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1 SECTION II: GOVERNING PRINCIPLE

1.1 Text of Section II

II. Governing Principle

1. Each person covered by these Rules (as defined in paragraph 1 of Section IV below and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.

1.2 "shall be independent and impartial"

1.2.1 Scientific experts

1. In *US – Shrimp*, the Panel selected five scientific experts to advise it on scientific and technical issues, pursuant to Article 13 of the DSU. The Panel noted that:

"[I]n their disclosure forms, three of the proposed experts disclosed what might be considered to be potential conflicts of interest. However, the Panel decided to confirm their appointments being of the view that the disclosed information was not of such a nature as to prevent the individuals concerned from being impartial in providing the scientific information expected of them. The Panel has also taken into account the disclosed information when evaluating the answers provided. The Panel underlined that, in making its choice, it had been guided primarily by the need to gather expertise of the best quality and covering as wide a field as possible. In the small community of sea turtle specialists, it was difficult - if not impossible - to reconcile this need with an agreement by all the parties to the dispute on each and every individual concerned."¹

2. In *US/Canada – Continued Suspension*, the Appellate Body found that the institutional affiliation of two experts appointed by the Panel compromised their appointment and thereby the adjudicative independence and impartiality of the Panel. The Appellate Body focused its analysis largely on Sections II and VI of the Rules of Conduct. The Appellate Body began its analysis by discussing the relationship between "due process" and the Rules of Conduct, including Section II:

"These due process considerations are reflected in the *Rules of Conduct*. Section II (Governing Principle) of the *Rules of Conduct* provides that all covered persons, such as panelists and experts advising panels:

... shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.

¹ Panel Report, *US – Shrimp*, para. 5.7.

Scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel's consideration of the evidence and its review of a domestic measure, especially in cases like this one involving highly complex scientific issues. Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel's ability to act as an independent adjudicator. For these reasons, we agree with the view of the European Communities that the protection of due process applies to a panel's consultations with experts. This due process protection applies to the process for selecting experts and to the panel's consultations with the experts, and continues throughout the proceedings."²

3. The Appellate Body found that:

"[T]he standard to be applied by panels when selecting experts is whether there is an objective basis to conclude that an expert's independence or impartiality is likely to be affected or there are justifiable doubts about that expert's independence or impartiality."³

4. After considering the evidence relating to two of the appointed experts' institutional affiliation, the Appellate Body concluded as follows:

"We understand that panels often face practical difficulties in selecting experts who have the required level of expertise and whose selection is not objected to by the parties. We do not wish to make the expert selection process more difficult than it may already be. However, experts consulted by a panel can have a decisive role in a case, especially when it involves highly complex scientific questions such as this one. The Panel in this case said 'the role of the experts was to act as an 'interface' between the scientific evidence and the Panel, so as to allow it to perform its task as the trier of fact.' Experts appointed by a panel can significantly influence the decision-making process. If a panel does not ensure that the requirements of independence and impartiality are respected in its consultations with the experts, this can compromise the fairness of the proceedings and the impartiality of the decision-making. In these circumstances, the practical difficulties that a panel may encounter in selecting experts cannot displace the need to ensure that the consultations with the experts respect the parties' due process rights.

For these reasons, we consider that there was an objective basis to conclude that the institutional affiliation with JECFA of Drs. Boisseau and Boobis, and their participation in JECFA's evaluations of the six hormones at issue, was likely to affect or give rise to justifiable doubts as to their independence or impartiality given that the evaluations conducted by JECFA lie at the heart of the controversy between the parties. The appointment and consultations with Drs. Boisseau and Boobis compromised the adjudicative independence and impartiality of the Panel. Therefore, we find that the Panel infringed the European Communities' due process rights as a result of the Panel having consulted with Drs. Boisseau and Boobis as scientific experts."⁴

5. In *Australia – Apples*, Australia objected the selection of one of the experts on the grounds that this expert had a connection with the government of New Zealand. The Panel concluded that "nothing in the objection raised by Australia gave any indication of real or perceived conflicts of interest or any other situation that would have affected the expert's independence and impartiality".⁵ The Panel stated that:

"A panel is responsible for ensuring that the selected experts have the necessary qualifications and expertise, and comply with the requirements for independence, impartiality and avoidance of conflicts of interest. Conversely, it is not enough for a

² Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 435-436.

³ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 454.

⁴ Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 480-481.

⁵ Panel Report, *Australia – Apples*, para. 7.36.

party to simply assert an objection regarding the selection of a particular expert. Any party raising such an objection is expected to explain in what manner the expert's independence or impartiality have been or may be compromised.

