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Experts in WTO Dispute Settlement

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This article offers an overview of the procedural and substantive issues that concern the use of experts by World Trade Organization (WTO) panels, ie the WTO tribunals of first instance which are responsible for the management of evidence. The purpose of using experts in WTO dispute settlement is essentially to help panelists understand and evaluate the evidence submitted and the arguments made. Expert opinions can play an important part in the decision-making of panels. *How* experts are used by WTO panels goes to the very nature of the WTO dispute settlement system and this article explores: whether, and the degree to which, assistance/information can be sought/accepted from outside the WTO; the degree of panels' discretion in doing so; panels' responsibility in delineating and maintaining the respective roles for experts/panelists; due process safeguards; and importantly, the related accountability of the WTO dispute system when using outside experts to address its disputes.

1. Introduction

The purpose of using experts (including scientific experts) in World Trade Organization (WTO) dispute settlement (DS) is essentially to help panelists 'understand and evaluate the evidence submitted and the arguments made'.¹ Beyond and related to this underlying need for the use of experts, the question of how science and experts are used by WTO panels (tribunals of first instance) is one which goes to the very nature of the WTO DS system: whether and the degree to which assistance/information can be sought/accepted from outside the institution's dispute settlement bodies or its support staff; the degree of panels' discretion in doing so; panels' responsibility in delineating and maintaining the respective roles for experts/panelists; due process safeguards; and so forth.

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¹ Appellate Body Report, Japan – Measures Affecting the Importation of Apples (*Japan – Apples*) WT/DS245/AB/R adopted 10 December 2003, para 130.

This paper outlines the various forms and ways in which expert and scientific input can come before WTO panels and the different purposes for which this input can be considered. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) which applies to all WTO DS proceedings² provides panels with a general right to seek information or advice—from disputing Members and other sources (Article (13) of the DSU). It also includes specific provisions targeted at the use of expert (including scientific) advice. This has been described as a ‘significant investigative authority’³ which enables panels to ‘shape the processes of fact-finding and legal interpretation’.⁴ The rationale for panels’ authority to seek information/advice and to consult with experts is that this authority is ‘indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant [WTO] agreements”’.⁵ Thus, panels’ broad right to seek and advice under Article 13 of the DSU is foundational to ensuring that panels appropriately effect their core function under Article 11 of the DSU. There is substantial WTO jurisprudence on what Article 11 requires of panels. Suffice it to say that it requires that panels objectively assess the matter so that there are rational bases for their decisions. Recourse to Article 13 may be necessary to achieve this result. In other words, Article 11 ‘regulates a panel’s exercise of its discretion’⁶ and this discretion may concern when and how a panel may exercise its right to request (expert) information pursuant to Article 13.

It is difficult to precisely state the percentage of disputes in which panels have made use of ‘experts’ or ‘science’. This depends on how broadly one defines these terms. For example, as of May 2012, 438 disputes had been initiated.⁷ In some instances, panels were established and composed but they were later terminated (suspended). The figures are as follows: Of the 438 disputes initiated, 163 panels were established and composed in respect of 206 disputes because some disputes were grouped together.⁸ The use of *scientific experts* was made in at least 13 disputes⁹ and input was sought from other

² Although, as we see later, claims under certain of the WTO agreements may be subject to special rules relating to their dispute settlement.

³ Appellate Body Report, Japan – Measures Affecting Agricultural Products (*Japan – Agricultural Products II*) WT/DS76/AB/R adopted 19 November 1996, para 129.

⁴ Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products (*US – Shrimp*) WT/DSWT/DS58/AB/R adopted 6 November 1998, paras 107–110.

⁵ *ibid*, para 106. See also Appellate Body Report, Argentina – Measures Affecting Imports of Footwear, Textiles and Other Items (*Argentina – Textiles and Apparel*) WT/DS56/AB/R and Corr.1 adopted 22 April 1998, paras 82, 84 and 86.

⁶ Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology (*US – Continued Zeroing*) WT/DS350/AB/R adopted 19 February 2009, para 345.

⁷ Many of these 438 disputes did not, or have not yet, progressed beyond the initial consultations stage.

⁸ 190 panels have been established covering 236 disputes. Panel establishment precedes panel composition (and thus the commencement of substantive proceedings).

⁹ See the following panel reports: *Australia – Measures Affecting Importation of Salmon* (*Australia – Salmon*), WT/DS18/R, adopted 6 November 1998, as modified by the Appellate Body Report WT/DS18/AB/R, paras 6.1–6.6, and its related compliance panel proceedings *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* (*Australia – Salmon (Article 21.5 – Canada)*) adopted 20 March 2000, WT/DS18/RW, adopted 20 March 2000, paras 6.1–6.5; *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (*EC – Hormones*), WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Reports WT/DS26/AB/R, WT/DS48/AB/R, paras 8.7–8.8; *Japan – Measures Affecting Agricultural Products* (*Japan – Agricultural Products II*), WT/DS76/R, adopted 19 March 1999, as

international organizations (due to their specialization or expertise) in at least 19 additional disputes.¹⁰ In another dispute, experts were engaged for translation purposes.¹¹ There are also *many* other disputes in which panels have sought or relied on information beyond that submitted to the panel as evidence by the parties, such as that provided by the WTO Secretariat staffs as explained hereafter. This information may not necessarily be ‘expert’ in the sense that panels may not characterize it as such. Panels may not state that their reliance on such information is reliance on expert information *per se* and they may not invoke any of the WTO provisions, discussed below, which were inserted into the WTO rule-book in order to allow the appropriate use of

