

| | |
|---|----------|
| 1 ARTICLE 17 | 1 |
| 1.1 Text of Article 17 | 1 |
| 1.2 General | 3 |
| 1.2.1 Role of the Appellate Body | 3 |
| 1.3 Article 17.4..... | 3 |
| 1.4 Article 17.5..... | 4 |
| 1.4.1 Table showing the length of time taken in Appellate Body proceedings to date | 4 |
| 1.5 Article 17.6: scope of Appellate review | 4 |
| 1.5.1 "issues of law ... and legal interpretations" | 4 |
| 1.5.1.1 Factual findings versus legal findings..... | 4 |
| 1.5.1.2 Relevance of the characterization of a finding by the panel..... | 7 |
| 1.5.1.3 Review of new issues..... | 7 |
| 1.5.1.4 Review of new evidence..... | 7 |
| 1.5.1.5 Review of new arguments | 8 |
| 1.5.2 Review of expired measures..... | 10 |
| 1.5.3 "Completing the analysis" | 11 |
| 1.6 Article 17.9: Working procedures of the Appellate Body..... | 20 |
| 1.7 Article 17.10: Confidentiality requirements on the Appellate Body proceedings..... | 20 |
| 1.8 Article 17.11: concurring and separate opinions | 22 |
| 1.8.1 Table of individual opinions in Appellate Body reports to date..... | 22 |
| 1.9 Article 17.12: "shall address each of the issues raised" | 22 |
| 1.10 Article 17.13: "may uphold, modify or reverse the legal findings and conclusions of the panel" | 23 |
| 1.10.1 Panel finding not appealed not implicitly upheld | 23 |
| 1.10.2 Appellate Body may declare a Panel findings "moot" and of "no legal effect" | 23 |
| 1.10.3 "legal findings and conclusions" | 24 |
| 1.11 Article 17.14 | 25 |
| 1.11.1 Time period between circulation of Appellate Body report and its adoption | 25 |
| 1.11.2 Legal effect of adopted Appellate Body reports | 25 |
| 1.11.3 Disagreement about whether a report was adopted by the DSB | 27 |

1 ARTICLE 17

1.1 Text of Article 17

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall

serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.⁸ This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

(footnote original)⁸ If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

1.2 General

1.2.1 Role of the Appellate Body

1. In *US – Stainless Steel (Mexico)*, the Appellate Body expressed its concern over the Panel's decision to deviate from well-established Appellate Body jurisprudence. In that context, the Appellate Body made some observations on its role in the WTO dispute settlement system:

"In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review 'issues of law covered in the panel report and legal interpretations developed by the panel'. Accordingly, Article 17.13 provides that the Appellate Body may 'uphold, modify or reverse' the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote 'security and predictability' in the dispute settlement system, and to ensure the 'prompt settlement' of disputes."¹

2. The Appellate Body in *India – Solar Cells* considered that the phrase "hear appeals from panel cases" in Article 17.1 describes the Appellate Body's function in broad terms.²

1.3 Article 17.4

3. In *EU – Fatty Alcohols (Indonesia)*, the European Union requested the Appellate Body to find that Indonesia's appeal was inconsistent with Article 3 of the DSU because the measure at issue had expired. In rejecting the European Union's assertion, the Appellate Body noted that Article 17.4 of the DSU does not limit the right to appeal a panel report on the ground that the measure at issue has expired:

"At the outset of our analysis, we note that it is uncontested by the participants that the measure at issue has expired. We recall that appellate review is governed primarily by Article 17 of the DSU. In particular, Article 17.4 stipulates that the parties to the dispute may appeal a panel report. It also provides that third parties have no right to appeal a panel report. However, Article 17.4 does not impose limitations on the parties' right to appeal a panel report.

...

... [T]he Appellate Body has expressly rejected the proposition that the repeal of a measure necessarily constitutes, without more, a 'satisfactory settlement of the matter', and has recognized that benefits accruing to a Member may be impaired by measures whose legislative basis has expired. The Appellate Body has also recognized that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims in respect of that measure. Similarly, we consider that the expiry of the measure at issue does not, without more, render it unnecessary for us to

¹ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

² Appellate Body Report, *India – Solar Cells*, para. 5.157.

rule on Indonesia's appeal. Significantly, pursuant to Article 3.7, Members are expected to be largely self-regulating in deciding if any action under the DSU would be 'fruitful'.³

1.4 Article 17.5

1.4.1 Table showing the length of time taken in Appellate Body proceedings to date

4. For a table providing information on the length of time taken in WTO proceedings to date from the date of the commencement of an appeal to the date of the circulation of the Appellate Body report, see the chapter of the Analytical Index on "DS information tables".

1.5 Article 17.6: scope of Appellate review

1.5.1 "issues of law ... and legal interpretations"

1.5.1.1 Factual findings versus legal findings

5. In *Canada – Periodicals*, the Appellate Body made reference to the limits of its mandate under Articles 17.6 and 17.13 as follows:

"We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the DSU. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since 'likeness' must be construed narrowly and on a case-by-case basis."⁴

6. In *EC – Bananas III*, the Appellate Body identified several findings of the Panel as being factual findings and thus outside its scope of review:

"On the first issue, the Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. ...

...

It is, however, evident from the terms of its finding that the Panel concluded, as a matter of fact, that the *de facto* discrimination did continue to exist after the entry into force of the GATS. This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or modify the Panel's conclusion in paragraph 7.308 of the Panel Reports.

...

In our view, the conclusions by the Panel on whether Del Monte is a Mexican company, the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas, the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin, and the nationality of the majority of operators that 'include or directly represent' EC (or ACP) producers, are all factual conclusions. Therefore, we decline to rule on these arguments made by the European Communities."⁵

³ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.175 and 5.179.

⁴ Appellate Body Report, *Canada – Periodicals*, p. 22.

⁵ Appellate Body Report, *EC – Bananas III*, paras. 206, 237, and 239.

7. In *EC – Hormones*, the Appellate Body made a distinction between factual⁶ and legal findings and stressed that factual findings "are, in principle, not subject to [its] review":

"Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on [one of the growth hormones at issue] is a factual question. ... The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question."⁷

8. In *Australia – Salmon*, the Appellate Body confirmed that "[t]he Panel's consideration and weighing of the evidence in support of [the] claims relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU."⁸

9. The Appellate Body on *Korea – Alcoholic Beverages* further indicated that the panel's examination and weighing of the evidence submitted fall within the scope of its discretion as the trier of facts:

"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."⁹

10. In *US – Wheat Gluten*, the Appellate Body again referred to the Panel as the trier of the facts in respect of its discretion to consider the evidence in a given case and summarized its prior jurisprudence on the scope of 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

⁶ Examples of factual findings that the Appellate Body have refrained from reviewing are Appellate Body Report, *EC – Bananas III*, paras. 206; 237 and 239; Appellate Body Report, *Australia – Salmon*, paras. 259-261; Appellate Body Report, *Japan – Agricultural Products II*, para. 98; Appellate Body Report, *India – Quantitative Restrictions*, paras. 143-144.

⁷ Appellate Body Report, *EC – Hormones*, para. 132. See also, *inter alia*, Appellate Body Report, *US – Upland Cotton*, where the Appellate Body dealt with the scope of an appellate review under Article 17.6 of the DSU and recalled its previous findings in *EC – Hormones*.

⁸ Appellate Body Report, *Australia – Salmon*, para. 261.

⁹ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161.

