<sup>206</sup> Panel Report, *China – Autos (US)*, para. 7.81.

<sup>207</sup> Panel Reports, *China – Rare Earths*, para. 7.21.

<sup>208</sup> Panel Reports, *China – Rare Earths*, para. 7.24.

180. In *Australia – Tobacco Plain Packaging*, the Panel accepted comments submitted by the complainants after the comments on responses to questions following the second substantive meeting.<sup>209</sup>

181. The Panel in *Russia – Traffic in Transit* excluded from the record an exhibit submitted by the complainant, concerning the application of a measure that was challenged as such, on the basis that it had not been submitted in a timely manner and did not fall within one of the exceptions provided for in the relevant paragraph of the Panel's Working Procedures.<sup>210</sup>

182. In *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, the European Union requested the Panel to issue a ruling rejecting as "untimely filed" certain arguments and evidence contained in the United States' comments on the European Union's responses to the Panel's questions following the substantive meeting. Alternatively, the European Union requested an opportunity to comment on the alleged new arguments and evidence, if the Panel were to decline the foregoing request, arguing that the United States' failure to submit the arguments and evidence earlier raised serious due process issues. Specifically, the European Union claimed that the United States addressed arguments and evidence that had been filed as early as the European Union's first written submission and that the United States "could and should have filed those arguments many months ago, had it considered them pertinent to the issues arising in this dispute".<sup>211</sup> The Panel found the United States' arguments and evidence as relevant in conducting the objective assessment of the matter, and declined the European Union's request to reject them as "untimely filed". The Panel granted the European Union an opportunity to comment on certain of the arguments and evidence that the European Union had identified. According to the Panel:

"There is no particular temporal sequence of proof in a WTO proceeding and both parties will adduce evidence in support of their own arguments or to rebut the arguments made by the other at various stages of a dispute throughout the entirety of a proceeding. Due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. However, this due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU. We also take into account the complex nature of issues that have been raised and the fact that we must discharge this responsibility in a compliance proceeding in which it was envisaged that the parties would hold only one substantive meeting with the Panel."<sup>212</sup>

183. The Panel in *India – Tariffs on ICT Goods (Japan)* found timely the submission of a legal opinion as evidence following the first substantive meeting of the Panel. In this context, the Panel stated:

"In our view, it is natural, if not inevitable, that over the course of dispute settlement proceedings, parties' arguments will evolve and develop. The process of responding to the assertions and arguments of the other party may necessitate elaboration or substantiation of aspects of one's initial arguments, in order to adequately rebut those assertions and arguments. Furthermore, what may appear to be minor issues early in the proceedings can take on new significance later on, necessitating the submission of additional arguments or evidence. In our view, it is both reasonable and consistent with our Working Procedures that evidence for purposes of rebuttal be introduced after the first substantive meeting in order to rebut another party's rebuttal of one's own initial position. This is notwithstanding that such evidence may relate to arguments that were initially raised by the adducing party.

Having said that, we also note that the opportunity to further substantiate or develop arguments through the submission of additional evidence should not be read as a free

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<sup>209</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 1.113 and 1.114.

<sup>210</sup> Panel Report, *Russia – Traffic in Transit*, para. 1.21, Annex B-3, paras. 2.1-2.2 and 3.1.

<sup>211</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, Annex D-1, para. 2.

<sup>212</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, Annex D-1, para. 18. See also Annex D-1, paras. 19-34.

licence to submit extensive or factually intensive evidence at a late stage of the proceedings, in particular evidence that not only was available at an earlier stage of the proceedings but was plainly necessary in order to make one's case. Indeed, while panels have an interest in making their determinations on the basis of a complete factual and evidentiary record, there is also an interest in 'prompt' and efficient dispute settlement proceedings. Moreover, parties' due process rights should entail a sufficient opportunity to review and comment on any new evidence that is submitted. These considerations also ought to be taken into account in assessing the admissibility of evidence submitted for purposes of rebuttal of arguments made earlier in the proceedings."<sup>213</sup>

#### 1.4.3.2 Temporal scope of the review

184. In *US – Cotton Yarn*, the Appellate Body considered that a panel reviewing the due diligence exercised by a Member in making its determination under Article 6 of the Agreement on Textiles and Clothing has to put itself in the place of that Member at the time it makes its determination and thus "must not consider evidence which did not exist *at that point in time*".<sup>214</sup>

185. The Appellate Body in *EC – Selected Customs Matters* discussed the temporal limitations for measures to be considered as within the Panel's term of reference, and emphasized that a panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment:

"[I]t is important to distinguish between, on the one hand, the measures at issue and, on the other hand, acts of administration that have been presented as evidence to substantiate the claim that the measures at issue are administered in a manner inconsistent with Article X:3(a) of the GATT 1994. The Panel failed to make the distinction between *measures* and pieces of *evidence*. While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment. In this case, the United States was not precluded from presenting evidence relating to acts of administration before and after the date of Panel establishment. A panel enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment."<sup>215</sup>

186. In *Korea – Radionuclides*, the Panel rejected Korea's argument that the Panel was precluded from considering evidence that did not exist at the time the Korean authorities conducted their risk assessment for the imposition of the challenged SPS measure:

"In our view this means that the Panel should not simply defer to the importing Member. Similarly, an evaluation of whether arbitrary or unjustifiable discriminatory treatment exists, within the meaning of Article 2.3, or whether control, inspection or approval procedures conform to Article 8 and Annex C is not dependant on a review of any particular scientific judgment made by the regulator at the time of the adoption of the measure. Of course, such evidence would be relevant and useful, but other scientific evidence should also be considered.

... Our understanding of the obligations in Articles 2.3, 5.6, and 8 and Annex C leads us to conclude that this Panel is free to accept any evidence that will assist it in assessing the measures in question for compliance with the obligations therein."<sup>216</sup>

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<sup>213</sup> Panel Report, *India – Tariffs on ICT Goods (Japan)*, Annex E-3, paras. 3.5-3.6

<sup>214</sup> Appellate Body Report, *US – Cotton Yarn*, para. 78

<sup>215</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188. See also Panel Report, *US – Animals*, paras. 7.447 and Panel Reports, *US – COOL*, para. 6.13 and footnote 20.

<sup>216</sup> Panel Report, *Korea – Radionuclides*, paras. 7.4-7.5.

187. The Panel in *Korea – Radionuclides* found support for its approach in the fact that Japan's claim concerned not only the sanitary situation at the time Korea had imposed the challenged SPS measure, but also the continued application of that measure:

"Evidence of a continuing inconsistency is by its very nature unavailable at the time measures are adopted. Therefore, the Panel does not see how it could conduct the assessment called for by the Appellate Body in *Australia – Apples* and by the nature of Japan's claims if it were to limit itself to examining only the scientific evidence that was available to the regulator at the time it made its determination. Moreover, there is no evidence on the record as to how the regulator arrived at its decision or what evidence it considered.

As mentioned in paragraph [] above, Korea also argues that Article 11 would preclude the Panel from considering any evidence that did not exist prior to the dispute, in particular the analysis of relevant sampling data that was compiled by Japan's experts for the purposes of demonstrating the efficacy of its proposed alternative measure under Article 5.6. We disagree. Prior panels and the Appellate Body have confirmed that '[e]vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel', therefore a panel 'is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment'. In this regard, the Panel notes that several exhibits that Japan provided for the purpose of supporting its analysis on the similarity of Japanese products to those from the rest of the world as well as its proposed alternative measure under Article 5.6 contain data that pre-dates the establishment of the Panel which has simply been analysed and packaged for purposes of explaining how it supports Japan's claims."<sup>217</sup>

#### 1.4.3.3 Factual findings made in previous disputes

188. In *US – Continued Zeroing*, the Appellate Body made findings on the status of factual findings made in previous disputes on the assessment of facts in an ongoing dispute:

"Factual findings made in prior disputes do not determine facts in another dispute. Evidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding. The finders of fact are of course obliged to make their own determination afresh and on the basis of all the evidence before them. But if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings. Nonetheless, the factual findings adopted by the DSB in prior cases regarding the existence of the zeroing methodology, as a rule or norm, are not binding in another dispute. In themselves, they do not establish that zeroing was used in all the successive proceedings in each of the 18 cases listed in the European Communities' panel request."<sup>218</sup>

189. In *US – Shrimp II (Viet Nam)*, the complainant relied on the factual findings made in past disputes, as part of its argument that the zeroing methodology had "general and prospective application". The Panel disagreed with this approach and explained:

"We disagree with Viet Nam. In our view, the fact that the panel in *US – Shrimp (Viet Nam)* found that Viet Nam had established the existence of the zeroing methodology as a measure of general and prospective application under the same anti-dumping order does not affect the fundamental rule regarding allocation of the burden of proof in the present dispute. Viet Nam is therefore bound to provide relevant evidence proving the facts it asserts in the present dispute and cannot rely on previous panel and Appellate Body decisions to establish, as a matter of fact, the existence of the zeroing methodology as a norm or rule of general and prospective application."<sup>219</sup>

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<sup>217</sup> Panel Report, *Korea – Radionuclides*, paras. 7.6-7.7.

<sup>218</sup> Appellate Body Report, *US – Continued Zeroing*, para. 190.

<sup>219</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.42.



#### 1.4.3.4 Admissibility of evidence versus weight accorded to evidence

190. The Panel in *EC – Bed Linen* examined the European Communities objection to the inclusion by India in its submission of reports of the consultations between the parties which took place before the establishment of the Panel. Although the Panel made no findings on the European Communities objection, it provided its views on the difference between questions concerning the admissibility of evidence, and the weight to be accorded to the evidence in making its decisions:

"[I]t seems that the evidence concerning the consultations is at best unnecessary, and may be irrelevant. That said, however, merely because the evidence is unnecessary or irrelevant does not require us to exclude it.

...

... we consider that it is not necessary to limit the facts and arguments India may present, even if we might consider those facts or arguments to be irrelevant or not probative on the issues before us. In our view, there is a significant and substantive difference between questions concerning the admissibility of evidence, and the weight to be accorded evidence in making our decisions. That is, we may choose to allow parties to present evidence, but subsequently not consider that evidence, because it is not relevant or necessary to our determinations or is not probative on the issues before it. In our view, there is little to be gained by expending our time and effort in ruling on points of "admissibility" of evidence *vel non*.