modified by the Appellate Body Report WT/DS76/AB/R, paras 6.1–6.4; *Japan – Measures Affecting the Importation of Apples (Japan – Apples)*, WT/DS245/R, adopted 10 December 2003, as modified by the Appellate Body Report WT/DS245/AB/R, paras 6.1–6.4; *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, paras 7.12–7.30; *United States/Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (US/Canada – Continued Suspension)*, WT/DS320/R and WT/DS321/R, adopted 14 November 2008, as modified by the Appellate Body Reports WT/DS320/AB/R, WT/DS321/AB/R, paras 7.55–7.75 (US) and paras 7.53–7.73 (Canada); *Australia – Measures Affecting the Importation of Apples from New Zealand (Australia – Apples)*, WT/DS367/R, adopted 17 December 2010, as modified by the Appellate Body Report WT/DS367/AB/R, paras 1.21–1.40; *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/R, adopted 6 November 1998, as modified by the Appellate Body Report WT/DS58/AB/R, paras 7.9–7.10; *European Communities – Measures Affecting Asbestos and Products Containing (Asbestos EC – Asbestos)*, WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report WT/DS135/AB/R, paras 1.21–1.40. The panels in all of the aforementioned disputes consulted with individual scientific experts in relation to matters pertaining to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), except for the last two which pertained to the General Agreement on Tariffs and Trade (GATT).

¹⁰ The following citations refer to panels reports. Consultation with the International Monetary Fund (IMF): *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions)*, WT/DS90/R, adopted 22 September 1999 as modified by the Appellate Body Report WT/DS90/AB/R, paras 5.11–5.13; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes (Dominican Republic – Import and Sale of Cigarettes)*, WT/DS302/R, adopted 19 May 2005 as modified by the Appellate Body Report WT/DS302/AB/R, para 1.8. Consultation with the World Intellectual Property Organization: *United States – Section 110(5) of US Copyright Act (US – Section 110(5) Copyright Act)*, WT/DS160/R, adopted 27 July 2000, paras 1.7 and 4.1; *United States – Section 211 Omnibus Appropriations Act of 1998 (US – Section 211 Appropriations Act)*, WT/176/R, adopted 2 January 2002 as modified by the Appellate Body Report WT/DS176/AB/R, paras 1.8 and 8.11–8.13; *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (EC – Trademarks and Geographical Indications)*, WT/174/R and WT/DS190/R, adopted 20 April 2005, paras 2.16–2.18; *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WT/362/R, adopted 20 March 2009, paras 2.7–2.9. Consultation with the World Customs Organization: *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)*, WT/DS269/R and WT/DS286/R, adopted 27 September 2005 as modified by the Appellate Body Reports WT/DS269/AB/R and WT/DS286/AB/R, paras 7.52–7.59; *China – Measures Affecting Imports of Automobile Parts (China – Autos Parts)*, WT/DS342/R, adopted 12 January 2009 as modified by the Appellate Body Report WT/DS342/AB/R, paras 2.5–2.6; *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products (EC – IT Products)*, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010, para 2.3. Consultation with the Convention on Biological Diversity, Codex Alimentarius, Food and Agriculture Organization (FAO), International Plant Protection Convention, World Organization for Animal Health, United Nations Environmental Programme, World Health Organization: *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, paras 7.31–7.32. Consultation with the Codex Alimentarius Commission, Joint FAO/WHO Expert Committee on Food Additives (JECFA), International Agency for Research on Cancer: *US/Canada – Continued Suspension*, para 1.7. Consultation with the IMF and the Eastern Caribbean Central Bank: *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU (US – Gambling (Article 22.6 – US))*, WT/285/ARB, circulated 21 December 2007, paras 2.32–2.35. Consultation with the FAO in the following arbitration: Award of the Arbitrator, 1 August 2005, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001 (EC – The ACP-EC Partnership Agreement)*, para 11.

¹¹ Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper (Japan – Film)*, adopted 22 April 1998, paras 1.8–1.11.

expert input. Regardless of the terms employed, reliance on such information could sometimes be considered reliance on expert input however, depending on one's conception of this term.

Section 2 notes the different textual treaty bases (ie legal mechanisms) which permit or oblige panels to consider or accept expert support and/or information and/or advice—thereby demonstrating the reason why experts may be used more frequently in disputes involving certain subject matters or WTO agreements. Some observations on the practice of WTO panels to date are made in Section 3 before turning to comments of a systemic nature in Section 4. Section 5 concludes.

2. Expert Sources in WTO Dispute Settlement

Panelists could be called 'experts' themselves, but they are experts in international trade law and policy matters.¹² WTO disputes can involve other complex technical and scientific issues related to or intertwined with the matters covered in the WTO agreements. Accordingly, the DSU recognizes that panels may require (outside) information, input or assistance in order to effectively resolve a dispute. DSU Article 13 titled 'Right to Seek Information' is the centrepiece of any discussion on the use of experts and science in WTO DS. As mentioned, it provides panels with a right to seek information generally (expert, scientific or otherwise) as well as a more defined right targeted at consultations with experts.