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)"¹⁰

11. In *US – Section 211 Appropriations Act*, the Appellate Body considered that the examination by the Panel of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel and thus subject to review by the Appellate Body:

"[T]he 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."¹¹

12. However, the Appellate Body in *China – Auto Parts* recognized that:

"[T]here may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements. With respect to such elements, the Appellate Body will not lightly interfere with a panel's finding on appeal."¹²

13. Similarly, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* concluded that "[n]ot every type of evidence that has been examined by panels to determine the scope and meaning of municipal law may be subject to full appellate review."¹³

14. The Appellate Body in *EC – Seal Products* held that it was the panel's task to identify the objective of the EC Seal Regime. In this context, the Appellate Body considered that "[a] panel's identification of the 'objective' of a measure is a matter of legal characterization subject to appellate review under Article 17.6 of the DSU."¹⁴

15. In *US – Softwood Lumber V*, the United States submitted that one of the issues raised by Canada on appeal – whether the United States' investigating authority exercised its discretion in calculating wood chip offset revenue for Tembec in an "objective" and "even-handed" manner – was a factual issue and, accordingly, beyond the scope of appellate review. The Appellate Body first noted that United States did not dispute the general proposition that an investigating authority must make its determinations in an objective and even-handed manner, as the Panel had found that the USDOC did in this case, but did not find such an obligation in Article 2.2.1.1 of the Anti-Dumping Agreement. The Appellate Body disagreed with the United States since, in its view, the issue raised by Canada was a question of law. For the Appellate Body, "[t]he fact that such an 'obligation [is] not found in Article 2.2.1.1' is not dispositive. Whether a particular approach of an investigating authority is, or is not, even-handed is, ultimately, a matter of the 'legal characterization'¹⁵ of facts and, as such, a matter of law".¹⁶

16. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body noted that the "boundary between an issue that is purely factual and one that involves mixed issues of law and fact is often difficult to draw".¹⁷ The Appellate Body also pointed out that, pursuant to Article 17.6 of the DSU,

¹⁰ Appellate Body Report, *US – Wheat Gluten*, paras. 150-151.

¹¹ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

¹² Appellate Body Report, *China – Auto Parts*, para. 225.

¹³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 4.99.

¹⁴ Appellate Body Report, *EC – Seal Products*, para. 5.144.

¹⁵ Appellate Body Report, *EC – Hormones*, para. 132.

¹⁶ Appellate Body Report, *US – Softwood Lumber V*, para. 163.

¹⁷ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 385.

it could only review the claim by the United States to the extent to which it related to an error of interpretation or application of Article 6.3(c) of the SCM Agreement.¹⁸

1.5.1.2 Relevance of the characterization of a finding by the panel

17. In *Chile – Price Band System*, the Appellate Body noted that the Panel's characterization of a finding "as a factual matter" does not mean that the issue is shielded from appellate review:

"[T]he Panel's characterization of its finding 'as a factual matter' does not mean that the issue whether Chile's price band system is a border measure similar to a variable import levy or a minimum import price is shielded from appellate review. This is a question of law, and not of fact, and thus is clearly within our jurisdiction under Article 17.6 of the DSU. As we said in our Report in *EC – Hormones*, the assessment of the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is an issue of legal characterization. The mere assertion by a panel that its conclusion is a 'factual matter' does not make it so. ... All the same, in reviewing the Panel's assessment of Chile's price band system, we are mindful of the need to give due deference to the discretion of the Panel, as the 'trier of fact', to weigh the evidence before it."¹⁹

1.5.1.3 Review of new issues

18. In *EC – Tube or Pipe Fittings*, the Appellate Body rejected the European Communities' argument that a particular issue was not properly before the Appellate Body, stating that the issue was identified during the Panel proceedings.²⁰

1.5.1.4 Review of new evidence

19. In *US – Offset Act (Byrd Amendment)*, the Appellate Body stated that it had no authority to consider new facts on appeal:

"Article 17.6 is clear in limiting our jurisdiction to issues of law covered in panel reports and legal interpretations developed by panels. We have no authority to consider new facts on appeal. The fact that the documents are 'available on the public record' does not excuse us from the limitations imposed by Article 17.6. We note that the other participants have not had an opportunity to comment on those documents and, in order to do so, may feel required to adduce yet more evidence. We would also be precluded from considering such evidence."²¹

20. In *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body dealt with a request of Argentina to reject certain documents attached to the appellant submission of Chile. According to Argentina, such documents consisted of new evidence that had not been brought before the Panel. The Appellate Body did not find necessary to have recourse to the information contained in such documents and, thus, did not make any separate or additional ruling related to their admissibility.²²

21. Similarly, in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body received a request from the United States to dismiss a piece of evidence (an exchange of emails) submitted by the European Communities given that, allegedly, it was a new piece of evidence that could not be considered in the appellate stage. The Appellate Body agreed with the United States that the evidence was new and, therefore, it could not be considered in the appellate proceedings.²³

¹⁸ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 420.

¹⁹ Appellate Body Report, *Chile – Price Band System*, para. 224.

²⁰ Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 183-184.

²¹ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222.

²² Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 12-15 and 253.

²³ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 171.

1.5.1.5 Review of new arguments

22. In *Canada – Aircraft*, Brazil had raised an argument during the appellate review which it had not raised during the Panel review. The Appellate Body, although it found that this new argument was beyond the scope of appellate review, stated that "new arguments are not *per se* excluded from the scope of appellate review, simply because they are new":

"In our view, this new argument raised by Brazil is beyond the scope of appellate review. Article 17.6 of the DSU provides that '[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'. In principle, new arguments are not *per se* excluded from the scope of appellate review, simply because they are new. However, for us to rule on Brazil's new argument, we would have to solicit, receive and review new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise."²⁴

23. The Appellate Body in *US – FSC* declined to address a "new" argument regarding double taxation under the last sentence of footnote 59 of the *SCM Agreement* because it considered that this new argument did not involve either an "issue of law covered in the panel report" or "legal interpretations developed by the panel":

"The argument which the United States asks us to address under the fifth sentence of footnote 59 involves two separate legal issues: first, that the FSC measure is a measure 'to avoid double taxation of foreign-source income' within the meaning of footnote 59; and second, that, in consequence, the FSC measure is *excluded* from the prohibition in Article 3.1(a) of the *SCM Agreement* against export subsidies. In our view, examination of the substantive issues raised by this particular argument would be outside the scope of our mandate under Article 17.6 of the DSU, as this argument does not involve either an 'issue of law covered in the panel report' or 'legal interpretations developed by the panel'. The Panel was simply not asked to address the issues raised by the United States' new argument. Further, the new argument now made before us would require us to address legal issues quite different from those which confronted the Panel and which may well require proof of new facts. ... We, therefore, decline to examine the United States' argument that the FSC measure is a measure 'to avoid double taxation' within the meaning of footnote 59, and we reserve our opinion on this issue."²⁵

24. In *EC – Export Subsidies on Sugar*, the Appellate Body held that for it to rule on the "new argument" at issue, it would have to solicit, receive and review new facts that were not before the Panel:

"[T]he European Communities did not argue before the Panel that sales of A and B beet are 'largely insufficient to cover all the fixed costs of producing C beet', in the manner in which it is arguing this point on appeal. ...

The Appellate Body previously held, in *Canada – Aircraft*, that new arguments are not excluded from the scope of appellate review 'simply because they are new'. However, in that case, the Appellate Body also said ... for us to rule on [the] new argument [at issue], we would have to solicit, receive and review new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise.

In this respect, we note that the European Communities supports its argument on appeal with a table containing calculations (Table 9 in its appellant's submission). This table was not placed before the Panel, but uses data drawn from Exhibits presented to the Panel by the Complaining Parties. We also note that the Complaining Parties, in their respective appellee's submissions and at the oral hearing, contested

²⁴ Appellate Body Report, *Canada – Aircraft*, para. 211.