In addition, we note that, under Article 13.2 of the DSU, Panels have a general right to seek information "from any relevant source". In this context, we consider that, as a general rule, panels have wide latitude in admitting evidence in WTO dispute settlement. The DSU contains no rule that might restrict the forms of evidence that panels may consider. Moreover, international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit. As one legal scholar has noted:

'The inherent flexibility of the international procedure, and its tendency to be free from technical rules of evidence applied in municipal law, provide the 'evidence' with a wider scope in international proceedings ... Generally speaking, international tribunals have not committed themselves to the restrictive rules of evidence in municipal law. They have found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case'.

It has clearly been held in the WTO that information obtained in consultations may be presented in subsequent panel proceedings. "<sup>220</sup>

#### 1.4.3.5 Circumstantial versus direct evidence

191. In *Canada – Aircraft*, the Appellate Body observed that it is commonplace for adjudicators to rely on "inferences" in making factual findings:

"The DSU does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts. Yet, in all cases, in carrying out their mandate and seeking to achieve the 'objective assessment of the facts' required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example, the ensemble of facts found to exist warrants the characterization of a 'subsidy' or a 'subsidy contingent ... in fact ... upon export performance'. The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not

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<sup>220</sup> Panel Report, *EC – Bed Linen*, paras. 6.32-6.35.

the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute."<sup>221</sup>

192. In *US – Countervailing Duty Investigation on DRAMS*, a case involving a review of the US investigating authority's countervailing duty determination, the United States argued that the Panel erred in effectively requiring every piece of evidence "to be *direct* evidence of entrustment or direction and thereby precluded legitimate inferences drawn from circumstantial and secondary evidence". The Appellate Body agreed:

"In our view, having accepted an investigating authority's approach, a panel normally should examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority. Moreover, if, as here, an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding of entrustment or direction, a panel reviewing such a determination normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination. Indeed, requiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence. Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence.

...

... [W]hat is absent from the Panel's 'global' assessment, in our view, is a consideration of the *inferences* that might reasonably have been drawn by the USDOC on the basis of the *totality* of the evidence. As we have already observed<sup>283</sup>, individual pieces of circumstantial evidence are unlikely to establish entrustment or direction; the significance of individual pieces of evidence may become clear only when viewed together with other evidence. In other words, a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference of entrustment or direction."<sup>222</sup>

193. In *US – Continued Zeroing*, the Appellate Body faulted the Panel for rejecting a claim in the absence of direct evidence:

"The fact that there is no direct evidence establishing the use of simple zeroing does not absolve a panel from examining submitted evidence in its totality. We, however, come to this question not as the original reviewer of that evidence, but against the standard of whether the factual findings and uncontested facts on the Panel record adequately support completion. On that basis, we decide not to complete the analysis to reach a finding that the United States applied simple zeroing in these two periodic reviews. We emphasize that the nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member's regulating authority. Because the design and operation of national regulatory systems will vary, we believe that, in a specific case, a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence."<sup>223</sup>

#### 1.4.3.6 Public statements by company executives and government officials

194. In *EC and certain member States - Large Civil Aircraft*, the United States submitted various public statements by company executives and government officials as evidence that Airbus would

<sup>221</sup> Appellate Body Report, *Canada – Aircraft*, para. 198.

<sup>222</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 150 and 154.

<sup>223</sup> Appellate Body Report, *US – Continued Zeroing*, para. 357.

not have been able to launch its aircraft without launch aid / member State financing (LA/MSF). The European Communities argued that such statements not be given weight. Citing the prior panel report in *Australia – Automotive Leather II*, the Panel stated that:

"In considering the above evidence, we recognize that the public statements of Airbus or participant company executives and public officials as to the need for LA/MSF in order to launch a given aircraft may involve a degree of self-interest. For example, comments attributed to Sir Austin Pearce appear to have been made in the midst of efforts by British Aerospace to lobby the government of the United Kingdom for additional support. In these circumstances, it may well have been in the interest of the company to suggest that its participation in the A320 project would come to a halt without further commitment from the UK government. Having committed public monies, it is also possible that public officials would be inclined to describe government participation in Airbus projects as essential. However, we note that the Decision letter of the European Commission seems to us to be in the nature of a quasi-judicial evaluation and finding, rather than mere statements by public officials, and therefore the same concerns do not arise in evaluating that decision. In any event, we consider it appropriate to take this evidence into account, making our own judgements as to its weight and probative value, together with other evidence in our evaluation of the United States claims." <sup>224</sup>

195. In *Argentina – Import Measures*, the Panel relied, among other evidence, on statements by public officials in determining the "existence, nature and characteristics" of the alleged unwritten Trade-Related Requirements (TRRs) measure:

"Consistent public statements made on the record by a public official cannot be devoid of importance, especially when they relate to a topic in which that official has the authority to design or implement policies. That is the case for the Argentine officials that have been cited, such as the President, the Minister of Economy and Public Finance, the Minister of Industry, the Minister of Agriculture, the Secretary of Domestic Trade, and the President of the Central Bank of Argentina. It is appropriate for the Panel to assume that these officials have authority to make statements in the matters that relate to their respective competences. In many cases, the statements were prepared speeches delivered at formal events or were contained in notes issued by the press office of agencies of the Argentine Government; these cannot be dismissed as casual statements. While the Panel notes Argentina's assertion that statements made by public officials, and even by the President of Argentina, have limited legal value, 'a panel must not lightly cast doubt on the good faith underlying governmental declarations and on the veracity of these declarations'. Indeed, Argentina itself cited and relied upon statements made by its high-ranking officials, including some made by the Argentine President.

Moreover, as has been noted by the International Court of Justice, statements made by public officials, 'are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them'. Additionally, account must be taken as to the manner in which the statements are made, including the medium in which they are made public, but also whether the statements are unambiguous and, in the case of plural statements, whether they are consistent and repeated over time." <sup>225</sup>

#### 1.4.3.7 Findings of a Member's domestic court

196. In *US – Shrimp II (Viet Nam)*, the Panel declined to base a finding of inconsistency with the Anti-Dumping Agreement on the court decisions of the respondent. According to the Panel, "a ruling by a domestic court of a Member, applying the domestic law of that Member, cannot establish an inconsistency with WTO obligations." <sup>226</sup>

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<sup>224</sup> Panel Report, *EC and certain member States - Large Civil Aircraft*, para. 7.1919.

<sup>225</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.79-6.80.

<sup>226</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.308.

### Articles from newspapers and magazines

197. In *Argentina – Import Measures*, the Panel disagreed with Argentina's contention that a journalistic material cannot be "considered to have any probative value" in ascertaining the existence of an unwritten measure:

"Newspapers or magazine articles may sometimes be a reflection of personal opinions by their authors. However, they can be useful sources of information, particularly when dealing with unwritten measures and when corroborating facts asserted through other forms of evidence. Indeed, notwithstanding Argentina's blanket rejection of the appropriateness of newspaper articles as evidence, Argentina has itself provided newspaper articles, including at least one article from one of the two newspaper groups it had previously objected to, as evidence of some of its own assertions.

A panel must assess the credibility and persuasiveness of newspapers or magazine articles submitted as evidence, taking into account that the articles may reflect personal opinions, and assess the information contained in those articles contrasting it with the other evidence on the record. Ultimately, the Panel's task of making an objective assessment of the facts of the case consists in a holistic consideration of all the available evidence that has probative value. Furthermore, if an article submitted as evidence by one party is thought to contain incorrect information, nothing prevents another party from presenting evidence to rebut that information or to seek to demonstrate that it is incorrect."<sup>227</sup>

### Scientific publications

198. In *Australia – Tobacco Plain Packaging*, the Panel disagreed with the argument that a scientific publication can only be considered as evidence by panels if access is provided to the data underlying the conclusions reached in the publication:

"We do not consider that lack of direct access to the full data underlying a peer-reviewed scientific publication should in itself lead the Panel to disregard such publication or its conclusions as evidence. We do not exclude that, where evidence is presented that may call into question the conclusions of certain research results reflected in scientific publications cited as evidence, this may be validly taken into account in assessing the probative value of that evidence in demonstrating the facts at issue. However, we see no basis for assuming that scientific publications presented as evidence in dispute settlement proceedings can only be validly considered by a panel, if access is also provided to the complete underlying research data. Indeed, as observed by Australia, such an approach would render reliance on such information, and the management of evidence in dispute settlement proceedings, unduly complex and ultimately unmanageable. We note in this respect that a range of scientific sources including, where relevant, scientific publications, has been relied upon by parties and taken into account as admissible evidence in prior panel proceedings.

More generally, in these proceedings, all parties have extensively discussed the validity and implications of conclusions drawn from a range of scientific studies in a variety of research fields, including on the basis of the many expert reports commissioned for these proceedings. In assessing the probative value of this evidence, we are mindful that our role is not to make scientific determinations or otherwise seek to resolve scientific debates. Rather, our task is to assist the DSB in resolving a dispute and, in this context, to make an objective assessment, based on the arguments and evidence before us, of the degree of contribution of the TPP measures to their objective, as part of a broader determination on their consistency with Article 2.2 of the TBT Agreement."<sup>228</sup>

199. In *Australia – Tobacco Plain Packaging*, the Panel took the following factors into account in determining the weight to be accorded to scientific evidence in making its factual findings:

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<sup>227</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.70-6.71.

<sup>228</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.513-7.514.

"To the extent that scientific evidence is relied upon, our assessment may include in particular a consideration of whether such evidence 'comes from a qualified and respected source', whether it has the 'necessary scientific and methodological rigor to be considered reputable science' or reflects 'legitimate science according to the standards of the relevant scientific community', and 'whether the reasoning articulated on the basis of the scientific evidence is objective and coherent'." <sup>229</sup>

200. In *Australia – Tobacco Plain Packaging*, the Panel disagreed with arguments calling into question the objectivity of scientific evidence on tobacco plain packaging on the ground that scientific research in this particular area is biased towards a certain outcome due to alleged preferences of the public:

"The complainants also suggest that the TPP literature is predisposed in favour of study outcomes that support plain packaging due to the alleged preferences of the public health community and the small size of the tobacco control community. Although 'publication bias' is a known phenomenon, we see no basis to assume that researchers in the tobacco control community or more broadly in the public health community would have an *a priori* vested interest in supporting one type of tobacco control intervention over another." <sup>230</sup>

201. In *Australia – Tobacco Plain Packaging*, the Panel outlined as follows the manner in which it assessed the weight to be given to various pieces of scientific evidence:

"Overall, we do not consider that we are in a position to draw definitive conclusions on the methodological merits of each individual study referred to in relation to the impact of plain packaging on the various outcomes that they measure, including the three 'proximal outcomes' reflected in the TPP Act. Nor, indeed, do we consider that it would be appropriate for us to do so. Rather, as described above, what we must consider is the extent to which the body of evidence before us, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked. In this assessment, to the extent that scientific evidence is being relied upon, we must determine whether such evidence has the 'necessary scientific and methodological rigor to be considered reputable science' according to the standards of the relevant scientific community, as well as the extent to which its use in support of the measures at issue is 'objective and coherent'." <sup>231</sup>

202. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel explained its role in assessing scientific evidence, as follows:

"The Panel recalls that its mandate to 'make an objective assessment of the matter before it' under Article 11 of the DSU involves a duty to examine and consider all the evidence on the record and to evaluate the relevance and probative force of each piece thereof. Insofar as discharging this duty could involve reviewing scientific evidence, the Panel considers that while it may not be in a position to draw definitive conclusions on the methodological merits of the approaches presented and the underlying scientific information, the Panel can consider whether the body of evidence, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked.