A. Explicit Provision on Experts—DSU Article 13.2

DSU Article 13.2 provides that:

Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

The modalities for such expert review groups (ERGs) provided in Appendix 4 include, *inter alia*, that:

- the panel retains authority over the ERG¹³
- participation in ERGs is 'restricted to persons of professional standing and experience in the field in question',¹⁴

¹² DSU Art 8.1 provides that 'Panels shall be composed of well-qualified governmental and/or non-governmental individuals' before providing an illustrative list of such individuals. There is some more specific guidance for specific types of disputes: Art 4 of the GATS Annex on Financial Services dictate that panelists working on panels dealing with issues relating to prudential issues and financial services shall have the necessary expertise relevant to the specific financial service under dispute.

¹³ This does not affect the independence of ERGs; rather DSU Appendix 4(1) provides that the panel sets ERGs' terms of reference/working procedures and that they report to the panel.

¹⁴ DSU Appendix 4(2).

- only in ‘exceptional circumstances’ where the panel considers that ‘the need for specialized *scientific* expertise cannot be fulfilled otherwise’ and with the parties’ agreement, can citizens of the parties serve on ERGs¹⁵
- ERGs themselves may, in turn, ‘consult and seek information and technical advice from any source they deem appropriate’¹⁶
- Parties have an opportunity to comment on ERGs’ draft reports and ERGs may take those comments ‘into account, as appropriate, in the final [advisory] report’ submitted to the panel (and issued to the parties)¹⁷

Instead of appointing ERGs under the detailed provisions of Article 13.2 and Appendix 4,¹⁸ and notwithstanding the requests of some disputing Members to do so, panels have preferred to seek expert advice from individual experts.¹⁹ Panels may choose to do so in order to avail themselves of a range of opinions from various individual experts, and for cost and efficiency reasons. The Appellate Body (AB; the WTO’s appellate tribunal) has confirmed panels’ discretion in choosing how to consult with experts (either with individual or ERGs) and to establish ad hoc rules for such consultations. Indeed, the AB has expressly stated that Appendix 4 need not apply *per se* to situations where a panel chooses to consult with individual experts.²⁰

B. Other Relevant Provisions

(i) Unspecified experts

As previously indicated, specific rules apply to experts in disputes involving claims under particular WTO agreements.²¹ Similarities and differences exist between the various provisions. The relevant provisions of the *Agreement on Technical Barriers to Trade (TBT Agreement)* speak only of ‘groups of experts’ but otherwise largely resemble those of the DSU relating to ERGs.²² Indeed, TBT Annex 2 also includes procedures which generally mirror those in DSU Appendix 4.²³ On the contrary, the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)* does not speak uniquely of expert groups. While, in certain circumstances, panels are obliged under the SPS Agreement to seek expert advice in some manner or other,²⁴ the establishment of ‘advisory technical expert groups’ remains explicitly discretionary.²⁵

¹⁵ DSU Appendix 4(3). (emphasis added)

¹⁶ DSU Appendix 4(4). Parties are entitled to access to all information provided to an ERG, with certain constraints for confidential information. (DSU Appendix 4(5))

¹⁷ DSU Appendix 4(6).

¹⁸ Expert groups are provided for in the DSU and TBT Agreement.

¹⁹ Even where the agreement in question only refers to ‘groups of experts’, ie the *TBT Agreement*.

²⁰ Appellate Body Report, *EC – Hormones*, para 148.

²¹ DSU Art 1.2 and Appendix 2 mean that these ‘Special and Additional Rules’ apply to the extent that there is a difference with the DSU rules. See also DSU Art 1.2 on the approach in the event of conflicts in disputes involving more than one WTO agreement.

²² See TBT Arts 14(2) and 14(3).

²³ Some minor differences exist in the wording of the procedures. For example, whereas DSU Appendix 4 specifies that an ERGs’ report is ‘advisory’, there is no such statement regarding the reports of ‘technical expert groups’ under the TBT.

²⁴ Namely where the SPS dispute ‘involve[es] scientific or technical issues’. (SPS Art 11.2)

²⁵ Following a discussion with Gretchen Stanton who acted as Chairperson of the SPS negotiating group during the Uruguay Round, it seems that, at that time, the negotiators reviewed the references to expert-related provisions in the TBT Agreement and in the DSU and decided that it was more appropriate to envisage that SPS

(ii) *Specifically-recognized expertise*

Article XV:2 of the General Agreement on Tariffs and Trade (GATT) obliged the then GATT 'contracting parties' and now obliges the WTO Members (acting collectively or as an institutional body such as a panel), to consult with the International Monetary Fund (IMF) when considering 'problems concerning monetary reserves, balances of payments or foreign exchange arrangements'. Article XV:2 also explicitly anticipates that IMF determinations pertaining to factual matters be accepted by the WTO. The modalities for such consultations are not provided for in any provision of the GATT or elsewhere in the WTO Agreement. However, Article 13 of the DSU concerns panels' procedural exercise of their rights with respect to experts. For example, Article XV of GATT requires that consultations take place with the IMF experts in certain instances. When those matters are handled by panels, the manner in which panels will consult experts will be in accordance with the provisions of Article 13 of the DSU.

