

# The WTO's Rules of Conduct for Dispute Settlement

Jochem Wiers\*

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**Abstract:** This article provides an overview of, and a short comment on the WTO's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes. After an introduction, the nine articles and three annexes of the Rules are described. Next, some comments are made. The article concludes arguing that some clarifications to the Rules could be made. However, these are not expected to be realised shortly, since there is as yet little or no experience with the Rules. Interpretative issues regarding the Rules appear unlikely to be invoked frequently for fear of impairing the success of the dispute settlement process.

## 1. INTRODUCTION

In December 1996, the World Trade Organization (WTO) adopted its Rules of Conduct for the Understanding on Rules and Procedures Concerning the Settlement of Disputes (Rules of Conduct).<sup>1</sup> The Rules of Conduct are part of the WTO's integrated dispute settlement system.<sup>2</sup> This system is centered around the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>3</sup> The DSU establishes compulsory jurisdiction of the Dispute Settlement Body (DSB) for all disputes concerning the 1994 Agreement Establishing the WTO and all Multilateral Trade Agreements, which cover trade in goods and services, and trade related aspects of intellectual property rights.<sup>4</sup> Apart from the DSU and the Rules of

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\* LL.M, College of Europe, Bruges, Belgium; and M.A., University of Amsterdam, Amsterdam, The Netherlands. The author is currently a researcher and lecturer at the Europa Institute of the University of Amsterdam. Before, he was a researcher at the European University Institute in Florence, Italy.

1. WTO Doc. WT/DSB/RC/1, 11 December 1996, reproduced in 36 ILM 477 (1997). In the version as reproduced in ILM, December 1997 instead of December 1996 is erroneously provided as the date of adoption and the title reads "Converning" instead of "Governing". The WTO documents discussed here also appear at the WTO homepage (<http://www.wto.org>).
2. On this system, see, e.g., E.U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997).
3. 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted 15 April 1994, reproduced in 33 ILM 1226 (1994).
4. 1994 Agreement Establishing the WTO and all Multilateral Trade Agreements, 33 ILM 13 (1994). See Art. 1 and App. I of the DSU, *supra* note 3. The DSU also covers the 1994 Plurilateral Agreements on Trade in Civil Aircraft and on Government Procurement, if the parties to those Agreements so decide. The two other Plurilateral Agreements concluded in the Uruguay

Conduct, the dispute settlement system also comprises the Working Procedures for Appellate Review.<sup>5</sup>

The WTO's dispute settlement system has been used intensively during its first three years of functioning.<sup>6</sup> Panel reports are compulsorily adopted, unless the DSB decides by consensus not to adopt them, or a party to the dispute appeals.<sup>7</sup> The WTO Standing Appellate Body (Appellate Body) reports are adopted unless the DSB decides by consensus not to adopt them.<sup>8</sup> Dispute settlement panel members should be independent.<sup>9</sup> The Appellate Body is to comprise persons unaffiliated with any government, who shall avoid participating in the consideration of any disputes that would create a conflict of interest.<sup>10</sup> In view of the frequent use and compulsory character of the dispute settlement system, and also of the considerable effects its outcomes may have on national legal orders,<sup>11</sup> it is not surprising that additional safeguards have been sought to ensure that those involved in the dispute settlement process are impartial and independent. The Rules of Conduct aim to lay down such safeguards.

## 2. OVERVIEW

The Rules of Conduct consist of nine articles and three annexes.<sup>12</sup> The Preamble, somewhat surprisingly numbered as 'Article 1', affirms that the Rules of Conduct are designed "to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU."<sup>13</sup> They should

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Round, on dairy products and bovine meat, have in the meantime been abolished. See 23 WTO Focus (October 1997). All the Agreements mentioned in App. 1 of the DSU are reproduced in 33 ILM 1125 (1994).

