1 ARTICLE 7

1.1 Text of Article 7

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

> 3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

1.2 General

1.2.1 Importance of the terms of reference

1. The Appellate Body in *Brazil – Desiccated Coconut* explained the importance of the terms of reference in the following terms:

> "A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute."[1]

2. In *US – Carbon Steel*, the Appellate Body emphasized that the terms of reference "define the scope of the dispute".[2] Moreover, "pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the panel request, unless the parties agree otherwise".[3]

3. In *EC and certain member States – Large Civil Aircraft*, the Panel observed that the jurisdiction of a panel is established by the panel's terms of reference, governed by Article 7 of the DSU.[4]

4. In *Australia – Apples*, the Panel observed that according to established jurisprudence, it is the panel's terms of reference that "define the scope of a dispute". The Panel also emphasized that "a panel's mandate or terms of reference are determined by the request for the establishment of the panel."[5]

1.2.2 A panel's jurisdiction

5. In *Argentina – Import Measures*, the Appellate Body clarified the function of a panel request:

> "According to Article 7 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel, unless the parties agree otherwise. … The panel request … defines the scope of the dispute and serves to establish and delimit the panel's jurisdiction."[6]

1.2.2.1 Duty to address jurisdictional issues

6. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body described two instances where a panel is obliged to address issues that affect its own jurisdiction:

> "We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that '[t]he vesting of jurisdiction in a

[1] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22.
[2] Appellate Body Report, *US – Carbon Steel*, para. 126.
[3] Appellate Body Report, *US – Carbon Steel*, para. 124. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.11.
[4] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.88.
[5] Panel Report, *Australia – Apples*, para. 2.244.
[6] Appellate Body Report, *Argentina –Import Measures*, para. 5.11. See also Appellate Body Reports, *US – Carbon Steel*, para. 124, *US – Countervailing Measures (China)*, para. 4.6, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6, Panel Report, *Colombia – Ports of Entry*, para. 7.30.

> panel is a fundamental prerequisite for lawful panel proceedings.' For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.
>
> …
>
> [O]ur task is simply to determine whether the 'objections' that Mexico now raises before us are of such a nature that they could have deprived the Panel of its authority to deal with and dispose of the matter. If so, then the Panel was bound to address them on its own motion."[7]

7. In *EC and certain member States – Large Civil Aircraft*, the United States challenged not only individual instances of launch aid / member State financing (LA/MSF), but also the LA/MSF "programme" as a whole. The Panel agreed with the European Communities that the United States failed to demonstrate the existence of an unwritten LA/MSF "programme". On appeal, the Appellate Body found that the alleged measure was not actually identified in the panel request and therefore fell outside of the Panel's terms of reference. The Appellate Body made this finding in the absence of the European Communities having raised this issue, and it stated that:

> "Although the European Union did not raise procedural objections, under Article 6.2 of the DSU, against the United States' challenge to an unwritten LA/MSF Programme before the Panel or in its appellee's submission, 'certain issues going to the *jurisdiction* of a panel are so fundamental that they may be considered at any stage in a proceeding.' In this case, we have deemed it necessary to consider these issues on our own motion."[8]

8. In *US – Clove Cigarettes*, both parties considered that the Panel would not be exceeding its jurisdiction if it included regular cigarettes in the "likeness" analysis under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, notwithstanding that Indonesia's panel request specified that the imported and domestic "like products" in this case were clove cigarettes and menthol cigarettes. The Panel stated that:

> "In spite of the parties' views, we consider that it is necessary for us to examine this issue as it touches upon our jurisdiction. In this respect, the Appellate Body has cautioned panels that there are certain inherent powers to their adjudicative function and that 'panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction.' The Appellate Body has also clarified that 'it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative'. We shall therefore examine whether we would be exceeding our terms of reference if we include regular cigarettes in the likeness analysis."[9]

9. The Panels in *EU – Energy Package*[10] and in *Morocco – Hot-Rolled Steel (Turkey)*[11] also considered it appropriate to examine certain jurisdictional issues on their own initiative.

1.2.2.2 Objections to the panel's jurisdiction

1.2.2.2.1 Timing of objections to the panel's jurisdiction

10. In *US – 1916 Act*, the Appellate Body agreed with the Panel that objections to the Panel's jurisdiction should not be raised at the interim review stage for the first time, although it also agreed with the Panel that certain jurisdictional issues may need to be addressed by the Panel at any time:

---

[7] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.
[8] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 791.
[9] Panel Report, *US – Clove Cigarettes*, para. 7.134.
[10] Panel Report, *EU – Energy Package*, paras. 7.200, 7.215 and 7.221.
[11] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.54-7.57.