Interestingly, the WTO agreement on customs valuation (the '*Agreement on Implementation of Article VII*')²⁶ has established an expert body under the auspices of another organization.²⁷ The 'Technical Committee on Customs Valuation' (Technical Committee) is explicitly foreseen as potentially playing an expert role in disputes involving that agreement.²⁸ Its makeup is of note: all WTO Members may be represented at the Technical Committee²⁹ and, where the panel has requested the Technical Committee to examine a technical question, the panel *must consider* its report.³⁰ However, where the Technical Committee is 'unable to reach consensus on a matter referred' to it by the panel in this way, the disputing parties must then be given an opportunity to present the panel with their views on the matter.³¹ Use of this Technical Committee has never been made in the context of a dispute.

The *Agreement on Subsidies and Countervailing Measures (SCM Agreement)* also specifically provides for the use of named experts. To this end, the WTO SCM Committee—open to the participation of all Members—was charged with establishing, and did establish, a 'Permanent Group of Experts' (PGE) comprising 'five *independent* persons, highly qualified in the fields of subsidies and trade relations'.³² Panels are expressly permitted, but not obliged, to

disputes may need expert information and advice from a variety sources. SPS Art 11.2 provides in full: 'In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.' Unlike DSU Appendix 4, the SPS does not set out special procedures for groups.

²⁶ Specifically, Art 18 of the *Agreement on Implementation of Article VII* of the General Agreement on Tariffs and Trade 1994.

²⁷ The World Customs Organization (referred to in the agreement under its former name—the 'Customs Co-operation Council').

²⁸ See Arts 19.3 and 19.4 of the *Agreement on Implementation of Article VII*.

²⁹ Annex 2(5) to the *Agreement on Implementation of Article VII*.

³⁰ Art 19.4 of the *Agreement on Implementation of Article VII* ('[t]he panel shall take into consideration the report...').

³¹ *ibid.*

³² SCM Art 24.3. (emphasis added)

engage the PGE *in order to determine* whether the measure being examined represents a ‘prohibited subsidy’—something which has a particular meaning under the disciplines of the *SCM Agreement*. The *SCM Agreement* provides that the PGE must review the evidence, hear from the responding party, and then report its conclusions to the panel. No panel considering alleged prohibited subsidies has ever made use of this provision. Panels have refrained from its use, presumably given the obligation to accept any PGE conclusions (which would represent legal determinations) ‘without modification’.³³

C. Other de facto Sources of Potential ‘Expert’ and/or Scientific Input

There are other potential (direct and indirect) sources of expert input for panels:³⁴ (i) Assistance/advice from the WTO Secretariat.³⁵ (ii) Parties’ delegations, which are not limited to lawyers, may include experts on diverse matters. These experts, in addition to advising the parties, submit reports and studies to the panel as evidence and attend panel meetings.³⁶ (iii) Panels may receive unsolicited *amicus curiae* briefs prepared by experts.³⁷ (iv) The first paragraph of Article 13 gives panels the broad right to seek ‘information and technical advice from any individual or body which it deems appropriate’³⁸ and, in addition, the first sentence of Article 13.2 allows panels to ‘seek information from any relevant source’. The rationale for Article 13.1 appears to be to enable panels to explore and establish the necessary facts in a dispute. Where information is requested pursuant to Article 13.1, Members must ‘respond promptly and fully... as the panel considers necessary and appropriate’.³⁹ This provision does not only apply to individuals and bodies within a Member’s jurisdiction but to any Member which is a party to the dispute.⁴⁰ As mentioned, this need not necessarily be ‘expert’ information or technical

³³ SCM Art 4.5.

³⁴ In addition, the AB indicated (in 1999) that ‘panels should take into account the deliberations and conclusions’ of WTO committees (comprised of delegates from the membership) in reaching their legal determinations. (See Appellate Body Report, *India – Quantitative Restrictions*, para 103—relating to the Balance of Payments (BOP) Committee). The AB recently (in May 2012) found that a consensus decision of one such committee is in fact a ‘subsequent agreement’ within the meaning of Art 31(3)(a) of the Vienna Convention on the Law of Treaties. (See, Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))* WT/DS381/AB/R adopted 3 June 2012, para 372) Therefore, while such consensus decisions/conclusions are subsequent agreements, the deliberations of the committees may remain relevant as non-binding advice/guidance for panels.

³⁵ DSU Art 27.1: ‘The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and *technical support*.’ (emphasis added) Some commentators (Chad Bown) consider that ‘technical support’ covers economic support whereas Thomas considers that this only extends to ‘incidental administrative matters’. See CA Thomas, ‘Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement’ (2011) 14 *Journal of International Economic Law*, at 317.

³⁶ The delegations of third parties may also add to the expert evidence presented to panels.

³⁷ Technically these are received and considered on the basis of Art 13.1—although they are not initially sought out by panels.

³⁸ DSU Article 13.1.

³⁹ DSU Article 13.1. A Member’s failure to provide the information requested means that the panel may draw adverse inferences by interpreting the factual matter in question to the disadvantage of that Member. See Appellate Body Report *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)* WT/DS70/AB/R adopted 20 August 1999, paras 200–203.