5. WTO Doc. WT/AB/WP/1 of 15 February 1996, reproduced in 35 ILM 495 (1996) with an accompanying letter from the Appellate Body Chairman to the Dispute Settlement Body Chairman.
6. See, e.g., 21 WTO Focus (August 1997); in that month, the number of disputes brought since early 1995 reached the century mark.
7. Art. 16(4) DSU, *supra* note 3.
8. *Id.*, Art. 17(14).
9. *Id.*, Art. 8(2).
10. *Id.*, Art. 17(3).
11. To mention just one example, the recent WTO ruling in the dispute on the European Community's banana import regime can be expected to have important economic effects on a number of small banana exporting economies. See Appellate Report EC – Regime for the Importation, Sale and Distribution of Bananas, adopted 9 September 1997, AB-1997-3, WT/DS27/AB/R and Panel Report EC – Regime for the Import, Sale and Distribution of Bananas, adopted 22 May 1997, WT/DS27/R.
12. It should be noted that they are not called 'articles' as such in the text of the Rules; they are simply numbered I-IX, and titled after their contents. I will hereinafter refer to them as 'articles'.
13. Art. 1 of the Rules of Conduct, *supra* note 1.

strengthen the operation of the new dispute settlement system and thereby enhance confidence in it.

The main principle of the Rules of Conduct can be found in Article II. All persons covered by the Rules shall be independent and impartial, avoid conflicts of interest, and respect the confidentiality of DSU proceedings.<sup>14</sup> Thereto, according to Article III, persons covered by the Rules of Conduct (covered persons) are expected to adhere strictly to the DSU provisions, and to disclose all information they can reasonably be expected to know and that is likely to affect, or raise doubts about, their independence or impartiality. They are also expected to take due care when performing their duties to fulfil these expectations. More specific elaborations of these obligations follow, such as the prohibition to delegate responsibilities.<sup>15</sup>

Article IV defines the personal scope of the Rules of Conduct, which is wide. First of all, they cover panellists and members of the Appellate Body.<sup>16</sup> Also covered are arbitrators and experts acting pursuant to various provisions of the DSU and other Agreements, as listed in Annexes 1a and 1b to the Rules of Conduct; members of the WTO Secretariat assisting in panel or arbitration proceedings; Appellate Body support staff; and, finally, the Chairman and Secretariat members of the Textiles Monitoring Body (TMB).<sup>17</sup>

Article VI further specifies the principles set out in Articles II and III. Paragraph 2 repeats the obligation to disclose information contained in Article III. According to Article VI(3), however, this obligation does not extend to matters whose relevance to the proceedings "would be insignificant". Information disclosure requirements must take into account the personal privacy of persons concerned and "shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve [...] in [...] dispute settlement roles."<sup>18</sup> Article VI(1.a) stipulates that panellists, arbitrators, experts, and Appellate Body members receive the Rules of Conduct when requested to serve in dispute settlement roles. They also receive an illustrative list of matters subject to disclosure.<sup>19</sup> Panellists, arbitrators,

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14. However, the Rules of Conduct shall in no way modify the rights and obligations of WTO members under the DSU.

15. Art. III(2) of the Rules of Conduct, *supra* note 1.

16. Interestingly, the Appellate Body had already in February 1996 provisionally adopted the then draft Rules of Conduct, as an Annex to its Working Procedures for Appellate Review, *supra* note 5.

17. The Rules of Conduct also apply to other members of the TMB in accordance with Art. 8(1) of the 1995 Agreement on Textiles and Clothing, 235 Tractatenblad 75-123 (1994), as elaborated in the working procedures of the TMB to which Art. V of the Rules of Conduct, *supra* note 1, refers.