²⁵ Appellate Body Report, *US – FSC*, para. 103.

the accuracy of some of the calculations, as well as certain concepts underlying the European Communities' calculations."²⁶

25. In *Peru – Agricultural Products*, Guatemala contended that Peru's arguments that the Panel had erred in its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 by failing to take into account the FTA between Peru and Guatemala and ILC Articles 20 and 45, in accordance with Article 31(3) of the Vienna Convention, were not raised before the Panel and were, accordingly, not properly within the scope of the appeal. Thus, Guatemala asserted that "consideration of Article 31(3)(a) and (c) of the Vienna Convention, either with respect to the FTA or ILC Articles 20 and 45, would ... be contrary to Article 17.6 of the DSU and would violate Guatemala's due process rights."²⁷ The Appellate Body found that Peru's arguments on appeal were "new, but concern 'issues of law covered in the panel report' or 'legal interpretations developed by the panel'."²⁸ Thus, it stated that, "to the extent that consideration of these arguments does not require us to consider new facts, we are of the view that such arguments do not adversely affect Guatemala's due process rights and were properly raised on appeal."²⁹ In particular, the Appellate Body explained:

"Although, before the Panel, Peru did not raise arguments on the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 on the basis of Article 31(3)(a) or (c) of the Vienna Convention, it did raise arguments concerning the interpretation of Article 4.2 and Article II:1(b). Peru's arguments on appeal, albeit new, are framed as concerning the interpretation of WTO provisions, namely, Article 4.2 and Article II:1(b), which were raised before the Panel and are covered in the Panel Report. Therefore, Peru's new arguments on appeal can be considered as relating to 'issues of law covered in the panel report' or 'legal interpretations developed by the panel'. We consider that although arguments relating to the FTA and the ILC Articles 20 and 45 under Article 31(3) of the Vienna Convention were not raised before the Panel, those arguments can be addressed in this appeal to the extent they concern issues of law and legal interpretations covered in the Panel Report, and without prejudicing Guatemala's due process rights. In addition, we are of the view that the consideration of provisions of an FTA for the purpose of determining whether a Member has complied with its WTO obligations involves legal characterizations that fall within the scope of appellate review under Article 17.6 of the DSU.

We now turn to Guatemala's contention that, in order to address the new arguments raised by Peru, we would have to consider facts that were not presented to the Panel. We agree that if Peru's new arguments on appeal required us to review new facts, we would not be able to address such arguments to that extent. However, to the extent Peru's arguments would require us to consider the provisions of the FTA and ILC Articles 20 and 45 to determine the consistency of the PRS with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, we are not persuaded that consideration of Peru's arguments on appeal would require us to review new facts."³⁰

26. In *US – COOL (Article 21.5)*, the Appellate Body considered that the argument raised by the United States, that Article IX of the GATT 1994 constitutes relevant context for the interpretation of Article III:4 of the GATT 1994, is a legal argument relating to the proper interpretation of the term "treatment no less favourable" in Article III:4. Hence, it falls within the scope of Article 17.6:

"In the present case, the United States argues that Article IX constitutes relevant context for the interpretation of Article III:4 of the GATT 1994. We consider that this is a legal argument relating to the proper interpretation of the term 'treatment no less favourable' in Article III:4. This issue was before the Panel and was addressed in the Panel Reports. As such, it does not require us to solicit or review new facts or address

²⁶ Appellate Body Report on *EC – Export Subsidies on Sugar*, paras. 240-242.

²⁷ Appellate Body Report, *Peru – Agricultural Products*, para. 5.81.

²⁸ Appellate Body Report, *Peru – Agricultural Products*, para. 5.87.

²⁹ Appellate Body Report, *Peru – Agricultural Products*, para. 5.88.

³⁰ Appellate Body Report, *Peru – Agricultural Products*, paras. 5.86-5.87.

issues with which the Panel was not confronted. Accordingly, we do not consider that addressing the United States' argument based on Article IX of the GATT 1994 would raise concerns of due process, and we, therefore, proceed with our analysis."³¹

27. In *US – Carbon Steel (India)*, India had contended that the United States' request for the Appellate Body to clarify the meaning of Article 1.1(a)(1) of the SCM Agreement should be rejected because, in seeking such a clarification, the United States was not challenging "issues of law covered in the panel report and legal interpretations developed by the panel". The Appellate Body rejected India's argument on the following grounds:

"The Appellate Body is required under Article 17.12 of the DSU to address each of the legal issues raised in the appellate proceedings. As we see it, the United States has appealed a 'legal interpretation' developed by the Panel in the sense of Article 17.6 of the DSU. We therefore consider that the United States' request for clarification falls within the ambit of the appeal, and disagree with India to the extent that it suggests otherwise."³²

28. In *US – Supercalendered Paper*, Canada asserted that the United States' claim on appeal fell outside the scope of appellate review, as it concerned the Panel's factual findings regarding the existence of the measure at issue. Nonetheless, the Appellate Body found that the United States' claim of error concerned the Panel's understanding and application of the legal standard for "ongoing conduct" as a measure that can be challenged in WTO dispute settlement:

"The Panel's analysis had three dimensions: (i) identifying the legal standard for 'ongoing conduct' measures; (ii) examining relevant evidence and making factual findings; and (iii) applying the legal standard to the facts before the Panel.

On appeal, the United States argues that the Panel erred in finding that a 'measure' existed as one that could be challenged in WTO dispute settlement under the DSU. We consider that the correct understanding of the legal standard for establishing the existence of an 'ongoing conduct' measure and the application of that standard to the facts on the panel record are legal issues, and thus fall within the scope of appellate review. We note that the United States neither contests the evidence on the Panel record, nor the Panel's factual assessment of that evidence. Specifically, the United States does not identify any factual findings that it challenges on appeal. Rather, we understand the United States' claim and arguments on appeal as directed to the legal standard for an 'ongoing conduct' measure, and the application of that standard to the facts of this case. Therefore, in our view, the United States' claim of error on appeal concerns issues of law covered in the Panel Report and legal interpretations developed by the Panel. On that basis, we consider that the United States' claim of error at issue falls within the scope of appellate review under Article 17.6 of the DSU."³³

29. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Turkey – Pharmaceutical Products (EU)*, the Arbitrator decided to analyse an argument raised by Türkiye for the first time in the arbitration proceedings, on the ground that doing so would not require the Arbitrator to "receive, or review new facts."³⁴

1.5.2 Review of expired measures

30. In *EU – Fatty Alcohols (Indonesia)*, the European Union requested the Appellate Body to find that Indonesia's appeal was inconsistent with Article 3 of the DSU because the measure at issue had expired. The Appellate Body rejected the European Union's request and stated that "Article 17.12 of the DSU provides that the Appellate Body shall address each of the issues raised in accordance with Article 17.6 of the DSU during appellate proceedings. Article 17.6 stipulates that an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Neither of these provisions contains any indication that expired measures

³¹ Appellate Body Report, *US – COOL (Article 21.5)*, para. 5.350.

³² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.15.

³³ Appellate Body Report, *US – Supercalendered Paper*, paras. 5.13-5.14.

³⁴ Award of the Arbitrators, *Turkey – Pharmaceutical Products (EU)*, para. 6.36.

are excluded from appellate review or that it might be unnecessary for the Appellate Body to rule on such measures."³⁵ The Appellate Body explained that:

"[T]he Appellate Body has expressly rejected the proposition that the repeal of a measure necessarily constitutes, without more, a 'satisfactory settlement of the matter', and has recognized that benefits accruing to a Member may be impaired by measures whose legislative basis has expired. The Appellate Body has also recognized that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims in respect of that measure. Similarly, we consider that the expiry of the measure at issue does not, without more, render it unnecessary for us to rule on Indonesia's appeal. Significantly, pursuant to Article 3.7, Members are expected to be largely self-regulating in deciding if any action under the DSU would be 'fruitful'.

As a general matter, the Appellate Body has held that it is within the panel's discretion to decide how it takes into account subsequent modifications to, or the repeal of, the measure at issue. This encompasses discretion either to make findings or not with respect to an expired measure. In exercising this discretion, panels have considered, inter alia, whether the measure could easily be re-imposed. In the present case, the European Union has not advanced specific arguments relating to the nature of the measure at issue in support of its contention that this dispute has been resolved. Rather, the European Union's submission focuses on the expiry of the measure itself. However, for the reasons above, we consider that Indonesia is not barred from pursuing an appeal just because the measure at issue has expired."³⁶

1.5.3 "Completing the analysis"

31. In *US – Gasoline*, the Appellate Body, further to reversing the Panel's conclusions on the first part of Article XX(g) of *GATT 1994* and having completed the Article XX(g) analysis in that case, examined the measure's consistency with the provisions of the chapeau of Article XX, based on the legal findings contained in the Panel Report.³⁷

32. In *Canada – Periodicals*, the Appellate Body reversed the Panel's findings on the issue of "like products" under Article III:2 of *GATT 1994*. The Appellate Body then addressed the question whether it could "complete the Panel's analysis", specifically whether it could proceed to make a determination on whether the goods at issue were "directly competitive or substitutable" within the meaning of Article III:2, second sentence, of *GATT 1994*. The Appellate Body held that it could do so, noting that Article III:2, first sentence, and Article III:2, second sentence, were part of a "logical continuum":

"We believe the Appellate Body can, and should, complete the analysis of Article III:2 of the *GATT 1994* in this case by examining the measure with reference to its consistency with the second sentence of Article III:2, provided that there is a sufficient basis in the Panel Report to allow us to do so. The first and second sentences of Article III:2 are closely related. The link between the two sentences is apparent from the wording of the second sentence, which begins with the word 'moreover'. It is also emphasized in *Ad Article III*, paragraph 2, which provides: 'A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where ...'. An examination of the consistency of Part V.1 of the Excise Tax Act with Article III:2, second sentence, is therefore part of a logical continuum.