⁴⁰ Appellate Body Report, *Canada – Aircraft*, para 185.

advice, but it could be. The rationale for this provision is to enable a panel to 'seek...information in order to elucidate its understanding of the facts and issues in the dispute before it'.⁴¹

As indicated in Section 1, frequent use has been made of the discretionary right(s) of panels under Article 13 to 'seek information' from parties, international organizations and other sources. The legal basis (where stated at all) for doing so has not always been precisely identified—sometimes Article 13.1 or 13.2 was specified, other times panels have simply relied on 'Article 13'.⁴² This may demonstrate the extent that the same action by panels may be legitimately based under either paragraph and the degree to which labelling an action as the 'seeking of information' does not preclude the possibility that such information may constitute expert input.⁴³

An interesting recent illustration is found in the panel's approach in *US – Clove Cigarettes*. There, the panel relied heavily on a report which was *not* submitted into evidence by the parties (as an exhibit) and which it did not solicit or seek from the relevant body. However, it was part of the legislative process of the defendant. The parties had anticipated this report in their written submissions (which predated the report's publication) and the panel reasoned that it was consistent with DSU Articles 11 and 13 to use the report to corroborate its findings since the 'the report [was] mentioned in the U.S. legislation; the parties referred to it in their submissions to the Panel; and the issuance of the report was widely reported in the media'.⁴⁴ One might say that this report falls under Article 13.2, first sentence which permits panels to 'seek information from *any* relevant source'⁴⁵, without setting out equivalent modalities to be followed as those included in the first paragraph of Article 13 (eg notification to the relevant Member's authorities). Could this report (on the public health impact of menthol cigarettes) be characterized as 'expert' and/or 'scientific' pursuant to Article 13.2 of the DSU? If so, of what significance is it that the panel apparently relied on it without consulting with the disputing parties?⁴⁶

⁴¹ Panel Report, *US – Continued Zeroing*, fn 20 at para 6.20. The panel also made it clear that it would be inappropriate for a panel to seek information on the basis of its own 'judgement as to what information is necessary for a party to prove its case.' (ibid) This does not mean that panels' experts can make the case for any party, see Appellate Body Report *Australia – Salmon*, para 222. See also para 592 of the Appellate Body Report in *US/Canada – Continued Suspension* which highlights panels' mandate of review and the role of experts.

⁴² A review of the disputes where information was sought from international organizations indicates disparity in the basis cited, if cited at all. An example of failing to cite any precise legal basis is: Panel Report, *Japan – Film* WT/DS44/R, adopted 22 April 1998, paras 1.8–1.11, where individual translation experts were appointed.

⁴³ This is also illustrated by one panel which relied on Art 13.2 to seek 'factual or legal information' from a Member not party to the dispute—regarding an agreement between that Member and the responding Member—in order to 'clarify the facts of this dispute and the parties' related legal arguments'. (Letter of the Chairman of the Panel to the Permanent Representative of the European Communities in Geneva, reproduced in Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)* WT/DS34/R adopted 19 November 1999 as modified by Appellate Body Report WT/DS34/AB/R, para 4.1.)

⁴⁴ Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)* WT/DS406/R adopted 24 April 2012 as modified by the Appellate Body Report WT/DS406/AB/R, para 7.228.

⁴⁵ Emphasis added.

⁴⁶ It should be noted that reference to this report appears to have been uncontroversial—no objection was made by either party, either when the interim panel report was released for their comments or later.

3. Experience to Date

A. Generally at a Panel's Discretion

(i) Whether to seek expert input

The *SPS Agreement*, *TBT Agreement* and the agreement on customs valuation explicitly anticipate panels seeking expert advice either on the basis of a party's request or on their own initiative. Examples of both instances exist in practice.⁴⁷ Under the *SPS Agreement* that obliges the seeking of advice from experts where technical or scientific issues are in question, experts (individual) have been appointed in every SPS dispute to date, with the exception of one.⁴⁸ Under all other agreements,⁴⁹ panels' choice to seek information (or technical advice, ie under Article 13.1) and to consult with experts remains discretionary (ie TBT; DSU; SCM; customs valuation agreement). Indeed, panels have refused to acquiesce to parties' requests,⁵⁰ and challenges to such decisions not to acquiesce have often been upheld as constituting the 'due exercise' of panels' discretion.⁵¹

(ii) What to do with expert input

Except in respect of the obligation to accept the PGE's conclusions (and possibly IMF determinations), a panel's discretion extends to its choice whether to 'accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof', to 'ascertain the acceptability and relevancy of information or advice received, and to decide what weight [if any] to ascribe to that information or advice'.⁵²

B. Method of Appointment and Engagement

How experts should be chosen is not set out. It is a very important issue as expert opinions and advice may have a significant influence on panels' decisions and decision-making.⁵³ While the rules governing the appointment of ERGs need not be applied when engaging individual experts, the principles they set out remain relevant, including the provisions relating to the requisite qualifications/standing of experts. While there may be less questions over the

⁴⁷ In *US – Shrimp*, the panel acted on its own initiative.

⁴⁸ See the eleven panel reports cited in n 4. It does not appear that an expert was appointed in the following dispute: Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, (US – Poultry (China)) WT/DS392/R, adopted 25 October 2010.

⁴⁹ With the possible exception of GATT Art XV:2.

⁵⁰ See, eg the panel in *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))* WT/DS121/R adopted 12 January 2000 as modified by Appellate Body Report WT/DS121/AB/R refused to seek expert advice from the IMF and the AB found that it had nevertheless discharged its duty under DSU Art 11.

⁵¹ Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)* WT/DS231/AB/R adopted 23 October 2002, para 302: 'A contravention of the duty under Art 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Art 13.2 of the DSU.'