18. Art. VI(3) of the Rules of Conduct, *supra* note 1.

19. Illustrative List of Information to be Disclosed, attached to the Rules of Conduct as Annex 2, *see* note 1, *supra*.

and experts must complete a disclosure form attached to the Rules of Conduct as Annex 3. The information they provide “would be disclosed” to the Chair of the DSB for consideration by the parties to the dispute.<sup>20</sup>

Appellate Body members selected to hear an appeal must complete the disclosure form after having reviewed the factual portion of the panel report appealed.<sup>21</sup> The information they provide “would be disclosed” to the Appellate Body for its consideration whether the member concerned should hear a particular appeal.<sup>22</sup> Appellate Body support staff and Secretariat members must be familiar with the Rules of Conduct.<sup>23</sup> Appellate Body support staff must disclose any relevant information to the Appellate Body for its consideration in deciding on which staff to assign to assist in a particular appeal.<sup>24</sup> Secretariat members must disclose to the Director-General of the WTO the information required by Article VI(2) and by the Staff Regulations, to which is referred in the Rules of Conduct.<sup>25</sup> According to Article VI(5), during a dispute, covered persons are to disclose any new relevant information as soon as they become aware of it.

Article VII stipulates that dispute settlement deliberations and proceedings are to remain confidential, and information acquired during them may not be used to gain personal advantage. Covered persons are not to engage in *ex parte* contacts concerning matters under consideration.<sup>26</sup> Nor may they make any statements concerning proceedings.<sup>27</sup>

Article VIII describes what is to be done in the event of alleged violations of the obligations of independence, impartiality, confidentiality, and avoidance of conflicts of interest. Failure by a covered person to disclose a relevant interest, relationship, or matter as such is not a sufficient ground for disqualification of that person; there must be a ‘material violation’ of the above-mentioned obligations, and evidence that this violation would impair the integrity, impartiality, and confidentiality of the dispute settlement mechanism.<sup>28</sup>

If any party to a dispute possesses evidence of such a ‘material violation’, it *must* submit it to the DSB Chair, the Director-General, or the Ap-

20. Art. VI(4.a) of the Rules of Conduct, *supra* note 1.

21. Before the information they disclose is examined and a decision is taken on their suitability to hear the appeal, Appellate Body members should not be able to review the legal portion of the panel report, as opposed to the factual portion thereof.

22. Art. VI(4.b(i)) of the Rules of Conduct, *supra* note 1.

23. *Id.*, Art. VI(1.b).

24. *Id.*, Art. VI(4.b(ii)).

25. *Id.*, Art. VI(4.c). The Staff Regulations are still in draft form.

26. The importance of this requirement is illustrated by the concerns expressed by Norway on the leaking of panel and Appellate Body reports. See 20 WTO Focus, at 6 (June/July 1997).

27. The latter prohibition is “subject to paragraph VII:1”, which appears somewhat strange, as that paragraph does not seem to allow the making of any statements on proceedings either.

28. Art. VIII(2) of the Rules of Conduct, *supra* note 1.

pellate Body, as appropriate. Other WTO members possessing such evidence *may* provide it to the parties to the dispute.<sup>29</sup>

If the covered person subject of the evidence is a panellist, arbitrator, or expert, the evidence must be submitted to the DSB Chair. The person concerned receives the evidence for consideration. The DSB Chair, if consultation with the person concerned has not resolved the matter, provides the evidence, and any additional information from the person concerned, to the parties to the dispute. If the person resigns, the DSB Chair informs the dispute parties and other relevant persons. The DSB Chair, in consultation with the Director-General of the WTO and at least one Chair of the relevant Council(s),<sup>30</sup> after having heard the person concerned and the dispute parties, “would decide” whether a material violation of the Rules of Conduct has occurred.<sup>31</sup> If the parties agree that a material violation has occurred, the disqualification of the person concerned “would be confirmed”.<sup>32</sup> The DSB Chair takes the necessary steps for the covered person’s appointment to be formally revoked or excused from the dispute. As long as no material violation is decided to have occurred, the person continues to participate in the consideration of the dispute.<sup>33</sup>

If the covered person is a Secretariat member, the evidence must be submitted to the Director-General, who will provide it to the person concerned, and will inform the other party or parties to the dispute and the panel. The Director-General shall take any appropriate action in accordance with Staff Regulations, and inform the dispute parties, the panel, and the DSB Chair of his decision.<sup>34</sup>