...

Therefore, the Panel is of the view that its task in this dispute is not to attempt to resolve scientific debates on the basis of the evidence submitted by the parties. Rather, the Panel must determine whether, considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction drawn by the high ILUC-risk cap and phase-out and the manner in which it is applied." <sup>232</sup>

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<sup>229</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516.

<sup>230</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.545. See also *ibid.* paras. 7.549-7.550.

<sup>231</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627. See also *ibid.* para. 7.622.

<sup>232</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.502 and 7.504.

### Documents prepared by market intelligence entities

203. In *Argentina – Import Measures*, the Panel considered that the documents prepared by market intelligence entities can be an important source of information in identifying an unwritten measure. In doing so, the Panel distinguished the admission of evidence from the probative value attributed to it:

"As with the Panel's conclusion with respect to articles published in newspapers or magazines, the Panel sees no reason to reject *a priori* documents prepared by market intelligence entities or export promotion offices for their clients or affiliated members, as devoid of any evidentiary value. We agree with Argentina that caution must be exercised in seeking to rely without more on these documents to prove the existence of the unwritten measure. Nevertheless, the documents can be an important source of information, especially with respect to unwritten aspects of a measure. Moreover, in the circumstances of this case, the documents submitted by the complainants may have more relevance and weight than an article published in a newspaper or in a magazine, because they have been prepared by professional entities on a narrow subject of trade policy for a specialized audience (normally, subscribers of a service). In any event, if any of these documents submitted as evidence is believed to contain incorrect information, nothing would have prevented any of the parties from submitting evidence presenting a contrasting view. None did so."<sup>233</sup>

### Industry surveys

204. In *Argentina – Import Measures*, the Panel stated that industry surveys presented by the complainant provided background information illustrating the impact of the alleged unwritten measure:

"In certain instances, industry surveys can be a useful source of information for a panel's analysis. In the present case, the Panel notes that the data from surveys submitted by the complainants 'are not, and do not purport to be, scientific' and that they are not used to try to demonstrate that a certain percentage of firms in Argentina are affected by trade-related requirements or by delays or rejections of their Advance Sworn Import Declarations. Accordingly, they are not to be taken as proving that any particular percentage of companies in Argentina is affected by the DJAI requirement and the alleged RTRRs. The Panel considers that the data from surveys provided by the complainants have limited value in allowing it to reach general conclusions regarding the operation of the measures at issue. They may, however, serve as background information illustrating the impact of the DJAI requirement and the alleged RTRRs on specific companies."<sup>234</sup>

### Exclusion of evidence from panel record

205. In *Russia – Railway Equipment*, Russia, the respondent, requested that the Panel exclude from the record two exhibits submitted by Ukraine, the complainant, on the ground that such evidence "contain factual errors because they reflect the view that Crimea is part of the territory of Ukraine."<sup>235</sup> The Panel first noted that the DSU did not address the issue of exclusion of evidence, and noted past dispute settlement decisions on this issue:

"The DSU and the Panel's Working Procedures are silent in respect of exclusion of evidence submitted by a party. According to the Appellate Body, panels in their role as triers of facts must review and consider all the evidence that they receive from the parties. However, as explained below, the Appellate Body has confirmed that panels may exclude evidence on procedural grounds. In addition, panels have rejected evidence on other grounds.

The Appellate Body has in some circumstances supported the rejection of evidence by panels on procedural grounds. This ground was found in cases where a party

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<sup>233</sup> Panel Reports, *Argentina – Import Measures*, para. 6.106.

<sup>234</sup> Panel Reports, *Argentina – Import Measures*, para. 6.103.

<sup>235</sup> Panel Report, *Russia – Railway Equipment*, para. 7.202.



submitted new evidence at a late stage of the proceedings, after the opportunity to submit evidence, as provided in the Working Procedures, had lapsed. In particular, this was the case where a party submitted new evidence during the interim review stage, the purpose of which is to permit a review of precise aspects of the interim report and not the submission of new evidence.

Furthermore, in *EC – Seal Products*, the panel issued a preliminary ruling addressing a request from the European Union to remove certain exhibits from the record of those proceedings. The European Union's request was based on the fact that these exhibits contained documents classified under European Union rules to which Canada should not have had access. The panel granted the European Union's request."<sup>236</sup>

206. The Panel then rejected Russia's request, on the following grounds:

"The grounds submitted by Russia in support of its request do not fall within the above-mentioned grounds accepted by the Appellate Body and previous panels for rejecting evidence. Russia does not argue that the two exhibits were filed late in the proceedings, or that they contain classified information to which Ukraine should not have had access. Rather, Russia's arguments, including that the information was filed 'with the sole purpose of creating controversy and damaging the dispute settlement process', suggest that Russia objects to the two exhibits because, in its view, they contain certain information that is of no relevance to the matter before the Panel.

Russia's request therefore appears to raise an issue as to whether a lack of relevance of certain information submitted to the Panel could constitute a valid basis for a panel to reject these exhibits. The Panel notes that WTO dispute settlement proceedings will often be characterised by highly divergent views between disputing parties as to the relevance, accuracy and value of evidence submitted by each side. While recognizing the disagreement between Russia and Ukraine in this regard, the Panel considers it unnecessary to rule on the 'relevance' of Exhibits UKR-62(BCI) and UKR-63(BCI) to the issues before it as a preliminary matter. The relevance of these exhibits is more easily analysed as part of the Panel's overall objective assessment of the case, which is reflected in the findings section of this Report."<sup>237</sup>

### Evidence protected by attorney-client privilege

207. In *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), the Philippines submitted as evidence a letter containing ACWL's legal advice to the government of Thailand, to disprove a position taken by Thailand in the dispute.<sup>238</sup> Thailand requested for a procedural ruling that the submission of this letter as evidence violated Thailand's due process rights, for three reasons: "(i) Thailand's 'due process' rights have been violated; (ii) the Philippines has not acted 'in good faith'; and (iii) the Panel is prevented from making an 'objective assessment of the matter' because the 'objectivity of the panel is tainted'."<sup>239</sup> In addressing Thailand's concern, the Panel noted, first, that Thailand's request raised important due process considerations.<sup>240</sup> Given that the DSU was silent on this issue, the Panel reviewed the rules adopted by other international tribunals on this matter<sup>241</sup> and highlighted the general principles that emerged therefrom:

"In our view, several common principles emerge from the foregoing. First, lawyer-client privilege is recognised and has been protected in the context of international dispute settlement proceedings. Second, lawyer-client privilege over a communication may be waived if the party voluntarily discloses the document or the content thereof to a third party. Finally, the extent to which the disclosure to a third party waives privilege depends on the specific circumstances. For example, privilege is not automatically waived by inadvertent disclosure to the opposing party. We consider that these common principles are fully consonant with the general principles of due

<sup>236</sup> Panel Report, *Russia – Railway Equipment*, paras. 7.204-7.206.

<sup>237</sup> Panel Report, *Russia – Railway Equipment*, paras. 7.208-7.209.

<sup>238</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.21.

<sup>239</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.22.

<sup>240</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.29.

<sup>241</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), paras. 7.35-7.40.

process and good faith applicable in the WTO dispute settlement context. We therefore consider that applying these principles is appropriate when dealing with issues of lawyer-client privilege arising in WTO dispute settlement."<sup>242</sup>

208. The Panel then went on to examine whether Thailand had waived the privilege over the letter at issue. Noting that the letter had been disclosed by a Thai public prosecutor to Philip Morris Thailand Limited, the Panel concluded that the attorney-client privilege over the letter had been waived:

"We recall that it is not in dispute that, in May 2016, the Public Prosecutor, an agent of the Thai government, provided a copy of the ACWL/Commerce Letters to PMTL in the context of the ongoing criminal proceedings against PMTL that are the subject matter of this dispute. It is also not in dispute that the Public Prosecutor provided the ACWL/Commerce Letters to PMTL without invoking the Public Prosecutor's right to object under Section 231 of the Thai Criminal Procedure Code. This provision establishes a right to object to disclosure of requested documents on the grounds that they are, *inter alia*, 'secret', 'confidential', or 'protected from publicity by law'. At no time has Thailand asserted that the Public Prosecutor disclosed these materials to PMTL inadvertently. To the contrary, it is common ground that the Public Prosecutor knowingly and voluntarily disclosed the ACWL/Commerce Letters to PMTL. We consider that, absent a clear and compelling explanation by Thailand as to why the ACWL/Commerce Letters continue to be protected by lawyer-client privilege despite the Public Prosecutor knowingly and voluntarily disclosing them to PMTL, the foregoing would suffice to compel the conclusion that Thailand waived any lawyer-client privilege over the documents.

In our view, Thailand has provided no such explanation. Regarding Thailand's argument that 'it is clear that Thailand never consented, expressly or even impliedly, to the use of these documents *by the Philippines in WTO proceedings*', we accept that Thailand never specifically consented to the use of these documents by the Philippines in this proceeding. However, we are unable to agree with Thailand that such consent was required following the Public Prosecutor's decision to knowingly and voluntarily disclose the ACWL/Commerce Letters to PMTL. That action by the Public Prosecutor had the consequence of waiving any lawyer-client privilege that previously existed in relation to the ACWL/Commerce Letters. With this in mind, we are aware of no dispute in which a panel or the Appellate Body found that evidence in the possession of one party could not be submitted to the panel in the absence of express consent, by the opposing party, for the use of those documents in WTO proceedings."<sup>243</sup>

209. In this context, the Panel also rejected Thailand's argument that because the letter at issue was labelled "confidential" it would naturally be considered lawyer-client privileged:

"We now turn to Thailand's argument that the documents were clearly labelled 'confidential' and included material that would normally be considered to be lawyer-client privileged. Thailand has not provided us with any domestic or international legal authority to support the premise that when a party voluntarily and knowingly discloses a communication to a third party, without imposing any restrictions on how that document may be used, lawyer-client privilege is not waived as long as that document is still marked 'confidential'. We agree with the Philippines that the consequences of disclosing the ACWL/Commerce Letters to third parties outside the lawyer-client relationship 'are not cured by the fact that the Commerce Letter was stamped confidential'. As the Philippines observes, it is often the case that, when a client discloses a privileged communication to a third party, and thereby waives privilege, the communication will have been marked or stamped 'confidential' and/or 'privileged' by the lawyer.