The Appellate Body found itself in a similar situation in *United States – Gasoline*. Having reversed the Panel's conclusions on the first part of Article XX(g) and having completed the Article XX(g) analysis in that case, the Appellate Body then examined the measure's consistency with the provisions of the chapeau of Article XX, based on the legal findings contained in the Panel Report.

³⁵ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.176.

³⁶ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.179-5.180.

³⁷ Appellate Body Report, *US – Gasoline*, pp. 22-29.

As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2, and because we reverse one of those findings, we need to develop our analysis based on the Panel Report in order to issue legal conclusions with respect to Article III:2, second sentence, of the GATT 1994."³⁸

33. In *EC – Hormones*, the Appellate Body, having reversed the Panel's findings under Article 5.5 of the SPS Agreement, refused to complete the analysis by examining the measure under Article 5.6. According to the Appellate Body; it "cannot be assumed that all the findings of fact necessary to proceed to a determination of consistency or inconsistency of the EC measures with the requirements of Article 5.6 have been made by the Panel".³⁹

34. In *EC – Poultry*, the Appellate Body referring to its previous rulings on *US – Gasoline* and *Canada – Periodicals*, held that, having reversed the Panel's finding on Article 5.1(b) of the Agreement on Agriculture, it should complete its analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy:

"We are aware of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. Article 17.6 of the DSU provides: 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'. Article 17.13 of the DSU states: 'The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.' In certain appeals, however, the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel. This occurred, for example, in the appeals in *United States – Standards for Reformulated and Conventional Gasoline* and in *Canada – Certain Measures Concerning Periodicals*. And, in this appeal, as we have reversed the Panel's finding on Article 5.1(b), we believe we should complete our analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy."⁴⁰

35. In *Australia – Salmon*, the Appellate Body noted that "[b]ecause the Panel finds that the difference in the level of protection in respect of the three natural hormones, when used for growth promotion purposes, and the level of protection in respect of natural hormones present endogenously in meat and other foods is unjustifiable, the Panel regards it as unnecessary to decide whether the difference in the levels of protection set by the European Communities in respect of natural hormones used as growth promoters and in respect of the same hormones when used for therapeutic or zootechnical purposes, is justified." The Appellate Body then decided to complete the Panel's analysis:

"In certain appeals, when we reverse a panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties. This occurred, for example, in the appeals in *United States – Gasoline*, *Canada – Certain Measures Concerning Periodicals*, *European Communities – Measures Affecting the Importation of Certain Poultry Products* ('*European Communities – Poultry*'), and *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.

As we have reversed the Panel's finding that the SPS measure at issue, erroneously identified as the heat-treatment requirement, is not based on a risk assessment, we believe that -- to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record -- we should complete the legal analysis and determine whether the actual SPS measure at issue, i.e., Australia's *import*

³⁸ Appellate Body Report, *Canada – Periodicals*, pp. 24-26.

³⁹ Appellate Body Report, *EC – Hormones*, para. 222.

⁴⁰ Appellate Body Report, *EC – Poultry*, para. 156.

prohibition on fresh, chilled or frozen ocean-caught Pacific salmon, is based on a risk assessment."⁴¹

36. In *Argentina – Footwear (EC)*, the Appellate Body upheld the conclusions of the Panel that Argentina's investigation in that case was inconsistent with the requirements of Articles 2 and 4 of the Agreement on Safeguards. The Appellate Body then stated that, as there was no legal basis for the safeguard measure at issue, it was not necessary to complete the analysis:

"As a consequence, there is *no legal basis* for the safeguard measures imposed by Argentina. For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred 'as a result of unforeseen developments'."⁴²

37. In *Korea – Dairy*, the Appellate Body considered the European Communities' request that the Appellate Body complete the Panel's reasoning and find that by imposing a safeguard measure in circumstances where the alleged increase in imports was not "as a result of unforeseen developments" within the meaning of Article XIX:1(a) of GATT 1994, Korea also violated its obligations under Article XIX of the GATT 1994. The Appellate Body declined to do so, noting there were insufficient factual findings:

"In the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, 'a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ...', we are not in a position, within the scope of our mandate set forth in Article 17 of the DSU, to complete the analysis and make a determination as to whether Korea acted inconsistently with its obligations under Article XIX:1(a). Accordingly, we are unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994."⁴³

38. The Appellate Body on *Korea – Dairy* also noted that in determining whether Korea violated the second sentence of Article 5.1 of the Agreement on Safeguards, it would have to determine whether the quantitative restrictions imposed by Korea were below the average level of imports in the last three representative years for which statistics were available, and if so, whether Korea had given a reasoned explanation as required by the second sentence of Article 5.1. Similarly, with regard to its conclusions referenced in paragraph 37 above, the Appellate Body held that it did not have a sufficient factual basis on which to complete the analysis:

"The Panel did not make any factual findings on the average level of imports of skimmed milk powder preparations in the last three representative years. The average level of imports in that period was also contested by the parties. Accordingly, we are not in a position, within the scope of our mandate under Article 17 of the DSU, to complete the analysis in this case and make a determination as to the consistency of Korea's safeguard measure with the second sentence of Article 5.1."⁴⁴

39. Similarly, the Appellate Body in *Canada – Autos* could not complete the Panel's analysis in the absence of sufficient facts in the Panel's record:

"In *Australia – Salmon*, we stated that where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis 'to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record'. Here, as we have stated, the Panel did not identify the precise levels of the CVA requirements applicable to specific manufacturers. In addition, there are not sufficient undisputed facts in the Panel record that would enable us to examine this issue ourselves. As a result, it is impossible for us to assess whether the use of

⁴¹ Appellate Body Report, *Australia – Salmon*, paras. 117-118.

⁴² Appellate Body Report, *Argentina – Footwear (EC)*, para. 98.

⁴³ Appellate Body Report, *Korea – Dairy*, para. 92.

⁴⁴ Appellate Body Report, *Korea – Dairy*, para. 102.

domestic over imported goods is a condition 'in law' for satisfying the CVA requirements, and, therefore, is a condition for receiving the import duty exemption."⁴⁵

40. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* was unable to complete the analysis and conclude whether Section 1 changed the US countervailing duty law and therefore determine whether Section 1 of PL 112-99 effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement or restriction on imports within the meaning of Article X:2 of the GATT 1994:

"The main question in this dispute under Article X:2 of the GATT 1994 is whether Section 1 of PL 112-99 changed the US countervailing duty law and thereby effected an advance in a rate of duty or imposed a new or more burdensome requirement within the meaning of that provision, or whether Section 1 merely clarified existing law and effected no such advance or imposition of a requirement. We recall that the relevant baseline of comparison in this case is Section 701(a) of the US Tariff Act, as interpreted by US courts and interpreted and applied by the USDOC.⁶³⁶ Our foregoing examination of the relevant elements of US countervailing duty law on the basis of the Panel record has highlighted that the text of the relevant legal instruments, the USDOC's practice and its consistency in interpreting and applying the US countervailing duty law with respect to imports from NME countries, the relevant judicial pronouncements of US courts, and the opinions of legal experts presented by the participants, are amenable to different readings. Our task has been made difficult because the Panel, as a consequence of its erroneous interpretation of the relevant baseline of comparison under Article X:2, and its consequential focus on the USDOC's practice after 2006, did not adequately examine all relevant elements of US countervailing duty law that would have assisted us in arriving at a conclusion on the basis of the correct interpretation of Article X:2. The Panel failed properly to analyse, and did not address in its findings, the nature of pre-2006 USDOC practice and its consistency with post-2006 practice and the relevant judicial pronouncements on the applicability of US countervailing duty law to NME countries."⁴⁶