⁵² n 4, para 104. (original emphasis)

⁵³ Grando notes that panels usually accord the opinions of panel-appointed experts great weight and suggests that a reading of a number of SPS disputes demonstrates the clear impact that the experts' opinions had on the findings made by the panels. See Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) 340.

quality of the advice sought from a specialized international institution (as opposed to an individual expert), concerns regarding the agendas of such institutions may remain.⁵⁴

Only the *SPS Agreement* specifies that experts be ‘chosen by the panel in consultation with the parties to the dispute’.⁵⁵ However, panels do accept input from the parties but do not automatically follow parties’ suggestions as to who to appoint.⁵⁶ Generally, an indicative list is sought from the relevant international organization or the parties are asked to suggest relevant experts. The panel consults with the parties—before deciding who to appoint—parties can comment on the experts suggested by the panel and object (with reasons) to their inclusion. Parties could also be asked to rank the persons in order of preference, but who is appointed remains the panel’s decision and they may decide to appoint experts notwithstanding objections. While, of course, panels cannot proceed to appoint experts in violation of parties’ due process rights (discussed further below), they can appoint an expert where the objections of the parties are considered not sufficient to disqualify that proposed expert.⁵⁷

No indication is given as to the number of experts to be appointed. To date, the number appointed has varied. The desirability to appoint more than one expert for each field is clear—so that the panel is open to differing opinions. Pauwelyn has suggested that three is the preferable number for each separate field.⁵⁸

Once appointed, experts are generally given a list of questions (drawn up in consultation with the parties) to which each expert individually responds in writing. Parties are consulted on the content of those questions. Special meetings between the experts, the panelists and the parties are convened at which these and other questions are discussed. The subsequent panel reports may reflect the questions put to the experts, the experts’ written responses to these questions as well as a transcript of these special meetings. This has been more or less the *practice* to date and, like all references to past practice in this article, it could change in future.

C. Code of Conduct and Due Process

The impartiality and independence of experts is essential. Possible concerns regarding bias of experts from international organizations were noted in

⁵⁴ In addition, where an institution has publicly held a particular position in respect of an issue, if referred to by a WTO panel for expert input on that same issue, it might be difficult for the institution to alter its position, even where such a change in position is appropriate and the position no longer fits into that institution’s agenda. Institutions and the positions that they take should be free to evolve to the extent that their mandates allow but there may be pressures to maintain institutional positions (or directions that were previously offered to that institution’s membership) that were either erroneous in the first place, or proved inappropriate by subsequent events. This pressure may be particularly grave where the publicly available outcome of a WTO dispute would be influenced by the position taken by that other institution.

⁵⁵ SPS Art 11.2.

⁵⁶ In an early dispute, *EC – Hormones*, each party could appoint one expert and the panel appointed the remaining six from a list referred from an international organization.

⁵⁷ The difficulty in securing experts has been noted. It is not clear if this is due to the (low) level of remuneration offered, or due to the particular skills needed. Experts apparently ordinarily take the position for the prestige. A combination of party objections and the unavailability of experts can thus potentially impair panels’ ability to appoint.

⁵⁸ Joost Pauwelyn. ‘The Use of Experts in WTO Dispute Settlement’ (2002) 51 *International and Comparative Law Quarterly* 342.

2002—when Pauwelyn suggested that experts from those institutions may be biased towards the agenda which the institutions seek to promote.⁵⁹ Experts' independence and impartiality was a live issue in one of the latest disputes involving the appointment and use of experts. The Code of Conduct—requiring self-disclosure, the avoidance of conflicts of interests, ensuring impartiality and demanding respect of confidentiality—applies to all experts used under SCM, TBT, SPS and DSU.⁶⁰ In *US/Canada – Continued Suspension*,⁶¹ the AB found that the panel had infringed a party's due process rights by consulting with certain experts—since 'justifiable doubts' over their independence were likely, given their affiliations and authorship of the very reports that were to be assessed by the panel-appointed experts (ie themselves). This compromised the panel's 'adjudicative independence and impartiality'.⁶² The AB found that this amounted to the panel's failure to discharge its duty under DSU Article 11.⁶³ Some noteworthy aspects of the AB's findings are as follows: panels must 'objectively determine and properly substantiate' the exclusion of proposed experts (due to 'justifiable doubts') on the basis of experts' self-disclosure, and information put forward by the parties and available generally⁶⁴; the 'fairness and impartiality'⁶⁵ of the panel's decision-making was tainted by the appointment of conflicted experts. By failing to ensure the parties' due process rights, the panel had failed to make an objective assessment of the matter under DSU Article 11. Despite this finding, the AB did not automatically reverse all the panel findings flowing from consultations with those experts but instead noted the difficulty in 'disentangling [those experts'] testimony from the other elements of the Panel's analysis'.⁶⁶

D. Experts' Mandates

It is important that panels correctly define experts' terms of reference, so that the delineation between the role of panels and experts remains clear. Panels retain the ultimate decision as to the determination of the facts and they cannot delegate questions of 'legal characterization' to experts, 'the answer to which will determine the consistency or inconsistency of a Member's measure'.⁶⁷ As mentioned previously, experts are to aid panelists in 'understand[ing] and evaluat[ing] the *evidence submitted* and the *arguments made*',⁶⁸ but the answering of a *legal* question which will determine whether a party is in breach of the WTO agreements cannot be delegated to experts.