> "We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.' We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner."[12]

11. In *US – Offset Act (Byrd Amendment)*, the Appellate Body recalled that "[a]n objection to jurisdiction should be raised as early as possible" and clarified that "it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal."[13]

12. In *EC – Fasteners (China)*, the Appellate Body found that the European Communities' failure to raise a terms of reference claim before the Panel did not bar the European Communities from raising the issue on appeal:

> "Regarding the Panel's terms of reference, the European Union acknowledges that it did not raise its challenge in this respect before the Panel. The Appellate Body has found that parties are required to raise procedural objections 'promptly', but also that matters going to the jurisdiction of a panel are 'fundamental' and can therefore be raised at any stage in a proceeding, including on appeal. If a claim is not within a panel's terms of reference, the panel does not have the jurisdiction to hear the claim. Moreover, a party's failure to raise a timely jurisdictional objection cannot operate to cure such a jurisdictional defect. We therefore find that the European Union's failure to raise its terms of reference claim promptly before the Panel does not bar it from bringing this challenge on appeal."[14]

1.3 Article 7.1

1.3.1 "the matter referred to the DSB"

13. In *Guatemala – Cement I*, the Appellate Body addressed the term "matter" and held that the "matter referred to the DSB" consists of two elements, namely the specific measures at issue and the legal basis of the complaint (claims):

> "The word 'matter' appears in Article 7 of the DSU, which provides the standard terms of reference for panels … when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term 'matter' becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a 'matter' to the DSB: in order to establish a panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a panel' (a 'panel request'). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out 'the matter referred to the DSB'. Thus, 'the matter referred to the DSB' for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the 'matter' identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly.' (emphasis added) The

[12] Appellate Body Report, *US – 1916 Act*, para. 54.
[13] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 208.
[14] Appellate Body Report, *EC – Fasteners (China)*, para. 561.

> '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[15]

14. In *Brazil – Desiccated Coconut*, Brazil argued that the issue of consistency of its countervailing duty measures with Articles I and II of GATT 1994 was not within the special terms of reference of the Panel, and, therefore, should not have been addressed by the Panel. The Appellate Body ultimately found that Articles I and II of GATT 1994 did not apply to the dispute before it, and as a result declined to make a finding on whether claims relating to these provisions were included in the Panel's terms of reference. However, the Appellate Body made the following general statement concerning this issue:

> "We agree, furthermore, with the conclusions expressed by previous panels under the GATT 1947, as well as under the *Tokyo Round SCM Code* and the *Tokyo Round Anti-dumping Code*, that the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference."[16]

15. In *Australia – Apples*, the Panel stated that the panel request constitutes the "matter referred to the DSB", which in turn forms the basis of a panel's terms of reference under Article 7.1 of the DSU.[17]

1.3.1.1 Measures not sufficiently identified in the panel request

16. See cases under Article 6.2 of the DSU.

1.3.1.2 Legal basis of the complaint (claims)

17. As regards the concept of claim, its scope, and the requirement to identify the claims in the request for establishment of a panel pursuant to Article 6.2 of the DSU, see the Section on Article 6.2.

1.4 Article 7.2

1.4.1 "Panels shall address …"

18. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body implied that expressly exercising judicial economy amounts to "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.[44]

---

[44] We recall that, in a different context involving judicial economy, we said that:

> … for purposes of transparency and fairness to the parties, a panel should, … in all cases, address expressly [even] those claims which it declines to examine and rule upon … Silence does not suffice for these purposes.

Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 117."[18]

---

[15] Appellate Body Report, *Guatemala – Cement I*, para. 72. See also ibid. para. 76 which states "the word 'matter' has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two elements: the specific 'measure' and the 'claims' relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU."

[16] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22.

[17] Panel Report, *Australia – Apples*, para. 2.244.

19. In *Mexico – Taxes on Soft Drinks*, Mexico requested that the Panel decline to exercise its jurisdiction in the circumstances of the dispute. The Panel declined Mexico's request, and the Appellate Body upheld the Panel's decision. In the course of its analysis, the Appellate Body stated that:

> "The second paragraph of Article 7 further stipulates that '[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.' The use of the words 'shall address' in Article 7.2 indicates, in our view, that panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[19]

1.4.2 "the relevant provisions"

20. In *Argentina – Footwear (EC)*, Argentina had claimed that the Panel had violated Article 7.2 of the DSU and exceeded its terms of reference, because it had relied on alleged violations of Article 3 of the *Agreement on Safeguards* even though the request for the establishment of a Panel only alleged violations of Articles 2 and 4 of the *Agreement on Safeguards*."[20] In this case, the Appellate Body did not consider that the Panel was wrong to rule on Article 3 of the *Agreement on Safeguards* and stated:

> "We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."[21]

1.4.3 "covered agreement or agreements"