41. In *EC – Seal Products*, Canada and Norway requested the Appellate Body to complete the analysis and find that the EU Seal Regime constituted a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement, should it find that the Panel erred in determining that the EU Seal Regime laid down "product characteristics" and/or "applicable administrative provisions" within the meaning of Annex 1.1. Although, the Appellate Body reversed the Panel's findings, it stated that it was not in a position to complete the legal analysis:

"[T]he Appellate Body has refrained from completing the legal analysis in view of the novel character of an issue which the panel 'had not examined at all' and on which the Panel had made no findings. Importantly, it has not completed the analysis in the absence of a full exploration of issues before the panel that might have given rise to concerns about the parties' due process rights. We believe that all these elements are present in this case. We further note that the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues. Although we explored the issue of whether the EU Seal Regime lays down related PPMs with the participants and third participants at the oral hearing, and while the participants' answers to the Division's questions did shed at least some light on the issue, we consider that in order to develop an interpretation of that phrase in the first sentence of Annex 1.1 and in order to reach a conclusion in this respect regarding the EU Seal Regime, more argumentation by the participants and exploration in questioning would have been required. The Panel has made no findings on this issue and the question was not explored by the Panel. Moreover, the complainants focused in their argumentation on the issue of whether the EU Seal Regime lays down 'product characteristics' and 'applicable administrative provisions' within the meaning of Annex 1.1. In these circumstances, we do not consider it appropriate to complete the

⁴⁵ Appellate Body Report, *Canada – Autos*, para. 145.

⁴⁶ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 4.182.

legal analysis by ruling on whether the EU Seal Regime lays down 'related processes and production methods' within the meaning of Annex 1.1 to the TBT Agreement."⁴⁷

42. In *EC – Asbestos*, the Appellate Body specified the conditions under which it would hold itself competent to "complete the analysis" of a panel. It held that it would do so when there were sufficient factual findings made by the Panel and the additional analysis required was "closely related" to the findings actually made by the Panel:

"As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU. However, we have insisted that we can do so only if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.

The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that 'the first and second sentences of Article III:2 are *closely related*' and that those two sentences are 'part of a *logical continuum*.' (emphasis added)⁴⁸

43. The Appellate Body in *EC – Asbestos* then noted that the rules it would have had to apply, had it decided to "complete the analysis" in the present case, would have meant applying provisions which had "not previously been the subject of any interpretation or application by either panels or the Appellate Body". Ultimately, the Appellate Body decided not to complete the panel's analysis in this respect:

"In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. We observe that, although the *TBT Agreement* is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.

As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel."⁴⁹

44. Similarly, in *US – Hot-Rolled Steel*, the Appellate Body could not complete the analysis of the Panel:

"In these circumstances, Japan requests that we rule on its claim, under Article 2.4 of the *Anti-Dumping Agreement*, that, in relying on downstream sales, USDOC failed to make proper 'allowances' in respect of the additional costs and profits of the downstream sellers, reflected in the price of these sales. ...

...

⁴⁷ Appellate Body Report, *EC – Seal Products*, para. 5.69.

⁴⁸ Appellate Body Report, *EC – Asbestos*, paras. 78-79.

⁴⁹ Appellate Body Report, *EC – Asbestos*, paras. 80-81.

Our examination of this issue must be based on the factual findings of the Panel or uncontested facts in the Panel record. As the Panel did not examine this issue, and as the parties do not agree on the relevant facts, we find that there is not an adequate factual record for us to complete the analysis by examining Japan's claim under Article 2.4 of the *Anti-Dumping Agreement*."⁵⁰

45. Also, in *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Appellate Body could not complete the Panel's analysis in the absence of factual findings in the record:

"[T]he Panel did not find it necessary to make any factual findings on the costs of production and the facts relating to this issue were not the subject of agreement between the parties. Moreover, the Panel proceedings were conducted without the parties arguing their case, or the Panel making enquiries, from the perspective of the average total cost of production standard we have adopted.

In these circumstances, we are unable to complete the analysis by determining whether the supply of CEM involves 'payments' under Article 9.1(c) of the *Agreement on Agriculture*. Yet, we do not wish to be understood as holding that the supply of CEM does *not* involve 'payments' under Article 9.1(c). We are simply not in a position to make a ruling on this issue."⁵¹

46. In *US – Section 211 Appropriations Act*, on the contrary, the Appellate Body found sufficient factual findings in the record of the Panel so as to be able to complete its analysis:

"In the past, we have completed the analysis where there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable us to do so, and we have not completed the analysis where there were not. In one instance, we declined to complete the analysis with respect to a 'novel' issue that had not been argued in sufficient detail before the panel.

...

[W]e conclude that the Panel record contains sufficient factual findings and facts undisputed between the participants to permit us to complete the analysis regarding the consistency of Sections 211(a)(2) and (b) – in respect of trade names – with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement*, with Article 4 of the *TRIPS Agreement*, with Article 42 of the *TRIPS Agreement*, and with Article 2.1 of that Agreement in conjunction with Article 8 of the Paris Convention (1967)."⁵²

47. In *US – Steel Safeguards*, the Appellate Body after considering whether it needed to complete the Panel's analysis, decided that it was not necessary.⁵³

48. In *US – Softwood Lumber IV*, the Appellate Body could not complete the Panel's analysis in the absence of sufficient factual findings:

"[W]e are unable to complete the legal analysis of Canada's claim that the United States acted inconsistently with Article 14(d) of the *SCM Agreement*. We observe, in this regard, that panels sometimes make alternative factual findings that serve to assist the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel, but this is not the case in the Panel Report before us."⁵⁴

⁵⁰ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 174 and 180.

⁵¹ Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 235-236.

⁵² Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 343 and 352. See also Appellate Body Reports on *US – Upland Cotton (Article 21.5 – Brazil)*, para. 296; *India – Additional Import Duties*, para. 204; and *US – Continued Zeroing*, para. 187, where the Appellate Body recalled its previous findings which clarified in which instances it could complete an analysis.

⁵³ Appellate Body Report, *US – Steel Safeguards*, paras. 430-431.

⁵⁴ Appellate Body Report, *US – Softwood Lumber IV*, para. 118.

49. In *US – Gambling*, the Appellate Body indicated that a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis:

"Provided that it complies with its duty to assess a matter objectively, a panel enjoys the freedom to decide which legal issues it must address in order to resolve a dispute. Moreover, in some instances, a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis, as, for example, in this case".⁵⁵

50. In *EC – Export Subsidies on Sugar*, the Appellate Body declined to complete the legal analysis and to examine the Complaining Parties' claims under the SCM Agreement left unaddressed by the Panel. The Appellate Body begun by reviewing previous case law on this matter:

"In several previous disputes, the Appellate Body examined an issue 'not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties'. However, the Appellate Body has declined to complete the legal analysis where 'the factual findings of the panel and the undisputed facts in the panel record' did not provide a sufficient basis for the legal analysis by the Appellate Body. Moreover, as Article 17.6 of the DSU limits appeals to 'issues of law covered in the panel report and legal interpretations developed by the panel', the Appellate Body has also previously declined to complete the legal analysis of a panel in circumstances where that would involve addressing claims 'which the panel had not examined at all'. In addition, the Appellate Body has indicated that it may complete the analysis only if the provision that a panel has not examined is '*closely related*' to a provision that the panel has examined, and that the two are 'part of a *logical continuum*'. "⁵⁶

51. With respect to the specific facts of *EC – Export Subsidies on Sugar*, the Appellate Body explained that the complaining parties' claims under the SCM Agreement were not closely related to their claims under the Agreement on Agriculture, that the issues raised by these claims were not sufficiently explored before the Panel, and that it did not have the requisite factual findings to complete legal analysis:

"Turning to the specific case before us, we note that the Complaining Parties argue that their claims under the SCM Agreement are closely related to their claims under the Agreement on Agriculture. We are not persuaded, however, that Articles 3, 8, and 9.1 of the Agreement on *Agriculture*, on the one hand, and Articles 3.1(a), 3.2, and items (a) and (d) of the Illustrative List of the *SCM Agreement*, on the other hand, are 'closely related, because the issues presented under the two Agreements are different in several respects.