⁵⁹ *ibid* 343.

⁶⁰ Appendix 1 b of the Working Procedures for Appellate Review, WT/AB/WP/6; and the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1.

⁶¹ See Grando (n 53) 341–342 for a compact overview of the divergence in views between the panel and the AB in that dispute as to the qualities which make experts appropriate.

⁶² Appellate Body Report, *US/Canada – Continued Suspension*, para 481.

⁶³ *ibid*, paras 415–482.

⁶⁴ *ibid*, para 446.

⁶⁵ *ibid*, para 436.

⁶⁶ *ibid*, para 484.

⁶⁷ Appellate Body Report, *Australia – Apples*, paras 384, 399. Note how this contrasts with the PGE's role under the *SCM Agreement*.

⁶⁸ n 1, para 130. (emphasis added)

4. Some Systemic Considerations

A. Legitimacy—Expert and Panelists' Backgrounds and the Frequency of Use

Legitimacy issues are clearly intrinsically linked to the use of experts. Some commentators have suggested that panels should proactively seek, on their own initiative, expert advice more often and that this might overcome any reluctance parties may have in requesting the appointment of experts.⁶⁹

Whether or not it is appropriate to seek expert advice depends on the parameters of the knowledge of the adjudicators in question, and more specifically depends upon panelists recognizing the limits of their own expertise. Some academics have criticized panels' failure to make use of economic experts.⁷⁰ While economists have represented the party-appointed experts (in parties' delegations),⁷¹ panels have apparently not felt the need to seek independent expert economic advice.⁷² Panels do, however, consult economists from the Secretariat, including in retaliation arbitration disputes, although this is not noted in the resulting panel reports.

Related to this point of knowing *when* to seek expert advice, *from whom* to seek it, and *how* to handle expert advice, is the issue of panelists' qualifications. Pauwelyn has suggested that it is not appropriate to have 'expert scientists' as panelists—for fear that they may exert too much control over the rest of the panel.⁷³ *In practice*, the parties, and (when called upon) the Director-General, chose panelists which together offer a special set of expertise in trade law, scientific, technical or other matters relevant to the dispute in question.⁷⁴

While certain standing/qualifications are required of experts, it may be difficult to find suitable experts to which the parties have not objected. The reality may be that the more 'expert' the expert, the more likely a party is to object to his/her appointment: 'The best people are normally those that have published in the field, thus expressed views in the field and taken position. Obviously the party *against* whom they have taken position may then object to that individual being appointed. In the end, one may, therefore, be able to gather consensus only around those people that have not expressed views, hence that are not normally the best experts.'⁷⁵ This does not seem to be unique to the WTO—and may be the same for 'renowned' experts appearing

⁶⁹ Pauwelyn (n 58) 339–340. Parties may be reluctant to request their appointment due to litigation strategies—that it may seem as if they cannot make out their case without expert input.

⁷⁰ Thomas (n 35) 321–322.

⁷¹ Indeed, in private sector law firms, it has become common practice to engage permanently economists in their trade law practice groups.

⁷² Except where consultation with other international organizations may constitute such economic information/advice.

⁷³ Pauwelyn (n 58) 345.

⁷⁴ See DSU Art 8 on the composition of panels. For example, Art 8.1 ('well-qualified' individuals) and Art 8.2 ('diverse background and a wide spectrum of experience'). Given that economics underlies many WTO rules, it is unsurprising that economic arguments present in many disputes and panelists sometimes have economic backgrounds (as do some AB Members). The proportion of panelists with deep economic expertise in disputes involving extensive economic evidence and arguments has been criticized as being too low: See Thomas (n 35) 313. It is also of note that each panel has a secretary and the division from which this secretary comes depends on the nature of the dispute—meaning that the secretary's special expertise can be of assistance to panels in this regard.

⁷⁵ Pauwelyn (n 58) 344.

in any tribunal. Their positions are clear and are therefore more easily objectionable to parties. Of course, obstacles to appointing experts with known positions may not be a bad thing because choosing experts whose views are known or which have proven a commitment to a particular view, may perpetuate (at least the perception of) bias.

It is of note that the WTO Code of Conduct (pertaining to impartiality and so forth) applies to panel experts but does not extend to the party-appointed experts and while disputing parties may purport to engage 'independent' experts, there are no mechanisms by which to ensure their independence.

B. *Timing Issue(s)*

The extra time that the use of experts has added to the duration of panel proceedings is important to note. Panel proceedings should usually be completed within 9 months from establishment of a panel. In practice, panel proceedings tend to take 12 months to complete. The use of experts has sometimes doubled the regular timetable of panels. The stage at which experts are appointed or at which advice/information is sought affects the nature and extent of the delay to this timeframe. Panels in SPS disputes have generally appointed experts at an early stage—sometimes even before receiving the parties' first written submissions. It is not always clear for panels what type of experts/information it should appoint/seek at an early stage; sometimes this may only come to light later (after becoming aware of the parties' arguments contained in their written submissions). Accordingly, although panels need not wait for a party to make a *prima facie* case in order to employ Article 13 of the DSU, some panels have chosen to defer the use of Article 13 until receipt of the parties' first written submissions.⁷⁶

C. *Panels cannot Rely on its Experts to make a Party's Case*

The establishment of a *prima facie* claim/defense is not a prerequisite to the exercise of a panel's right to seek information or to consult with experts on a matter pertaining to that particular claim/defense.⁷⁷ Indeed, the purpose of exercising this authority might be to enable a panel's evaluation of whether a *prima facie* claim/defense has been made out. However, such exercise by a panel cannot relieve a party from discharging its burden of proof.⁷⁸ Where is the line drawn between a panel's making of a party's case and a panel's *due* exercise of discretion to seek information or expert consultation? This goes to drawing the line between panels' duty under DSU Article 11 and the obligation of parties to adduce evidence in support of their case, and is a line that may

⁷⁶ See, eg Panel Report, *Canada – Aircraft*, paras 7.134–7.136 and paras 7.379–7.386.