It is to be expected that in any specialized area of science, the few knowledgeable experts will frequently engage with each other and may participate in joint research projects, in meetings and conferences, and joint publications. Participation in 'joint research projects and publications' are an indication of the qualifications and specialized scientific expertise that, in accordance with its Working Procedures, the Panel was to use as a basis to select scientific experts. *Per se*, this fact is not enough to call into question a researcher's independence and impartiality, nor is it necessarily evidence of a connection with the government of a party. Nor is the fact that some of those 'joint research projects and publications' may be funded or supported by institutions associated with the government of a Member. This is particularly true, when, as this Panel's considerable difficulty in identifying experts clearly demonstrates, there is a very small number of experts in the field in question. In such a situation it is all the more likely that 'all of the world's experts' will work and collaborate in some way at one time or another. Moreover, the fact that a scientific project or publication is funded by a private organization or a governmental institution is not in itself a reason to call into question the results of the research.

As noted above, the Panel is responsible of enforcing in its proceedings the standards of independence and impartiality contained in the Rules of Conduct for the DSU. Notwithstanding this fact, in the present case, as the party making an objection to the selection of an expert proposed by the Panel, it was Australia's burden to make the case that Dr Cross's participation in a joint research project and publication with researchers from HortResearch New Zealand would call into question Dr Cross's independence and impartiality, or create actual or potential, direct or indirect, conflicts of interest. In the absence of any explanation or evidence from Australia in this regard, the Panel finds no facts to support the conclusion that Dr Cross's participation in the research that led to the publication of the Suckling *et al.* (2007) paper, raises doubts regarding his independence and impartiality or his capacity to provide expert advice to this Panel."⁶

1.2.2 Panelists

6. In *Guatemala – Cement II*, Guatemala alleged that the presence on the Panel of a member who served on *Guatemala – Cement I* detracted from the "objectivity and independence" of the Panel. The Panel issued a preliminary ruling on the issue, in which it considered that it was not competent to rule on the issue, and noted that if Guatemala wished to persist with its concerns, it could avail itself of the procedure provided for in Section VIII of the Rules of Conduct. In the Panel's view, this was the "only proper way" for Guatemala to raise the issue:

"Prior to the first meeting of the Panel with the parties, we issued the following preliminary ruling on this issue through a communication addressed to the parties and third parties, dated 24 February 2000:

'In order to determine whether the substance of Guatemala's preliminary objection is an issue that is susceptible of a ruling by the Panel, we have carefully analysed the provisions of the DSU governing panel composition. It is clear that Article 8.6 of the DSU imposes primary responsibility for panel composition on the parties to the dispute. In cases where the parties are unable to agree on the composition of a panel, such as this one, Article 8.7 of the DSU imposes responsibility for panel composition on the Director General. According to Article 8 of the DSU, therefore, the composition of a panel is determined by the parties to the dispute and, in certain circumstances, by the Director General. Neither Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process. For this reason, we find that we are unable to rule on the substance of the issue raised by Guatemala.

⁶ Panel Report, *Australia – Apples*, paras. 7.32-7.34.

Should Guatemala persist with its substantive concerns regarding the composition of the Panel, Guatemala may avail itself of the procedure provided for in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.'

We are not aware whether Guatemala has decided to avail itself of its right under Article VIII:1 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes to submit evidence of a violation of the obligations of independence or impartiality by a panel member to the Chairman of the DSB. As we indicated in our preliminary ruling, we conclude that this would have been the only proper way for Guatemala to raise the issue. In light of this ruling, we also requested the parties not to submit any further arguments on this issue in subsequent stages of the procedure."⁷

1.3 "shall in no way modify the rights and obligations of Members under the DSU"

7. In *US/Canada – Continued Suspension*, the Panel decided to grant a request to open the panel meetings with the parties and experts for public observation. After reviewing the pertinent provisions of the DSU, the Panel stated:

"Finally, the Panel notes that Article VII of the Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes provides that '[e]ach 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.' The Panel notes that such confidentiality obligation on the covered persons during the panel proceedings is applicable to the extent not inconsistent with the DSU provisions. In this case, the parties waived their right to confidentiality and requested open hearings. As demonstrated above, the Panel accordingly adapted its working procedures by departing from Appendix 3 in a manner consistent with the DSU provisions. Therefore, the Rules of Conduct should not be construed in a manner that would restrict the rights of Members under the DSU. The Panel concludes that Article VII does not prevent the Panel from holding hearings open to observation by the public."⁸

8. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body stated that the DSU and the Rules of Conduct "establish a general confidentiality regime".⁹

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⁷ Panel Report, *Guatemala – Cement II*, paras. 8.12-8.13.

⁸ Panel Reports, *Canada – Continued Suspension*, para. 7.49; *US – Continued Suspension*, para. 7.51.

⁹ *EC and certain member States – Large Civil Aircraft*, Annex III, paras. 8 and 10.