Furthermore, we need to take into account the consequences that would follow from accepting Thailand's argument. The Appellate Body has found that a party cannot refuse to provide information requested by a panel that is exclusively in the party's

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<sup>242</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.41.

<sup>243</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), paras. 7.43-7.44.



possession on the grounds that it is confidential, as that would enable the party to 'thwart the panel's fact-finding powers and take control itself of the information-gathering process'. Insofar as Thailand's argument suggests that a Member must consent to the use of any information contained in a document stamped 'confidential', and which it chooses to designate as lawyer-client privileged notwithstanding its prior disclosure, this would have the same effect. Naturally, a Member that is defending a challenged measure in the context of a WTO dispute settlement proceeding would not have an incentive to consent to the use of information that a complainant seeks to rely on to establish the WTO-inconsistency of that measure."<sup>244</sup>

#### 1.4.3.8 Economic and statistical evidence

210. In *Australia – Tobacco Plain Packaging*, the Panel applied statistical tests to the evidence provided by the parties, and created graphs demonstrating its understanding of the evidence. On appeal, the appellants argued that such tests and evidence were insufficiently explained by the Panel, compromised the complainants' due process rights, and constituted making the case for the respondent, inconsistently with Article 11 of the DSU. The Appellate Body rejected these arguments, stating that:

"Regarding the Panel's reliance on a standard mean-comparison test, which Honduras challenges on the basis that the Panel provided no explanation or details of its calculation, we understand that a mean-comparison test is a simple statistical test that the Panel could have conducted when verifying that the parties' methodologies did indeed reveal the results asserted by the parties. Indeed, the application of statistical testing to verify statistical results seems to us be very much in accordance with the duty of a panel to review the evidence adduced by the parties. We therefore do not consider that the Panel's application of a mean-comparison test indicates that the Panel failed to act objectively. To the contrary, it seems perfectly plausible that the Panel's mean-comparison test could have revealed that the complainants were *correct* in asserting that the decline in cigarette consumption had not accelerated after the implementation of the TPP measures.

Regarding the Panel's confirmation of its mean-comparison test by assessing the steepness of the tobacco consumption trend pre- and post-TPP implementation, we address this issue in greater detail below. It suffices to note here that we do not consider that a panel acts inconsistently with Article 11 of the DSU simply by depicting the parties' evidence in graphical form. Furthermore, we do not see how a graphical representation of evidence that was in the parties' possession to begin with could imply that the Panel compromised the parties' due process rights. Since the evidence was in their possession, the parties were free to prepare such graphs on their own initiative. Their reluctance to do so should not preclude a panel from graphically representing data for the purpose of elucidating factual findings."<sup>245</sup>

211. The Panel in *Australia – Tobacco Plain Packaging* similarly assessed the parties' econometric evidence by applying certain tests of multicollinearity and non-stationarity. On appeal, the Appellate Body rejected the appellants' arguments that the Panel failed to adequately explain these findings, stating that:

"As to the Dominican Republic's arguments that the Panel failed to provide a reasoned and adequate explanation for its findings, we consider that the Panel adequately explained the basis for its concerns related to multicollinearity. Having explained in paragraphs 116 of Appendix B and 107 of Appendix C why it considered the presence of multicollinearity in a model to be a reason to doubt the reliability of that model, the Panel identified throughout its analysis certain models that did or did not suffer from this shortcoming. We see no reason for the Panel not to apply well-known statistical tests of rigour to evidence that is statistical in nature, insofar as the Panel ensures that the due process rights of the parties are respected, and, in our view, the appellants have not demonstrated how the brevity of the Panel's explanation for why

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<sup>244</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), paras. 7.46-7.47.

<sup>245</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.122-6.123.

and how it tested for multicollinearity implies that it failed to make an objective assessment of the matter."<sup>246</sup>

### Publicly available WTO documents

212. The Panel in *India – Tariffs on ICT Goods (Japan)* took into account a publicly available WTO document despite the fact that it had not been referred to by the disputing parties:

"We note that none of the parties appears to have referred to document G/MA/W/76 in their submissions to the Panel. It is, however, explicitly referenced in the General Council Decision on HS2007 Transposition Procedures contained in document WT/L/673, which is referred to by the parties. (See e.g. India's first written submission, fn 80 to para. 48). We therefore consider that the parties and the Panel were on notice of this document's potential relevance to the issues arising in this dispute. Moreover, since document WT/L/673 is relied upon by the parties, and explicitly refers to document G/MA/W/76, we consider that, as a publicly accessible WTO document, document G/MA/W/76 is part of the official record. In our view, this approach accords with the approach taken by a previous panel in analogous circumstances. (See Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.370). We further note that, even to the extent that this publicly available WTO document was not specifically identified in the evidence adduced by the parties, we do not consider that this would preclude us from taking it into account. In our view, panels are not obliged to disregard publicly available WTO documents of which they are aware, and which bear directly on the matters before them, simply because such documents were not raised by the parties to the dispute."<sup>247</sup>

### Treatment to be accorded to evidence requiring a panel to engage in speculation

213. In *Saudi Arabia – Intellectual Property Rights*, the Panel considered that there was sufficient evidence to establish the existence of three measures at issue, and the Panel further accepted that each measure could impact the ability of a foreign television operator to access civil enforcement procedures in the respondent's territory. Nevertheless, the Panel considered that there was no evidence that any of the three measures at issue had been applied to the foreign television operator to prevent it from accessing civil enforcement procedures. The Panel also considered that the complainant's arguments about how these measures would operate if the foreign television operator were able to retain counsel in the respondent's territory involves speculation about future and hypothetical events.<sup>248</sup> The Panel further elaborated as follows:

"It is well established that a WTO dispute settlement panel should not make findings that would involve speculation either about future or hypothetical measures and panels should refrain from making speculative findings on future measures. Panels must also refrain from making findings about existing measures in a manner that turns on speculation about future events, or events triggering the operation of a measure that have not yet arisen. Such speculation would be contrary to the duty of the Panel under Article 11 of the DSU to make 'an objective assessment of the facts of the case'."<sup>249</sup>

## 1.5 Objective assessment of the applicability of the covered agreements

214. In *Colombia – Textiles*, the Panel declined to make a finding on whether Article II:1 of the GATT 1994 covers "illicit trade", on the ground that "[t]he measure is not structured or designed to apply solely to operations which have been classified as 'illicit trade'."<sup>250</sup> The Panel considered that examining this issue would be a merely theoretical exercise.<sup>251</sup> The Appellate Body disagreed, noting that the Panel acted inconsistently with its obligation to make an objective assessment of the applicability of the covered agreements envisaged by Article 11 of the DSU:

<sup>246</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.171.

<sup>247</sup> Panel Report, *India – Tariffs on ICT Goods (Japan)*, fn 461.

<sup>248</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.82.

<sup>249</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.82.

<sup>250</sup> Panel Report, *Columbia – Textiles*, para. 7.106.

<sup>251</sup> Panel Report, *Columbia – Textiles*, para. 7.108.

"With respect to the 'applicability of ... the relevant covered agreements', a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to case at hand. The touchstone of this obligation is that a panel's assessment must be 'objective'.

...

In these circumstances, we do not consider that the Panel could have refrained from ruling on the interpretative issue before it simply because the challenged measure did not 'solely' cover the type of transactions that Colombia maintained was outside the scope of the applicable provision. Rather, given that this statement of the Panel implies that the measure at issue applies, or could apply, to some transactions considered by Colombia to be illicit trade, the Panel was, in our view, required to address the interpretative issue before it pertaining to the scope of Article II:1(a) and (b) of the GATT 1994. The Panel's conclusion that it was not necessary for it to interpret Article II:1 of the GATT 1994 does not follow logically from its previous finding indicating that the measure applies, or could apply, to some illicit trade. We therefore consider that the Panel did not provide coherent reasoning, and that the basis upon which it refrained from interpreting Article II:1(a) and (b) of the GATT 1994 was flawed.

We therefore find that the Panel acted inconsistently with its duty under Article 11 of the DSU to make an objective assessment of the matter, including an objective assessment of the applicability of the relevant covered agreements, in finding that it was unnecessary for the Panel to interpret the scope of Article II:1(a) and (b) of the GATT 1994."<sup>252</sup>

215. In *Philippines – Distilled Spirits*, the Appellate Body reversed the Panel's finding, noting that the Panel acted inconsistently with Article 11 of the DSU by finding that the European Union's claim under Article III:2, second sentence, of the GATT 1994 was made as an alternative to its claim under Article III:2, the first sentence, of the GATT 1994.<sup>253</sup> The Appellate Body pointed out that the European Union's panel request clearly identified separate and independent claims under the first and second sentences of Article III:2 of the GATT 1994, which required the Panel to examine and make an objective assessment under both provisions.<sup>254</sup>

216. In *US – Steel and Aluminium Products (Turkey)*, the United States argued that its invocation of Article XXI of the GATT was a non-justiciable issue and that the Panel may not make findings on the complainant's claims because they were not appropriate or suitable for adjudication by the Panel. The Panel stated:

"Based on its terms of reference, the Panel's mandate under the DSU is to examine the matter raised by the complainant in its panel request and to address the United States' invocation of Article XXI(b) of the GATT 1994. The purpose of this examination is to enable the Panel to make such findings as will assist the DSB in discharging its responsibilities under the covered agreements. In fulfilling this mandate, the Panel is mindful of its function and duty under Article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The Panel is further guided by the role of WTO dispute settlement, as recognized in Article 3.2 of the DSU, to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."<sup>255</sup>

217. In *Turkey – Additional Duties (US)*, the parties presented opposing views as to the applicability of certain provisions of the WTO Agreement to the challenged measures. The

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<sup>252</sup> Appellate Body Report, *Columbia – Textiles*, paras. 5.17 and 5.27-5.28.