⁷⁷ In brief, establishing *prima facie* entails proving the elements of the claim or defense which are required to be proved in light of the wording of the WTO provision at issue. This only establishes a *prima facie* claim/defense since the opposing party may adduce evidence to rebut (or disprove) that those elements are made out. See the Appellate Body Report in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (US – Wool Shirts and Blouses)* WT/DS33/AB/R adopted 23 May 1997, 13. See, in the context of the right to seek information under DSU Art 13.1, Appellate Body Report, *Canada – Aircraft*, para 192 and Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand – H-Beams)* adopted 5 April 2001, para 135.

⁷⁸ n 3, paras 127–130.

not be drawn easily. The AB has previously acknowledged that panels may draw both factual and legal inferences from the ‘ensemble of facts’ before them.⁷⁹ As mentioned previously, the AB has upheld panels’ decisions *not* to act under Article 13. However, the AB has also found that panels’ failure to exercise authority under Article 13 by seeking information has resulted in a failure to objectively assess the matter in accordance with DSU Article 11.⁸⁰

5. Conclusion

The issue of panel’s use of experts is complex and presents many difficult questions. The most striking being whether panels can maintain their legitimacy if they do not consult experts when faced with technical questions. What are the limits of the panel’s discretion in that regard? Recently, the AB concluded that a panel had violated Article 11 because it had not sought expert evidence.⁸¹ Whether, when and how experts are used is an issue which goes to the effectiveness and legitimacy of the DS system.⁸² Legitimacy and transparency are interrelated. There are transparencies as well as due process issues in the context of the use of experts. For example, it has been suggested that panels use economic experts but do not admit to doing so in their reports, thus failing to give the parties an opportunity to confront this evidence.⁸³ However, it must be noted that Article 27.1 of the DSU provides that “[t]he Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support”, and that panelists have traditionally made use of this provision by seeking the assistance of the Secretariat.

We must constantly bear in mind that it is essential for the system—represented by the membership as a whole in the form of the Dispute Settlement Body which officially adopts panel and Appellate Body Reports making them WTO *acquis*—to ‘secure a positive solution’ to disputes.⁸⁴ Given the essential automaticity of the adoption of these reports, much responsibility rests on panels in ensuring that a positive solution is secured. It is panels which have access to, and which develop a close knowledge of, the relevant facts. The facts, Articles 11 and 13 of the DSU are at the core of the effective conduct of dispute settlement at the WTO, as well as the law of course. Thus, panels have a heavy task in ensuring that they engage appropriately with DSU Article 13

⁷⁹ Appellate Body Report, *Canada – Aircraft*, para 198.

⁸⁰ Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, paras 1138–1145.

⁸¹ In *Argentina – Textiles*, the AB blamed the panel for not having consulted and made use of the expertise of the IMF. But in *US – Clove Cigarettes* and *US – Tuna (II)*—disputes that included some technical issues—the parties and the AB did not raise the issue of the absence of any consultation with experts. On the contrary, however, in the recent Appellate Body Report in *US – Large Civil Aircraft (2nd Complaint)*, the AB found that a panel should have exercised its authority under Art 13 to seek information. It should be recalled that, in that dispute, the complainant had attempted to obtain the information, failed to obtain it, and thus asked the panel to seek it. This context may explain why the Appellate Body was less deferential to the panel in that dispute.

⁸² On this systemic point, with respect to the use of independent economic experts in particular, see generally Thomas (n 35) 295–328. Grando makes the observation that it is different to determine with precision whether panels consider the balance between the efficient use of resources and the need for accuracy when making use of their right under DSU Art 13 but notes that at least the panel in *Argentina – Textiles and Apparel* considered this (in refusing to seek irrelevant information from the IMF). See Grando (n 53) 335.

⁸³ See Thomas (n 35) 309.

⁸⁴ DSU Art 3.7.

and other provisions which permit expert and scientific input, all to ensure that a positive solution is secured.⁸⁵

Finally, it is worth remembering that the system for the use of experts, such that it is, is still evolving. Developing practice will show what are the best practices to balance transparency, and the need to understand evidence and arguments that are presented in an increasingly specialized and technical manner.

⁸⁵ As evidenced recently in a highly technical dispute, where the AB reversed a panel finding but was unable to complete the analysis due to insufficient undisputed facts in the panel record. It is arguable that this dispute is an example of where the panel might have chosen to refer to expert economic advice. (See the Panel and AB Reports in *United States – Certain Country of Origin Labelling (COOL) (US – COOL)* WT/DS384/R, WT/DS386/R adopted 23 July 2012 as modified by Appellate Body Reports WT/DS384/AB/R, WT/DS386/AB/R with respect to the claim under Art 2.2 of the TBT Agreement).