21. In *EC – Hormones (US) (Article 22.6 – EC)*, the Arbitrators stated that:

> "The autonomous quota rights claimed by the US – irrespective of their legal status and consistency with WTO rules -- are not rights under any of the WTO agreements covered by the DSU. The rights thus alleged are derived from bilateral agreements that cannot be properly enforced on their own in WTO dispute settlement."[22]

22. In *EC and certain member States – Large Civil Aircraft*, the Panel noted that Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". The Panel proceeded to rule that it did not have the jurisdiction to make findings with respect to a bilateral Agreement between the United States and the European Communities signed in 1992, as it was not a covered agreement:

> "Article 7.2 of the DSU requires panels to 'address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute.' The 'covered Agreements' cited by the United States in document WT/DS316/2 [the panel request] include the DSU, the GATT 1994 and the SCM Agreement. As the 1992 Agreement is not a covered Agreement cited by the United States in document WT/DS316/2, or contained in the list of covered Agreements in Appendix 1 to the DSU, or one of the

---

[18] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 49 and fn 44.
[19] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.
[20] Appellate Body Report, *Argentina – Footwear (EC)*, para. 71.
[21] Appellate Body Report, *Argentina – Footwear (EC)*, para. 74.
[22] Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 50.

> instruments included in the GATT 1994, we do not have jurisdiction to determine the rights and obligations of the parties under the 1992 Agreement."[23]

23. The Panel in *EC and certain member States – Large Civil Aircraft* also considered the meaning of the expression "covered agreement or agreements" in Article 7.2:

> "[I]t is clear to us that the word 'agreements' in Article 7.2, which is joined to the words 'covered agreement' that immediately precede it by the conjunction 'or', refers to the plural of a 'covered agreement'. Therefore, it should not, as the European Communities suggests, be understood as referring to international agreements that are not WTO covered agreements. As we have already noted in our preliminary ruling, Article 7.2 does not give us jurisdiction to determine the rights and obligations of the parties under non-covered agreements for the purpose of the recommendations or rulings envisaged under Article 11 of the DSU. Such recommendations or rulings must relate to the parties' rights and obligations under the WTO covered agreements, not the rights and obligations of parties under international agreements that are not WTO covered agreements."[24]

1.5 Article 7.3

1.5.1 Special terms of reference

24. In *Brazil – Desiccated Coconut*, upon a request from Brazil for consultations on the terms of reference, the DSB authorized the DSB Chairman to "draw up terms of reference in consultation with the parties, in accordance with Article 7.3 of the DSU". The Philippines and Brazil agreed on the following special terms of reference:

> "To examine, in the light of the relevant provisions in GATT 1994 and the Agreement on Agriculture, the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[25]

1.6 Relationship with other provisions of the DSU

1.6.1 Article 3.3

25. The Panel in *Argentina – Footwear*, in discussing the concept of a "moving target" with respect to a panel's terms of reference, linked this issue with the principle of prompt settlement of disputes set out in Article 3.3.[26]

1.6.2 Article 4

26. In *Korea – Commercial Vessels*, Korea asked the Panel to issue a preliminary ruling that the European Communities had extended the scope of the dispute settlement proceedings by arguing beyond the measures specified in the request for consultations.[27]

1.6.3 Article 6.2

27. See the Section on Article 6.2.

---

[23] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.89
[24] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.324.
[25] Panel Report, *Brazil – Desiccated Coconut*, para. 10. See also WT/DS22/6.
[26] Panel Report, *Argentina – Footwear*, para. 8.41.
[27] See Panel Report, *Korea – Commercial Vessels*, para. 7.2.

1.6.4 Article 19.1

28. In *China – Raw Materials*, the Appellate Body clarified that the "measures" that form part of the "matter" referred to the DSB are the "measures" that may be the subject of recommendations in Article 19.1:

> "A panel is required, under Article 7 of the DSU, to examine the 'matter' referred to the DSB by the complainant in the request for the establishment of a panel, and to make such findings as will assist the DSB in making recommendations. The language in a complainant's panel request is therefore important because 'a panel's terms of reference are governed by the request for establishment of a panel'. Article 19.1 of the DSU establishes a link between a panel's finding that 'a measure is inconsistent with a covered agreement', and its recommendation that the respondent 'bring the measure into conformity'. The 'measures' that may be the subject of recommendations in Article 19.1 are limited to those measures that are included within a panel's terms of reference."[28]

1.7 Relationship with other WTO Agreements

1.7.1 Anti-Dumping Agreement

1.7.1.1 Article 17.4

29. In *Guatemala – Cement I*, the Appellate Body discussed the phrase "the matter referred to the DSB", noting that it bears the same meaning in Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement.[29]

Current as of: December 2024

[28] Appellate Body Reports, *China – Raw Materials*, para. 251.
[29] Appellate Body Report, *Guatemala – Cement I*, para. 72.