<sup>253</sup> Panel Reports, *Philippines – Distilled Spirits*, para. 192.

<sup>254</sup> Panel Reports, *Philippines – Distilled Spirits*, paras. 188-189.

<sup>255</sup> Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.4.

Panel found it appropriate to start its assessment by the issue of which provisions of the covered agreements invoked by the parties applied to the challenged measures:

"Under Article 7.2 of the DSU, a panel is required to address 'the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. In this dispute, while the United States has raised claims under Articles I and II of the GATT 1994 in its panel request, Türkiye has identified Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 as the provisions applicable to the additional duties measure. Both parties have made extensive arguments regarding the applicability (or non-applicability) of these provisions to the measure at issue. The Panel therefore considers that all of these provisions are 'relevant' within the meaning of Article 7.2 of the DSU and must be addressed in the Panel's analysis.

Reading Articles 7.2 and 11 of the DSU together, the Panel is of the view that, in making an objective assessment of the matter before it, it must determine which provisions of the covered agreements apply to Türkiye's additional duties measure. To examine the United States' claims under Articles I and II of the GATT 1994 without determining their relationship with other provisions raised by Türkiye (specifically, Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994) would overlook a disputed issue between the parties and not assist the DSB 'in making the recommendations or in giving the rulings provided for in the covered agreements', as prescribed in Article 11 of the DSU. The Panel further considers that this would be at odds with the aim of the dispute settlement mechanism, as set out in Article 3.7 of the DSU, of securing a positive solution to a dispute."<sup>256</sup>

#### 1.6 "make such other findings as will assist the DSB in making the recommendations or in giving the rulings"

##### General

218. In *Indonesia – Iron or Steel Products*, the Panel, after finding that the specific duty at issue did not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, did not make any alternative findings on the claims brought by the complainants under the Agreement on Safeguards and Article XIX of the GATT 1994. However, the Panel pointed to its responsibility to "make such other findings as will assist the DSB in making recommendations or in giving rulings", and provided an assessment of the relevant factual background without making any legal finding:

"Having said that, we recognize that the particular findings we have made leave open the possibility that the parties could be left with no final resolution of the matter, were our legal characterization of the specific duty to be appealed and overturned. In this light, and bearing in mind that our task under Article 11 of the DSU includes not only a duty to 'make an objective assessment of the matter' but also a duty to 'make such other findings as will assist the DSB in making recommendations or in giving rulings', we have set out an exposition of relevant facts, which we believe would be helpful to any potential subsequent evaluation of the merits of the parties' claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994."<sup>257</sup>

219. In *Australia – Tobacco Plain Packaging*, the appellants "made numerous claims against specific statements, analyses, and findings of the Panel", which in the view of the Appellate Body, "they ... largely addressed ... under the rubric of broad cross-cutting themes".<sup>258</sup> The Appellate Body considered that it was unnecessary to individually address each claim and argument raised by the appellants:

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<sup>256</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 7.18-7.19. See also Panel Report, *China – Additional Duties (US)*, paras. 7.51-7.52.

<sup>257</sup> Panel Report, *Indonesia – Iron or Steel Products*, Annex A-3, para. 3.11. See also Panel Reports, *US – Anti-Dumping Methodologies (China)*, para. 7.500; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.672.

<sup>258</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.41.

"We recall that, with respect to the Panel's analysis of the contribution of the TPP measures to Australia's objective, the appellants' claims under Article 11 of the DSU concern the Panel's assessment of the facts of the case. Article 11 provides that, in carrying out its function to assist the DSB in discharging its responsibilities under the DSU, 'a panel should make an objective assessment of the matter before it, including an objective assessment of the *facts* of the case.' In these appellate proceedings, the issue that we are required to address is whether the appellants have demonstrated that the Panel, in conducting its analysis leading to its overall conclusion on the contribution of the TPP measures to Australia's objective, made an objective assessment of the facts of the case in accordance with Article 11 of the DSU. The appellants' myriad claims and arguments pertain to this single issue, but are not in and of themselves, discrete 'issues' within the meaning of Articles 17.6 and 17.12. Accordingly, we need not address, separately, each claim of error raised by the appellants under Article 11 of the DSU. Rather, we consider that it would suffice for us to address, jointly, clusters of claims based on cross-cutting themes underpinning these claims."<sup>259</sup>

### 1.6.1 Order of analysis

220. In *Turkey – Additional Duties (US)*, the Panel noted that it had discretion to structure its order of analysis in the way it considered appropriate:

"Neither the DSU nor the relevant provisions of the GATT 1994 or the Agreement on Safeguards prescribe a mandatory order of analysis that must be followed in addressing the issues raised in this dispute. The Panel thus has discretion to structure its order of analysis in the way it considers most appropriate, provided that its choice is in line with its mandate and functions as laid down in the DSU."<sup>260</sup>

221. In *Turkey – Additional Duties (US)*, the measure at issue consisted of additional duties imposed by Türkiye on certain products originating in the United States pursuant to Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, in response to the additional duties imposed by the United States on products originating in Türkiye, which the latter considered to be a safeguard measure.<sup>261</sup> Since the US measures had been imposed under Section 232, the provision of US law concerning the actions to be taken by the United States for safeguarding national security, the United States argued that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 did not apply to such measures.<sup>262</sup> In the view of the United States, Türkiye's measures were in violation of Articles I and II of the GATT 1994. The Panel started its analysis by the issue whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 applied to the challenged measures.<sup>263</sup> In justifying its choice of order of analysis, the Panel noted the nature of the provision under the mentioned two provisions:

"Article XIX:3(a) of the GATT 1994 allows Members to 'suspend ... the application ... of ... substantially equivalent concessions or other obligations under this Agreement' to the trade of another Member taking action under Article XIX:1 of the GATT 1994. Article 8.2 of the Agreement on Safeguards, which clarifies the disciplines of Article XIX:3(a) of the GATT 1994, similarly allows Members, under certain conditions, to 'suspend ... the application of substantially equivalent concessions or other obligations under GATT 1994' to the trade of another Member applying a safeguard measure. Measures falling within the scope of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 thus 'suspend' the application of concessions or other obligations under the GATT 1994. In the context of these two provisions, the Panel understands the notion of a suspension of concessions or other obligations to mean that, provided certain conditions are met, Members affected by the application of a safeguard measure may temporarily lift the application of tariff concessions or other GATT obligations *vis-à-vis* the Member applying the safeguard

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<sup>259</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.45.

<sup>260</sup> Panel Report, *Turkey – Additional Duties (US)*, para. 7.22. See also Panel Report, *China – Additional Duties (US)*, para. 7.55.

<sup>261</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 2.4-2.6.

<sup>262</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 7.2 and 7.5.

<sup>263</sup> Panel Report, *Turkey – Additional Duties (US)*, para. 7.27.

measure. In such cases, measures falling within the scope of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 would not simultaneously be subject to GATT rules governing tariff concessions or other obligations that have been suspended.

The Panel therefore considers it most logical to begin its analysis by first determining whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 apply to Türkiye's additional duties measure, suspending concessions and obligations under Articles I and II of the GATT 1994. If that were the case, the Panel would have to conclude its analysis with a finding that Articles I and II of the GATT 1994 do not apply to Türkiye's additional duties measure. If, however, the Panel were to find that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to the measure at issue, this would mean that the application of Articles I and II of the GATT 1994 has not been suspended. Consequently, the Panel would need to review the consistency of Türkiye's additional duties measure with the latter set of provisions, as per the claims raised by the United States.

Beginning with an assessment of the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 has the benefit of allowing the Panel to examine the United States' claims under Articles I and II of the GATT 1994 only to the extent necessary, that is, only if the Panel determines that those provisions actually apply to Türkiye's additional duties measure. Otherwise, the Panel would need to make interim findings under Articles I and II of the GATT 1994, which would become moot if the Panel subsequently were to find that the application of those provisions to the additional duties measure is suspended under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994."<sup>264</sup>

222. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel addressed the claims under the GATT 1994 before proceeding to the more specific claims under the SCM Agreement, noting the difference in nature between these two set of claims:

"The Panel notes that the disciplines of the SCM Agreement clearly deal with certain types of measures more specifically and in greater detail than certain corresponding provisions of the GATT 1994, such as those provisions of the GATT 1994 relating to countervailing duty investigations (Article VI) and subsidies (Article XVI). However, in this dispute the provisions of the GATT 1994 raised by Malaysia are the non-discrimination obligations in Articles I:1 and III:2. The Panel considers that there is no mandatory order of analysis between the provisions of the GATT 1994 and the provisions of the SCM Agreement which are at issue in this dispute.

Therefore, the Panel will address the claims related to the French TIRIB measure in the order presented by Malaysia, and begin with the claims under the GATT 1994. If the Panel finds that any of Malaysia's claims is well founded, the Panel will proceed to address the European Union's defence under Article XX. The Panel will then address Malaysia's claims under the SCM Agreement."<sup>265</sup>

## **1.6.2 Judicial economy**

### **1.6.2.1 Legal basis for the exercise of judicial economy**

223. The Panel in *US – Wool Shirts and Blouses* decided to exercise judicial economy with respect to some of India's claims in that dispute, stating "India is entitled to have the dispute over the contested 'measure' resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute." The Appellate Body upheld the finding of the Panel and discussed the legal

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<sup>264</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 7.24-7.26. See also Panel Report, *China – Additional Duties (US)*, paras. 7.57-7.59.

<sup>265</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.1110-7.1111.



basis for judicial economy. The Appellate Body began by noting the function of panels, as defined under Article 11 of the DSU:

"The function of panels is expressly defined in Article 11 of the *DSU*, which reads as follows:

'The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and *make such other findings as will assist the DSB* in making the recommendations or in giving the rulings provided for in the covered agreements ... (emphasis added).'

Nothing in this provision or in previous GATT practice requires a panel to examine all legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.

Although a few GATT 1947 and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the *DSU* that requires panels to do so."<sup>266</sup>

224. In *US – Wool Shirts and Blouses*, the Appellate Body also referred to Article 3.7 of the DSU and emphasized that a requirement to address all legal claims raised by a party is inconsistent with the basic aim of dispute settlement, namely to settle disputes:

"Furthermore, such a requirement [to address all legal claims] is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the *DSU* explicitly states:

'The aim of the 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.'