Furthermore, in the instant case, we note that the Panel made reference to the limited arguments made by the Complaining Parties under the *SCM Agreement*: ... Although, on appeal, the Complaining Parties did argue their claims under the *SCM Agreement* to some extent, they did not address, in a sufficient manner, the question whether Article 3 of the *SCM Agreement* applies to export subsidies listed in Article 9.1 of the *Agreement on Agriculture* that are provided to *scheduled* agricultural products in excess of a responding Member's commitment levels ... the question of the applicability of the *SCM Agreement* to the export subsidies in this dispute raises a number of complex issues. We also consider that, in the absence of a full exploration of these issues, completing the analysis might affect the due process rights of the participants.

Moreover, we do not have the requisite factual findings to complete the legal analysis. In particular, we do not have sufficient facts before us, as would be necessary to specify the period of time for withdrawal, as required by Article 4.7 of

⁵⁵ Appellate Body Report, *US – Gambling*, para. 344.

⁵⁶ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 337.

the *SCM Agreement*. We note in this respect that, when specifying what period would represent 'without delay', panels have taken into account, *inter alia*, 'the nature of the measures and the difficulties likely to be faced in implementing the recommendation'. Based on our reading of the Panel Reports and the Panel record, we fail to see any evidence therein regarding the nature of the measures that would be required to 'withdraw' the subsidy, which would permit us to make a recommendation under Article 4.7."⁵⁷

52. In *EC – Selected Customs Matters*, the Appellate Body considered that general observations made by the Panel, in the context of an analysis based on a narrow interpretation of the measure at issue and the claim set out in the panel request that the Appellate Body reversed, did not provide a sufficient foundation to complete the analysis with respect to a broader claim:

"It is well settled that the Appellate Body will be in a position to complete the legal analysis if it has before it sufficient factual findings of the panel or undisputed facts on the panel record. In this case, the Panel did not examine the United States' claim that the measures at issue, collectively, are administered in a non-uniform manner. Therefore, we have to consider whether the factual findings or general observations made by the Panel with respect to the claims it did examine, can be utilized in the context of completing the analysis ...

... Accordingly, it appears to us that these general observations of the Panel do not constitute a sufficient foundation of factual findings or undisputed facts upon which we can rely for completing the analysis.

Further, as we said above, these general observations by the Panel with respect to the institutions and mechanisms involved in the administration of European Communities customs law were made in the context of an analysis based on the Panel's narrow interpretation of the measure at issue and the claim set out in the panel request. We have reversed this interpretation of the Panel...Moreover, the Panel examined the operation of these institutions and mechanism in isolation and did not discuss how these institutions and mechanism interact in the administration of the European Communities customs law. Finally, given the breadth and the nature of the claim set out by the United States in the panel request, we are of the view that paragraphs 7.157 to 7.191 of the Panel Report do not constitute a sufficient basis to enable us to complete the analysis"⁵⁸

53. In *Japan – DRAMs (Korea)*, the Appellate Body indicated that it was not in a position to complete the Panel's analysis:

"We note that neither participant has requested, in its written submission, that we complete the legal analysis by undertaking our own review of the JIA's finding of entrustment or direction if we were to reverse the Panel's finding of inconsistency with Article 1.1(a)(1)(iv) of the *SCM Agreement*. At the oral hearing, Korea tentatively suggested that we complete the analysis but recognized the difficulty of such a task. We do not consider that the participants have addressed sufficiently, in their submissions, those issues we might need to examine in order to complete the analysis in this case, including the probative value of certain evidence not considered by the Panel. In these circumstances, we are not in a position to, and therefore do not, complete the analysis to reach our own conclusion on the consistency of the JIA's determination of entrustment or direction with Article 1.1(a)(1)(iv) of the *SCM Agreement*."⁵⁹

54. In *US/Canada – Continued Suspension*, the Appellate Body concluded that because of numerous flaws in the analysis of the Panel and the highly contested nature of the facts, it was not possible to complete the analysis with regard to certain factual issues:

⁵⁷ Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 338-340.

⁵⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 278 and 285-286.

⁵⁹ Appellate Body Report, *Japan – DRAMs (Korea)*, para. 142.

"Having reversed the Panel, we must now determine whether we can complete the analysis by reviewing ourselves the consistency of the European Communities' risk assessment relating to oestradiol-17 β with Article 5.1 of the *SPS Agreement*. In the past, the Appellate Body has completed the analysis when there were sufficient factual findings by the panel or undisputed facts on the Panel record to enable it to do so. In light of the numerous flaws we have found in the Panel's analysis and the highly contested nature of the facts, we do not consider it possible to complete the analysis in this case. Thus, we make no findings on the consistency or inconsistency of the European Communities' import ban relating to oestradiol-17 β .

...

Given the numerous flaws that we identified in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis. Thus, we make no findings on the consistency or inconsistency of the European Communities' provisional SPS measure relating to progesterone, testosterone, zeranol, trenbolone acetate and MGA."⁶⁰

55. In *US – Continued Zeroing*, the Appellate Body found that it was not in a position to complete the analysis whenever the Panel's findings and undisputed facts were insufficient:

"We recognize the important limitation on our ability to complete the analysis. We have accordingly adopted, for the purpose of this dispute, a cautious approach. Thus, only where the Panel has made clear findings of fact concerning the use of the zeroing methodology, without interruption, in different types of proceedings over an extended period of time, have we considered these findings sufficient for us to complete the analysis and to make findings regarding the continued application of zeroing in these cases. By contrast, we have not completed the analysis where the factual findings are absent in respect of the use of the zeroing methodology in each of the successive proceedings whereby the duties are maintained, or where there are insufficient factual findings to indicate that zeroing has been repeatedly applied. In such circumstances, an examination of the facts, as well as a determination as to what conclusions may be drawn from the remaining evidence in the record, would be more appropriately conducted by a panel, with the assistance of the parties."⁶¹

56. In light of this finding, the Appellate Body did not complete the analysis on several issues.⁶²

57. In *Australia – Apples*, the Appellate Body, when deciding whether it could complete the analysis and rule on New Zealand's claim under Article 5.6 of the SPS Agreement, found that it was unable to identify sufficient uncontested facts or factual findings by the Panel to enable it to make findings concerning the level of risk associated with certain New Zealand's alternative measures.⁶³

58. In *US – Anti Dumping and Countervailing Duties (China)*, the Appellate Body stated that it was "mindful that it may only complete the analysis to the extent that there [were] sufficient factual findings by the Panel or undisputed facts on the Panel record".⁶⁴ The Appellate Body also recalled its settled jurisprudence, whereby:

"When the factual findings of the panel and the undisputed facts in the panel record provide the Appellate Body with a sufficient basis for its own analysis, the Appellate Body may complete the analysis with a view to facilitating the prompt settlement of the dispute".⁶⁵

⁶⁰ Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 620 and 735.

⁶¹ Appellate Body Report, *US – Continued Zeroing*, para. 195.

⁶² Appellate Body Report, *US – Continued Zeroing*, paras. 193-194.

⁶³ Appellate Body Report, *Australia – Apples*, paras. 385, 402.

⁶⁴ Appellate Body Report, *US – Anti Dumping and Countervailing Duties (China)*, para. 342.

⁶⁵ Appellate Body Report, *US – Anti Dumping and Countervailing Duties (China)*, paras. 528 and 598.

59. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body stated that it has exercised "restraint" in deciding whether to complete the analysis in past disputes:

"We note that the Appellate Body has exercised restraint in deciding whether to complete the legal analysis in past disputes. The Appellate Body has emphasized that it can complete the analysis only if the factual findings by the panel, or the undisputed facts on the panel record, provide a sufficient basis for the Appellate Body to do so. Where this has not been the case, the Appellate Body has declined to complete the analysis."⁶⁶

1.6 Article 17.9: Working procedures of the Appellate Body

60. See the Section on "Working Procedures for Appellate Review".

61. In *US – Lead and Bismuth II*, the Appellate Body examined whether it could admit *amicus curiae* briefs. The Appellate Body confirmed its broad authority to adopt procedural rules:

"[Article 17.9 of the DSU] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."⁶⁷

1.7 Article 17.10: Confidentiality requirements on the Appellate Body proceedings

62. In *Brazil – Aircraft*, the Appellate Body addressed the issue of the confidentiality obligation applicable to the Appellate Body members and staff as well as to WTO Members at large. It also emphasized the ordinary meaning of the word "proceedings":

"With respect to appellate proceedings, in particular, the provisions of the DSU impose an obligation of confidentiality which applies to WTO Members generally as well as to Appellate Body Members and staff. In this respect, Article 17.10 of the DSU states, without qualification, that '[t]he *proceedings* of the Appellate Body *shall be confidential*.' (emphasis added) The word 'proceeding' has been defined as follows:

In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, *including all possible steps in an action from its commencement to the execution of judgment*. (emphasis added).

More broadly, the word 'proceedings' has been defined as 'the business transacted by a court'. In its ordinary meaning, we take 'proceedings' to include, in an appellate proceeding, any written submissions, legal memoranda, written responses to questions, and oral statements by the participants and the third participants; the conduct of the oral hearing before the Appellate Body, including any transcripts or tapes of that hearing; and the deliberations, the exchange of views and internal workings of the Appellate Body."⁶⁸

63. Having recalled the provisions of Article 17.10 of the DSU which contains rules protecting the confidentiality of written submissions and information submitted to it, the Appellate Body, in *Brazil – Aircraft*, went on to assess the scope of the confidentiality requirements thereunder:

"Article 18.2 of the DSU also contains rules protecting the confidentiality of written submissions and information submitted to the Appellate Body:

⁶⁶ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1140.

⁶⁷ Appellate Body Report, *US – Lead and Bismuth II*, para. 39.

⁶⁸ Appellate Body Report, *Brazil – Aircraft*, para. 121.

'Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.' (emphasis added)

...

Finally, we wish to recall that Members of the Appellate Body and its staff are covered by Article VII:1 of the *Rules of Conduct*, which provides:

Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. (emphasis added)."⁶⁹

64. In *Australia – Apples*, the Appellate Body granted a request by the participants to allow public observation of the oral hearing. In the context of a procedural ruling regarding this request, the Appellate Body summarized its reasoning on this issue in prior cases, including its reasoning on Article 17.10:

"We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in five previous appeals. In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. The Appellate Body has reasoned that:

(a) The confidentiality rule in the first sentence of Article 17.10 of the DSU must be read in the light of its context, particularly Article 18.2 of the DSU, which does not preclude a participant from foregoing confidentiality and, instead, disclosing statements of its own positions to the public. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings, and thus suggests that the confidentiality rule in Article 17.10 has limits.

(b) The confidentiality requirement in Article 17.10 operates in a relational manner. Different sets of relationships are implicated in appellate proceedings, including: (i) a relationship between the participants and the Appellate Body; and (ii) a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body be confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants, as well as the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. When participants request to forego confidentiality protection for their communications with the Appellate Body at the oral hearing, the right to confidentiality of third participants vis-à-vis the Appellate Body is not implicated, because such request does not extend to any communications, nor touch upon the relationship, between the third participants and the Appellate Body.

⁶⁹ Appellate Body Report, *Brazil – Aircraft*, paras. 122 and 124.

(c) Pursuant to Rule 27 of the *Working Procedures*, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the request of the participants provided that this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process. The active participation of third participants in oral hearings has been fostered in the *Working Procedures* and in practice; yet the rights of third participants are distinct from those of the participants in an appellate proceeding.

(d) Although certain elements of confidentiality are incapable of derogation, the confidentiality of statements by participants at an oral hearing in an appeal is not of such a nature."⁷⁰

1.8 Article 17.11: concurring and separate opinions

1.8.1 Table of individual opinions in Appellate Body reports to date

65. For a table providing information on individual opinions in Appellate Body reports (and panel reports and Article 22.6 decisions), see the chapter of the Analytical Index on "DS information tables".

1.9 Article 17.12: "shall address each of the issues raised"

66. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body, while not making reference to Article 17.12, implied that expressly exercising judicial economy amounted "addressing" a claim (or objection):

"[H]ad we been satisfied that Mexico did, in fact, explicitly raise its objections before the Panel, then the Panel may well have been required to 'address' those objections, whether by virtue of Articles 7.2 and 12.7 of the DSU, or the requirements of due process."⁷¹

67. In several cases, the Appellate Body has found that Article 17.12 does not preclude it from exercising judicial economy. For example, in *US – Upland Cotton*, the Appellate Body considered it unnecessary to develop interpretations of certain terms for the purposes of resolving the dispute:

"Nor do we believe that it is necessary to make a finding on the interpretation of the phrase 'world market share' in Article 6.3(d) of the SCM Agreement. We recall that Article 17.12 of the DSU requires that the 'Appellate Body shall address each of the issues raised in accordance with paragraph 6 [of Article 17] during the appellate proceeding'. ... For its part, Article 3.4 of the DSU provides that '[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter'. Similarly, Article 3.7 states that '[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute'. ...

...

With this in mind, we observe that although an interpretation by the Appellate Body, in the abstract, of the meaning of the phrase 'world market share' in Article 6.3(d) of the SCM Agreement might offer at best some degree of 'guidance' on that issue, it would not affect the resolution of this particular dispute. Indeed, irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB, we find no compelling reason for doing so in this case.

⁷⁰ Appellate Body Report, *Australia – Apples*, Annex III, para. 4.

⁷¹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 49.

Accordingly, we believe that an interpretation of the phrase 'world market share' in Article 6.3(d) of the SCM Agreement is unnecessary for purposes of resolving this dispute. We emphasize that we neither uphold nor reverse the Panel's findings on the interpretation of the phrase 'world market share' in Article 6.3(d) of the SCM Agreement."⁷²

1.10 Article 17.13: "may uphold, modify or reverse the legal findings and conclusions of the panel"

1.10.1 Panel finding not appealed not implicitly upheld

68. In *Canada – Periodicals*, the Appellate Body stressed that "a Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body. Such a finding may be examined by the Appellate Body when the issue is raised properly in a subsequent appeal".⁷³

1.10.2 Appellate Body may declare a Panel findings "moot" and of "no legal effect"

69. In certain circumstances, the Appellate Body's analysis may declare a panel's findings moot and of no legal effect, rather than upholding, modifying or reversing those findings. For example, in *Brazil – Aircraft (Article 21.5 – Canada)*, the Appellate Body stated that:

"As Brazil has failed to prove one of the elements necessary to prove that payments made under the revised PROEX are justified by item (k), we do not believe it is necessary to examine the issue of whether export subsidies under the revised PROEX are 'the payment [by governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits' within the meaning of the first paragraph of item (k). Therefore, we do not address the Article 21.5 Panel's findings on this issue. These findings of the Article 21.5 Panel are moot, and, thus, of no legal effect."⁷⁴

In *US – Certain EC Products*, the Appellate Body stated that:

"Having found that the 3 March Measure is the measure at issue in this dispute, and that the 19 April action is outside its terms of reference, the Panel should have limited its reasoning to issues that were relevant and pertinent to the 3 March Measure. By making statements on an issue that is only relevant to the 19 April action, the Panel failed to follow the logic of, and thus acted inconsistently with, its *own* finding on the measure at issue in this dispute. The Panel, therefore, erroneously made statements that relate to a measure which it had *itself* previously determined to be outside its terms of reference.