Thus, the basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the *DSU*. Article 3.4, for example, stipulates:

'Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.'"<sup>267</sup>

225. Finally, the Appellate Body in *US – Wool Shirts and Blouses* rejected the argument by India that, pursuant to Article 3.2 of the DSU, panels were obliged to address all legal claims raised by the parties:

"As India emphasizes, Article 3.2 of the *DSU* states that the Members of the WTO 'recognize' that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing*

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<sup>266</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-19.

<sup>267</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18.



*provisions of those agreements* in accordance with customary rules of interpretation of public international law' (emphasis added). Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.

We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the 'exclusive authority' to adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements. This is explicitly recognized in Article 3.9 of the *DSU*, which provides:

'The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the *WTO Agreement* or a covered agreement which is a Plurilateral Trade Agreement.'

In the light of the above, we believe that the Panel's finding in paragraph 7.20 of the Panel Report is consistent with the *DSU* as well as with practice under the GATT 1947 and the *WTO Agreement*.<sup>268</sup>

226. The Appellate Body confirmed its approach to judicial economy in *India – Patents (US)*:

"[A] panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties -- provided that those claims are within that panel's terms of reference."<sup>269</sup>

#### 1.6.2.2 Meaning of "judicial economy"

227. In *Canada – Wheat Exports and Grain Imports*, the Appellate Body explained that:

"The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint."<sup>270</sup>

228. In *Brazil – Retreaded Tyres*, the Appellate Body confirmed that the concept of judicial economy applies only where there is a finding of *inconsistency*:

"[W]e observe that it might have been appropriate for the Panel to address the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1. We have previously indicated that the principle of judicial economy 'allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute', and it seems that the Panel assumed this to be the case in the present dispute. However, the Panel found that the MERCOSUR exemption resulted in the Import Ban being applied *consistently* with the requirements of the chapeau of Article XX. In view of this finding, we must acknowledge that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption."<sup>271</sup>

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<sup>268</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 19-20. See also Appellate Body Report, *India – Solar Cells*, para. 5.161.

<sup>269</sup> Appellate Body Report, *India – Patents (US)*, para. 87.

<sup>270</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

<sup>271</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 257.

229. In *EC – Fasteners (China)*, China alleged that the Panel failed to address one of its main arguments concerning a claim under Article 2.4 of the Anti-Dumping Agreement, and that this constituted a false exercise of "judicial economy". The Appellate Body disagreed, and explained the concept of "judicial economy" applies only in respect of *claims*:

"The above review of China's arguments before the Panel indicates that China did not raise a separate claim under the last sentence of Article 2.4, but referred to that sentence in support of its claim that the Commission acted inconsistently with the obligation to conduct a fair comparison under Article 2.4 of the *Anti-Dumping Agreement*. On appeal, China has also characterized its allegation under the last sentence of Article 2.4 as an 'argument put forward by China'. Thus, we disagree with China's view that the Panel's failure to address this argument constitutes 'a false exercise of judicial economy', because the issue of judicial economy is only relevant to the manner in which a panel deals with a party's *claims*. Moreover, as the Appellate Body has found, a panel has the discretion 'to address only those arguments it deems necessary to resolve a particular claim' and 'the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU'."

230. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* declined to exercise judicial economy in the preliminary stages of its proceedings on the ground that it had not yet made findings on the merits of other claims:

"We agree with Brazil that Indonesia's request is premature at this stage of the proceeding. We can only assess whether to exercise judicial economy with regard to the two claims at issue if and when we have made findings on the merits of other claims at issue. At this stage of the proceeding, we are therefore not in a position to decide whether to exercise judicial economy with regard to the two claims at issue and consequently decline to do so."<sup>272</sup>

231. The Panel in *US – Steel and Aluminium Products (Turkey)* identified two separate questions regarding the use of judicial economy by a panel:

"In approaching arguments relating to judicial economy, the Panel considers it useful to distinguish and consider two separate questions. The first is whether the Panel has the discretion to decline to rule on a given claim. This is a legal question, and it turns on whether such a ruling would be superfluous from the perspective of implementation. If the answer to the first question is yes, the second question is whether the Panel should exercise that discretion, given that a panel is not required to exercise judicial economy in circumstances where it is entitled to do so.<sup>273</sup> That assessment is not as much a legal question as it is a discretionary authority, the exercise of which is guided by the Panel's judgement of the circumstances of the case."<sup>274</sup>

### 1.6.2.3 Reasons for using judicial economy

232. The Panel in *US – Origin Marking (Hong Kong, China)*, having found a violation of the MFN obligation under Article IX:1 of the GATT, declined to rule on the claim under Article I:1 of the GATT 1994, stating that its findings under Article IX:1 captured the discriminatory dimension of the challenged measure.<sup>275</sup> Similarly, the Panel refrained from making findings under Article 2.1 of the TBT Agreement, despite certain differences between this provision and the provisions of the GATT 1994 on the non-discrimination obligation.<sup>276</sup>

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<sup>272</sup> Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.17.

<sup>273</sup> Appellate Body Report, *US – Lead and Bismuth II*, paras. 71 and 73.

<sup>274</sup> Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.238.

<sup>275</sup> Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.365.

<sup>276</sup> Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.366.

233. The Panel in *US – Origin Marking (Hong Kong, China)* declined to make findings on the complainant's claims under the Agreement on Rules of Origin, noting that the factual basis of the findings of violation made by the Panel under other claims rendered the factual basis of the claims under the Agreement on Rules of Origin incorrect.<sup>277</sup>

#### 1.6.2.4 No obligation to exercise judicial economy

234. In *US – Lead and Bismuth II*, the United States argued that the Panel was required to exercise judicial economy and not address issues which did not need to be addressed for resolving the dispute at hand. The Appellate Body rejected the argument and emphasized that the exercise of judicial economy was within the discretion of a Panel, but that a Panel was never required to exercise judicial economy:

"The United States seems to consider that our Report in *United States – Shirts and Blouses* sets forth a general principle that panels may not address any issues that need not be addressed in order to resolve the dispute between the parties. We do not agree with this characterization of our findings. In that appeal, India had argued that it was entitled to a finding by the Panel on each of the legal claims that it had made. We, however, found that the principle of judicial economy allows a panel to decline to rule on certain claims.

...

In order to resolve the claim of the European Communities, the Panel deemed it necessary to address the two principal arguments made in support of this claim. In doing so, the Panel acted within the context of resolving this particular dispute and, therefore, within the scope of its mandate under the DSU."<sup>278</sup>

235. In *Argentina – Footwear (EC)*, the Appellate Body expressed its "surprise" that the Panel had made a certain finding under the Agreement on Safeguards:

"We are somewhat surprised that the Panel, having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*."<sup>279</sup>

236. In *EC – Countervailing Measures on DRAM Chips*, the Panel opted to make findings in regard to a 2001 restructuring programme despite holding the view that the principle of judicial economy permitted it not to do so:

"We recall that, in the earlier section of our Report concerning the existence of a financial contribution, we concluded that the EC failed to establish that the private bodies which participated in the May 2001 restructuring through a bond purchase of KRW 1 trillion were directed to do so by the government. In the absence of a proper determination of the existence of a financial contribution, the principle of judicial economy suggests that it is not necessary for us to discuss the question of benefit conferred by the private creditor bank's behaviour.

However, for purposes of implementation and in case of an appeal which would overturn our financial contribution determination, and thus assuming, arguendo, that the EC properly determined that all banks that took part in the May 2001 Restructuring Programme were directed by the government to do so, we will now examine whether the EC was justified on the basis of the record evidence to consider

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<sup>277</sup> Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.367.

<sup>278</sup> Appellate Body Report, *US – Lead and Bismuth II*, paras. 71 and 73.

<sup>279</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

that a benefit was conferred by the purchase of the CBs by the creditor banks in May 2001."<sup>280</sup>

237. Elsewhere in the Panel Report in *EC – Countervailing Measures on DRAM Chips*, however, the Panel elected to exercise judicial economy with respect to claims under Articles 10, 15.1, 19.4, 22.3, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994.<sup>281</sup>

238. The Panel in *Korea – Stainless Steel Bars* considered that, with respect to judicial economy, a panel has a duty under Article 11 of the DSU to ensure not only a positive and effective resolution to the dispute, but also a *prompt* resolution in light of the magnitude and complexity of the matter to be resolved. The Panel emphasized that the DSU envisages that a balance is struck between providing "high-quality panel reports, while not unduly delaying the panel process", and that "[p]rudent expeditiousness is a core facet of [its] 'objective assessment'":

"In instances where a panel exercises judicial economy, it is required to explain its decision to decline to examine those claims. While we explain below our exercise of judicial economy for each of Japan's claims ..., we make the overarching point that findings on these claims would add nothing to the way in which Korea chooses to comply with the inconsistencies that we have already found in sections 7.5 and 7.6. The significance of this lies in our 'objective assessment' under Article 11 of the DSU encompassing not only a duty to ensure a positive and effective resolution to the dispute, but also a *prompt* resolution in light of the magnitude and complexity of the matter to be resolved. The DSU envisages that a balance is struck between providing 'high-quality panel reports, while not unduly delaying the panel process'. Prudent expeditiousness is a core facet of our 'objective assessment'. With that in mind, we explain our exercise of judicial economy for each applicable claim."<sup>282</sup>

#### 1.6.2.5 Relevance of order of analysis to judicial economy

239. In *India – Autos*, the Panel observed that the order of analysis of claims can have an impact on the potential to exercise judicial economy (the Panel ultimately exercised judicial economy in respect of the claims under the TRIMs Agreement):

"The order selected for examination of the claims may also have an impact on the potential to apply judicial economy. It seems that an examination of the GATT provisions in this case would be likely to make it unnecessary to address the TRIMs claims, but not vice-versa. If a violation of the GATT claims was found, it would be justifiable to refrain from examining the TRIMs claims under the principle of judicial economy. Even if no violation was found under the GATT claims, that also seems an efficient starting point since it would be difficult to imagine that if no violation has been found of Articles III or XI, a violation could be found of Article 2 of the TRIMs Agreement, which refers to the same provisions. Conversely, if no violation of the TRIMs Agreement were found, this would not necessarily preclude the existence of a violation of GATT Articles III:4 or XI:1 because the scope of the GATT provisions is arguably broader if India's argument was accepted that there is a need to prove that a measure is an investment measure and its assertion that this is not the case with the measures before this Panel."<sup>283</sup>

#### 1.6.2.6 Requirement for a panel to state it is exercising judicial economy

240. In *Canada – Autos*, the Appellate Body admonished the Panel for not stating explicitly that it was exercising judicial economy, when it did not address a particular claim:

"In our view, it was not necessary for the Panel to make a determination on the European Communities' *alternative* claim relating to the CVA requirements under Article 3.1(a) of the *SCM Agreement* in order 'to secure a positive solution' to this dispute. The Panel had already found that the CVA requirements violated both

<sup>280</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.201-7.202.

<sup>281</sup> See Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 8.3.

<sup>282</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.227.

<sup>283</sup> Panel Report, *India – Autos*, para. 7.161.

Article III:4 of the GATT 1994 and Article XVII of the GATS. Having made these findings, the Panel, in our view, exercising the discretion implicit in the principle of judicial economy, could properly decide not to examine the *alternative* claim of the European Communities that the CVA requirements are inconsistent with Article 3.1(a) of the *SCM Agreement*.

We are bound to add that, for purposes of transparency and fairness to the parties, a panel should, however, in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy. Silence does not suffice for these purposes."<sup>284</sup>

241. However, the Appellate Body in *US – Upland Cotton* approved of the Panel's application of judicial economy where the Panel only explained that it did not believe it "necessary to conduct any additional examination" without explicit reference to the principle:

"The Appellate Body has stated that panels may exercise judicial economy and refrain from addressing claims beyond those necessary to resolve the dispute. In this case, the Panel did not expressly state it was exercising judicial economy. We agree with the United States, however, that the Panel's approach can be properly characterized as an exercise of judicial economy. Moreover, we believe that the Panel was within its discretion in refraining from making additional findings and it was not improper for the Panel to have exercised judicial economy given that its finding of actual circumvention resolved the matter."<sup>285</sup>

#### 1.6.2.7 "False" judicial economy

242. In *Australia – Salmon*, the Appellate Body held that the right to exercise judicial economy could not be exercised where only a partial resolution of a dispute would result:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"<sup>286</sup>

243. In *Japan – Agricultural Products*, the Appellate Body found an error of law in the Panel's exercise of judicial economy. As in *Australia – Salmon*, the Appellate Body found that the Panel had exercised "false" judicial economy and had provided only a partial resolution of the dispute before it:

"We note that there is an error of logic in the Panel's finding in paragraph 8.63. The Panel stated that it had found earlier in its Report that the varietal testing requirement violates Article 2.2, and that there was, therefore, no need to examine whether the measure at issue was based on a risk assessment in accordance with Articles 5.1 and 5.2 of the *SPS Agreement*. We note, however, that the Panel's finding of inconsistency with Article 2.2 only concerned the varietal testing requirement as it applies to apples, cherries, nectarines and walnuts. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel found that there was insufficient evidence before it to conclude that this measure was inconsistent with Article 2.2. The Panel, therefore, made an error of logic when it stated, in general terms, that there was no need to examine whether the varietal testing requirement was consistent with Article 5.1 because this requirement had already been found to be

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<sup>284</sup> Appellate Body Report, *Canada – Autos*, paras. 116-117.

<sup>285</sup> Appellate Body Report, *US – Upland Cotton*, para. 718.

<sup>286</sup> Appellate Body Report, *Australia – Salmon*, para. 223. See also Appellate Body Reports, *US – Upland Cotton*, para. 732; *US – Steel Safeguards*, para. 10.703; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.134; Panel Reports, *EC – Sardines*, paras. 7.148-7.152; and *EC – Commercial Vessels*, para. 7.225.

inconsistent with Article 2.2. With regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, there was clearly still a need to examine whether this measure was inconsistent with Article 5.1. By not making a finding under Article 5.1 with regard to the varietal testing requirement as it applies to apricots, pears, plums and quince, the Panel improperly applied the principle of judicial economy. We believe that a finding under Article 5.1 with respect to apricots, pears, plums and quince is necessary 'in order to ensure effective resolution' of the dispute."<sup>287</sup>

244. In *Argentina – Ceramic Tiles*, the Panel declined to exercise judicial economy despite its finding under Article 6.8 of the Anti-Dumping Agreement that "cast doubt on the entire final determination of dumping" by the investigating authorities. The Panel indicated that "[m]indful of the Appellate Body's comments in [*Australia – Salmon*]<sup>288</sup>, we will continue with our analysis of the other claims made before us 'because it could prove of utility depending on any appeal' and in order 'to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance with those recommendations and rulings'."<sup>289</sup>

245. In *EC – Export Subsidies on Sugar*, the Appellate Body addressed whether it is appropriate to exercise judicial economy with respect to a claim under Article 3 of the SCM Agreement where a panel finds that a complaining Member has established that the subsidy in question is prohibited within the meaning of Article 3. The European Communities argued that the Panel was permitted to exercise judicial economy since a panel is not obligated to make multiple findings that a measure is inconsistent with various provisions, when one finding would be sufficient to resolve the dispute.<sup>290</sup> Noting that the SCM Agreement contains special rules and additional procedures on dispute settlement in respect of subsidies prohibited under Article 3 and that the subsidy in question was prohibited within the meaning of Article 3, the Appellate Body condemned the Panel's exercise of false judicial economy, explaining:

"In this case, the Panel's findings under Articles 3 and 8 of the Agreement on Agriculture were not sufficient to 'fully resolve' the dispute. This is because, in declining to rule on the Complaining Parties' claims under Article 3 of the *SCM Agreement*, the Panel precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the *SCM Agreement*, in the event of the Panel finding in favour of the Complaining Parties with respect to their claims under Article 3 of the *SCM Agreement*. Moreover, in declining to rule on the Complaining Parties' claims under Article 3 of the *SCM Agreement*, the Panel failed to discharge its obligation under Article 11 of the *DSU* by failing to make 'such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements', namely, a recommendation or ruling by the DSB pursuant to Article 4.7. This constitutes false judicial economy and legal error."<sup>291</sup>

246. In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Mexico argued that the Panel exercised false judicial economy by declining to decide Mexico's claims concerning the dumping margins, thus failing to make an objective assessment of the matter before it as required by Article 11 of the DSU. The Appellate Body upheld the Panel's exercise of judicial economy with regard to the issue of whether the USDOC determination was consistent with Article 2, where the Panel had already found that determination to be inconsistent with Article 11.3 of the Anti-Dumping Agreement. The Appellate Body supported its conclusions based on several factors, focusing its reasoning on Mexico's failure to explain why an additional finding on Mexico's claim under Article 2 was necessary to resolve the dispute:

"In *Canada – Wheat Exports and Grain Imports*, the Appellate Body found that the practice of judicial economy 'allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.' Mexico has not explained why an additional finding on Mexico's claim under Article 2

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<sup>287</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 111.

<sup>288</sup> See para. 230 of this Section.

<sup>289</sup> Panel Report, *Argentina – Ceramic Tiles*, para. 6.81

<sup>290</sup> See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

<sup>291</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335.



of the Anti-Dumping Agreement is necessary to resolve the dispute. And we find no such need.

In any event, we note that Mexico's arguments are premised on the assumption that the United States 'used' a dumping margin in the context of the sunset review at issue. Thus, Mexico submits, for instance, that the USDOC's 'reliance on a flawed margin for purposes of its likelihood of dumping determination, and its reporting of a flawed margin of dumping likely to prevail to the [USITC], tainted both the [USDOC's] and the [USITC's] likelihood determinations.' Although the USDOC 'calculated' dumping margins for OCTG, the Panel found that 'it is clear that USDOC did not rely on historical dumping margins ..., but solely on import volumes' in making its determination of likelihood of continuation or recurrence of dumping in the sunset review at issue. Hence, we do not see how a margin that the USDOC did not 'rely upon' could taint the USITC's and the USDOC's determinations in the context of the OCTG sunset review at issue. Moreover, the Panel's finding that the USDOC did not rely on historical dumping margins is a factual finding. No reason was given to us why we should 'interfere' with this finding by the Panel. Nor has Mexico pointed to any evidence in the Panel record to suggest that the USITC relied on or otherwise factored in the margin of dumping likely to prevail that was reported to it by the USDOC. Also, the Panel Report contains no factual findings regarding this issue."<sup>292</sup>

247. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Panel, after concluding that the initiation of the SCM Annex V procedure did not occur automatically in the absence of any action by the DSB, declined to rule on the complainant's additional requests, on the ground that these requests were "necessarily dependant upon the Panel ruling that the Annex V procedure was initiated".<sup>293</sup> The Appellate Body disagreed:

"Taken as a whole, the Panel's findings and statements in paragraphs 7.21 and 7.22 of its Report do not adequately resolve the legal issues presented. The question before the Panel was not limited to *whether* an Annex V procedure had been initiated; rather, the Panel was asked to rule on *how* the relevant provisions of the covered agreements provide for an Annex V procedure to be initiated. The Panel did not provide an answer to that question in its truncated analysis of paragraph 2 of Annex V. By refusing to undertake a more comprehensive analysis of the legal issue of how the DSB is to initiate an Annex V procedure, the Panel deprived Members of the benefit of a 'a clear enunciation of the relevant WTO law' and failed to advance a key objective of WTO dispute settlement, namely, the resolution of disputes 'in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law'. We also recall that, when a panel's findings provide 'only a partial resolution of the matter at issue', this amounts to 'false judicial economy' and an error of law."<sup>294</sup>

#### 1.6.2.8 Considerations not relevant to judicial economy

248. In *US – Tuna II (Mexico)*, Mexico brought claims under both the TBT Agreement and the GATT 1994, and argued that the Panel should not exercise judicial economy in respect of any of its claims. The Panel considered that most of the reasons invoked by Mexico in support of its view that the Panel should not exercise judicial economy with respect to any of its claims were not persuasive:

"We note that, in response to a question by the Panel, Mexico has argued that it was necessary and essential to the effective resolution of this dispute that the Panel rule on all of the claims raised by Mexico under Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement because of: '(i) the nature of the measures at issue; (ii) the fact that this is the first time that such measures have been subject to dispute settlement under the DSU; (iii) the differences in the wording

<sup>292</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras. 178-179. See also *US – Zeroing (EC)*, paras. 223-225, and 248-250.

<sup>293</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.22.

<sup>294</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 500.



and potential application of the provisions of the GATT 1994 and the TBT Agreement to the measures; and (iv) the importance of the effective discipline of such non-tariff measures to developing country Members such as Mexico. This final reason – the importance of these disciplines to developing country Members – is particularly important because developing country Members may be most likely to be exposed to the adverse effects of non-tariff measures such as those at issue in this dispute.'