For these reasons, we conclude that the Panel erred by making the statements in paragraphs 6.121 to 6.126 of the Panel Report on the mandate of arbitrators appointed under Article 22.6 of the DSU. Therefore, these statements by the Panel have no legal effect."⁷⁵

70. In *US – Cotton Yarn*, the United States appealed against the Panel's interpretation that Article 6.4 of the Agreement on Textiles and Clothing required attribution to all Members the imports from whom cause serious damage or actual threat thereof. The Appellate Body stated that:

"The Panel considered it necessary, in its reasoning, to rule on the broader interpretative question of whether Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof. The United States also appeals the Panel's interpretation on this broader question. However, our findings resolve the dispute as defined by Pakistan's claims before the Panel. We, therefore, do

⁷² Appellate Body Report, *US – Upland Cotton*, paras. 508 and 510-511. See also Appellate Body Report, *US – Upland Cotton*, paras. 695, 745-748, and 761-762.

⁷³ Appellate Body Report, *Canada – Periodicals*, fn 28 to para. 19.

⁷⁴ Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 78.

⁷⁵ Appellate Body Report, *US – Certain EC Products*, paras. 89-90.

not rule on the issue of whether Article 6.4 requires attribution to all Members the imports from whom cause serious damage or actual threat thereof. In these circumstances, the Panel's interpretation on this question is of no legal effect."⁷⁶

1.10.3 "legal findings and conclusions"

71. In *US – Wool Shirts and Blouses*, the Appellate Body declined to address a particular statement by the Panel appealed by India. The Appellate Body held that the statement was not a legal finding, but rather a "descriptive and gratuitous comment":

"India appealed the following statement relating to Article 6.10 of the ATC at paragraph 7.20 of the Panel Report:

'During the review process, the TMB is not limited to the initial information submitted by the importing Member as parties may submit additional and other information in support of their positions, which, we *understand*, may relate to subsequent events.' (emphasis added)

In our view, this statement by the Panel is purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions. We do not consider this comment by the Panel to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'.⁷⁷

72. In *EC – Poultry*, the Appellate Body addressed the issue of the allocation of a tariff-rate quota share to a non-Member and the participation of non-Members in the "others" category of a tariff-rate quota. In this context the Appellate Body stated that it was mindful of the mandate under Article 17.6 of the DSU and held that, contrary to Brazil's claim, the Panel had not made any legal findings on this issue:

"It is true that in footnote 140 of the Panel Report, the Panel states that paragraph 7.75 of the *EC – Bananas* panel reports and 'particularly the use of the phrase 'all suppliers other than Members with a substantial interest in supplying the product' ... indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted'. We do not consider this comment made in a footnote by the Panel to be either a 'legal interpretation developed by the panel' within the meaning of Article 17.6 of the DSU or a 'legal finding' or 'conclusion' that the Appellate Body may 'uphold, modify or reverse' under Article 17.13 of the DSU. It is undisputed in this case that there is no *allocation* of a country-specific share in the tariff-rate quota to a non-Member. There is, therefore, no finding nor any 'legal interpretation developed by the panel' that may be the subject of an appeal of which the Appellate Body may take cognizance."⁷⁸

73. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body indicated that it was not clear that certain statements made by the Panel in that case could be characterized as "findings" on issues of law or legal interpretation:

"At the outset, we note that China's appeal concerns *statements* made by the Panel in order to clarify the narrow and fact-specific nature of its finding of violation of Article 2.2 of the *SCM Agreement*. These statements identify certain unanswered questions and posit that, *if* evidence relevant to those questions existed, and *if* it had been placed on the record before the USDOC, this 'might have' resulted in a finding of regional specificity consistent with Article 2.2.

⁷⁶ Appellate Body Report, *US – Cotton Yarn*, para. 127.

⁷⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 17.

⁷⁸ Appellate Body Report, *EC – Poultry*, para. 107.

Whether or not these statements by the Panel can be characterized as 'findings' on issues of law or legal interpretations, they were very much focused on the particular facts of the LWS investigation, and it is clear to us that they were *obiter* in nature."⁷⁹

1.11 Article 17.14

1.11.1 Time period between circulation of Appellate Body report and its adoption

74. For information on the number of days between circulation of the Appellate Body report and its adoption in cases to date, see the chapter of the Analytical Index on "DS information tables".

1.11.2 Legal effect of adopted Appellate Body reports

75. In *US – Shrimp (Article 21.5 – Malaysia)* the Appellate Body referred to its ruling in *Japan – Alcoholic Beverages II* and considered that the same reasoning applied to Appellate Body reports:

"[W]e note that in our Report in *Japan – Taxes on Alcoholic Beverages*, we stated that:

'Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.'

This reasoning applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning. Further, we see no indication that, in doing so, the Panel limited itself merely to examining the new measure from the perspective of the recommendations and rulings of the DSB."⁸⁰

76. In *US – Softwood Lumber V*, the United States requested that the Appellate Body not import wholesale the findings and reasoning from the Appellate Body report on *EC – Bed Linen* on the grounds that it was not a party to that dispute, that the arguments raised in that case were different and that the United States' practice of zeroing was not at issue in that appeal. The complainant, Canada, disagreed. The Appellate Body after referring to its prior reports on *Japan – Alcoholic Beverages II* and *US – Shrimp (Article 21.5 – Malaysia)* and to Article 3.2 of the DSU, indicated that they had given full consideration to the particular facts of the case before them and to the arguments raised by the United States on appeal, as well as to those raised by Canada and the third participants. The Appellate Body said that, in doing so, they "have taken into account the reasoning and findings contained in the Appellate Body Report in *EC – Bed Linen*, as appropriate".⁸¹

77. The Appellate Body in *EC – Bed Linen*, on a plain reading of Article 17.14 provisions held that an adopted Appellate Body Report must be treated as a *final resolution* to a dispute between the parties to that dispute. Unappealed findings are also subject to similar treatment:

"[A]n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim."⁸²

78. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body stated that:

⁷⁹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 420-421.

⁸⁰ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109.

⁸¹ Appellate Body Report, *US – Softwood Lumber V*, para. 112.

⁸² Appellate Body Report, *EC – Bed Linen*, para. 93.

"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."⁸³

79. In *US – Stainless Steel (Mexico)*, the Panel disagreed with the Appellate Body on whether "zeroing" is prohibited in the calculation of anti-dumping margins. On appeal, the Appellate Body explained it was "deeply concerned" by the Panel's decision. While noting that its reports are not binding beyond the relevant disputes, the Appellate Body panels are not free to disregard the reasoning in such reports:

"It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. ...

In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body clarified that this reasoning applies to adopted Appellate Body reports as well. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body held that '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.'

80. The Appellate Body in *US – Stainless Steel (Mexico)* then elaborated on the reasons justifying its approach:

"Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.

In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review 'issues of law covered in the panel report and legal interpretations developed by the panel'. Accordingly, Article 17.13 provides that the Appellate Body may 'uphold, modify or reverse' the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote 'security and predictability' in the dispute settlement system, and to ensure the 'prompt settlement' of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public

⁸³ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.

We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above. Nevertheless, we consider that the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue. Since we have corrected the Panel's erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU."⁸⁴

1.11.3 Disagreement about whether a report was adopted by the DSB

81. In *US – Supercalendered Paper (Article 22.6 – US)*, the Arbitrator recalled that the United States expressed the view that the document WT/DS505/AB/R was not a valid Appellate Body report and objected to its adoption; that Canada's request for authorization to suspend concessions was considered at the DSB meeting held on 29 June 2020; that the United States argued Canada's request to suspend concessions was based on an incorrect premise, namely, that there were valid DSB recommendations adopted; and that Canada responded that the DSB had adopted the Panel Report and the Appellate Body Report in this dispute at its meeting on 5 March 2020, as reflected in the minutes of the DSB meeting and consistent with Article 17.14 of the DSU, which sets forth the negative consensus rule for adoption of reports of the Appellate Body. The Arbitrator did not rule on this issue, but in the introduction to its Decision it noted that, notwithstanding the United States' objection, "the Panel Report and the Appellate Body Report were adopted by the DSB by negative consensus".⁸⁵

Current as of: December 2024

⁸⁴ Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 158-162.

⁸⁵ See Decision by the Arbitrator, *US – Supercalendered Paper (Article 22.6 – US)*, paras. 1.7-1.9.