We agree with Mexico that, should the Panel fail to make findings that are necessary to resolve the dispute this would constitute a false judicial economy and an error of law. However, we also note that if the panel finds that the matter in dispute is sufficiently resolved by the findings on the first claims examined, there is no need to examine additional claims. As explicitly stated by the Appellate Body, '[n]othing in [Article 11 of the DSU] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party.'

In this respect, we note that three of the reasons invoked by Mexico in support of its view that the Panel should not exercise judicial economy with respect to any of its claims (reasons (i), (ii) and (iv)) do not appear to directly relate to the question of whether the dispute would be fully resolved. These considerations therefore have little, if any, bearing on the question of whether we may exercise judicial economy."<sup>295</sup>

249. On appeal, the Appellate Body disagreed with the Panel, noting that the Panel had not acted consistently with Article 11 of the DSU because its reasoning rested upon the wrong assumption that the obligations under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 are substantially the same:

"To us, it seems that the Panel's decision to exercise judicial economy rested upon the assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 are substantially the same. This assumption is, in our view, incorrect. In fact, as we have found above, the scope and content of these provisions is not the same. Moreover, in our view the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a 'technical regulation' within the meaning of the *TBT Agreement*. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the *TBT Agreement*. By failing to do so, the Panel engaged, in our view, in an exercise of 'false judicial economy' and acted inconsistently with its obligations under Article 11 of the DSU."<sup>296</sup>

### 1.6.3 Use of *arguendo* assumptions

250. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body made certain findings assuming, *arguendo*, that Article 6.2 applied in the context of Article 21.5 proceedings. The Appellate Body did not make a finding whether Article 6.2 *actually applied* in the context of Article 21.5 proceedings and, if so, to what extent."<sup>297</sup>

251. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body stated that:

"[E]ven assuming *arguendo* that a 'practice' may be challenged as a 'measure' in WTO dispute settlement – an issue on which we express no view here – we *find* that the record does not allow us to complete the analysis of Argentina's conditional appeal with respect to the 'practice' of the USDOC regarding the likelihood determination in sunset reviews."<sup>298</sup>

252. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, Argentina argued that the manner in which the Panel "summarily" dismissed Argentina's request for a

<sup>295</sup> Panel Report, *US – Tuna II (Mexico)*, paras. 7.742-7.746.

<sup>296</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.

<sup>297</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 52-53, and 67.

<sup>298</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 220.

suggestion under Article 19.1 (for withdrawal of the anti-dumping duty order) was inconsistent with the Panel's duties under Articles 11 and 12.7 of the DSU. In the course of addressing this claim, the Appellate Body relied on an *arguendo* assumption regarding the applicability of Articles 11 and 12.7 to a panel's consideration of a request for a suggestion under Article 19.1:

"The Panel's explanation is brief, but it is sufficient to convey that the Panel considered Argentina's request and that, in the light of the discretionary nature of the authority to make a suggestion, the Panel declined to exercise that discretion. The discretionary nature of the authority to make a suggestion under Article 19.1 must be kept in mind when examining the sufficiency of a panel's decision not to exercise such authority. However, it should not relieve a panel from engaging with the arguments put forward by a party in support of such a request. In the present case, Argentina offered several reasons in support of its request for a suggestion. Although it would have been advisable for the Panel to articulate more clearly the reasons why it declined to exercise its discretion to make a suggestion, this does not mean that Panel's exercise of its discretion was improper, and, thus, even assuming *arguendo* that Articles 11 and 12.7 were applicable to a request for suggestion, we do not consider that, in the circumstances of this case, the Panel failed to fulfil its duties under those provisions." <sup>299</sup>

253. In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Appellate Body considered it unnecessary to resolve the issue of whether Article XX(d) of the GATT 1994 can be invoked as a defence to justify a measure found to constitute "specific action against dumping" under Article 18.1 of the Anti-Dumping Agreement, and not to be in accordance with the *Ad Note* to Article VI:2 and 3 of the GATT 1994, as well as Article 18.1 of the Anti-Dumping Agreement. The Appellate Body found that "[a]ssuming, *arguendo*, that such a defence is available to the United States" <sup>300</sup>, the measure at issue was not 'necessary' within the meaning of Article XX(d) of the GATT 1994. Having made that finding, the Appellate Body stated that "we do not express a view on the question of whether a defence under Article XX(d) of the GATT 1994 was available to the United States". <sup>301</sup>

254. In *China – Publications and Audiovisual Products*, the Appellate Body offered the following guidance on the use of *arguendo* assumptions by panels:

"We observe that reliance upon an assumption *arguendo* is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body may choose to employ this technique in particular circumstances, it may not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends. The purpose of WTO dispute settlement is to resolve disputes in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law. In doing so, panels and the Appellate Body are not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute. Rather, panels and the Appellate Body must adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." <sup>302</sup>

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<sup>299</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 183.

<sup>300</sup> Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 310.

<sup>301</sup> Appellate Body Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 319.

<sup>302</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213.

255. In that case, the Appellate Body concluded that it was not appropriate to proceed on the basis of an *arguendo* assumption on the question of whether the defence in Article XX(a) of the GATT 1994 could be invoked in respect of paragraph 5.1 of China's Accession Protocol:

"In our view, assuming *arguendo* that China can invoke Article XX(a) could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risks creating uncertainty with respect to China's implementation obligations."<sup>303</sup>

256. In several cases, panels and the Appellate Body have considered arguments based on the principle of estoppel on an *arguendo* basis, and found that the conditions for estoppel were not met. Thus, in *EC – Export Subsidies on Sugar*, the Appellate Body observed that "even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU".<sup>304</sup> Referring to the prior panel reports in *Argentina – Poultry Anti-Dumping Duties* and *Guatemala – Cement II*, the Panel in *EC and certain member States – Large Civil Aircraft* observed that these panels "did not establish that the principle of estoppel applies in WTO dispute settlement proceedings; rather, the respective panels proceeded on the basis that, even if *arguendo* a principle of estoppel in the terms contended for did exist, it was not established on the specific facts of the case."<sup>305</sup>

257. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Panel found that, assuming *arguendo* that the allocation of patent rights under NASA/DOD R&D contracts and agreements with Boeing involves a subsidy within the meaning of Article 1 of the SCM Agreement, the European Communities had failed to demonstrate that any such subsidy is specific within the meaning of Article 2 of the SCM Agreement. With respect to its use of this *arguendo* assumption, the Panel recalled the Appellate Body's guidance in *China – Publications and Audiovisual Products*, and explained that:

"We have relied upon the *arguendo* assumption that the allocation of patent rights is a subsidy within the meaning of Article 1 of the SCM Agreement and proceeded directly to the issue of specificity under Article 2 of the SCM Agreement for the following reasons. First, the question of whether the allocation of patent rights under NASA/DOD R&D contracts and agreements with Boeing constitutes a financial contribution, whether in the form of a provision of goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement or otherwise, is a potentially difficult one; in contrast, the question of whether the alleged subsidy is specific is more straightforward. (On the question of whether the allocation of patent rights under NASA/DOD R&D contracts and agreements with Boeing involves a financial contribution in the form of a 'provision' of 'goods' or otherwise, see European Communities' first written submission, paras. 841-842; United States' first written submission, paras. 317-325 and 331; European Communities' second written submission, paras. 536-548; United States' response to question 127, and the European Communities' related comments; Australia's oral statement, paras. 28-34; Canada's written submission, paras. 3-9.) In other words, we have relied upon this *arguendo* assumption to 'enhance simplicity and efficiency' in our decision-making. Second, having found that the alleged subsidy is not specific under Article 2, our reliance upon this *arguendo* assumption creates no issues or difficulties from the point of view of the 'implementation' of DSB recommendations and rulings. Third, the question of whether or not the allocation of patent rights constitutes a subsidy does not 'go to the jurisdiction' of the Panel. Finally, the substance of our analysis under Article 2 does not depend on whether the measures at issue are properly characterized as subsidies within the meaning of Article 1."<sup>306</sup>

258. On appeal, the Appellate Body disagreed, noting that the Panel's recourse to an *arguendo* assumption was not consistent with the Appellate Body's reasoning in *China – Publications and*

<sup>303</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 215.

<sup>304</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312.

<sup>305</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 1914.

<sup>306</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, fn 2933.

*Audiovisual Products*, and that a finding on a subsidy should have been the starting point for the assessment of specificity, which the Panel had failed to do:

"The chapeau of Article 2.1 of the *SCM Agreement* states that the analysis of specificity is directed at 'a subsidy, as defined in paragraph 1 of Article 1'. We understand that this is a reference to the measure that has been determined to be a subsidy under Article 1.1 because the measure is a financial contribution that confers a benefit. This suggests that the 'subsidy, as defined in paragraph 1 of Article 1' is the starting point of the assessment of specificity. The analysis of specificity called for in Article 2.1 presupposes that the subsidy has already been found to exist. No such finding was made here given that the Panel never performed an analysis under Article 1 but, rather, chose to start its assessment with the issue of specificity. The Panel thought that its adoption of an *arguendo* approach was consistent with the Appellate Body's guidance in *China – Publications and Audiovisual Products*. However, in that case, the Appellate Body identified precisely the same problem that arises here when it said that recourse to an *arguendo* approach 'may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends.' As we have explained, the assessment of specificity under Article 2.1 depends on how the subsidy was defined under Article 1.1, leaving little, if any, room for the adoption of an *arguendo* approach."<sup>307</sup>

259. The Appellate Body further explained that the Panel's approach to *arguendo* assumption could have led to the claim remaining unresolved:

"Another problem with the *arguendo* approach adopted by the Panel in this case is that, were the Appellate Body to disagree with the Panel's finding, it could lead to the claim remaining unresolved. If in this case we were to reverse the Panel and find instead that the allocation of patent rights under NASA/USDOD contracts and agreements is specific within the meaning of Article 2.1 of the *SCM Agreement*, there would be no Panel findings as to whether or not the allocation of patent rights under those contracts and agreements constitutes a subsidy. In order to resolve the European Communities' claim, we would have to be in a position to complete the analysis ourselves. Article 3.3 of the DSU provides that one of the purposes of the WTO dispute settlement system is the 'prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member'. This purpose is frustrated when, upon completion of the adjudication, a Member's claim is left unresolved because the Appellate Body was unable to complete the analysis of aspects of the claim with respect to which the panel had adopted an *arguendo* approach. An *arguendo* approach may initially appear to be more efficient, but ultimately may result in inefficient outcomes."<sup>308</sup>

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<sup>307</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 739.

<sup>308</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 741.