If the covered person is a member of the Appellate Body or of its support staff, the evidence must be provided to the other party to the dispute. Thereafter it is provided to the Appellate Body, which provides it to the person concerned for consideration. The Appellate Body takes any appropriate action after having heard the person concerned and the parties to the dispute, and informs those parties and the DSB Chair.<sup>35</sup>

The procedures outlined above must be completed within 15 working days following the submission of the evidence to the DSB Chair, Director-General, or Appellate Body.<sup>36</sup> If a covered person is disqualified or resigns, normal DSU appointment procedures apply for the appointment of a re-

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29. *Cf. id.*, Art. VIII(1).

30. *I.e.*, the General Council, the Council for Trade in Goods, the Council for Trade in Services, or the Council for Trade Related Intellectual Property Rights (TRIPs).

31. Although this paragraph is introduced by the words “[i]n all cases”, it appears that such a decision is not necessary in case the person concerned has resigned.

32. Art. VIII(5-8) of the Rules of Conduct, *supra* note 1.

33. *Id.*, Art. VIII(9 &10).

34. *Id.*, Art. VIII(11-13).

35. *Id.*, Art. VIII(14-17).

36. *Id.*, Art. VIII(4).

placement, be it with half the time periods specified in the DSU.<sup>37</sup> Information concerning possible or actual material violations of the Rules of Conduct is to remain confidential.<sup>38</sup>

Article IX, finally, prescribes the Rules of Conduct to be reviewed within two years of their adoption, i.e. by December 1998. The DSB must decide whether to continue, modify, or terminate the Rules of Conduct.

Annex 1 lists a number of provisions of the DSU and other Multilateral Trade Agreements. Arbitrators and experts acting in dispute settlement procedures pursuant to these provisions are covered by the Rules of Conduct. Annex 2 is a non-exhaustive list of examples of information to be disclosed, mentioning *inter alia* financial, professional, employment, and family interests relevant to the dispute. Annex 3 contains the disclosure form, in which the signatory states that he/she has read the DSU and the Rules of Conduct, and understands his/her continuing duty to disclose all relevant information and to respect the confidentiality of proceedings.

The Appellate Body's Working Procedures for Appellate Review have provisionally adopted the Rules of Conduct and refer to them in a number of instances.<sup>39</sup> For example, paragraph 1 of Rule 9 of the Working Procedures allows Appellate Body members to consult with each other before completing the disclosure form referred to in the Rules of Conduct. Paragraph 3 of Rule 9 prescribes that the Appellate Body considers whether further action is necessary when information has been disclosed pursuant to Article VI(4.b(i, ii)) of the Rules of Conduct. According to paragraph 5 of Rule 10, as a result of the procedure in Article VIII(14-16) of the Rules of Conduct, the Appellate Body may decide to dismiss the allegation, to excuse the Appellate Body member or staff member, or to make such other order as it deems necessary in accordance with Article VIII of the Rules of Conduct.

### 3. COMMENTS

The system established by the Rules of Conduct relies on a combination of self-disclosure (Article VI) and disclosure through others (subsequent disclosure, Article VIII). Concerning both mechanisms, however, some questions arise.

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37. *Id.*, Art. VIII(18).

38. *Id.*, Art. VIII(20).

39. *See* notes 5 and 16, *supra*. The Rules of Conduct are attached as Annex II to the Working Procedures for Appellate Review. The numbering of Rules of Conduct articles as referred to in the Appellate Body Working Procedures does not seem to correspond to the numbering of the actual Rules of Conduct. This is probably due to the fact that the draft version of the Rules of Conduct as adopted by the Appellate Body did not yet contain what was to become Art. V on the Textiles Monitoring Body.

Regarding Article VI, its paragraphs 2 and 3 contain a number of open terms. Variable interpretations can be given to such questions as, what information can “reasonably be expected to be known” to covered persons, and what information is “likely to affect or give rise to justifiable doubts as to their independence or impartiality”.<sup>40</sup> Flexible meaning can also be given to such concepts as, “matters whose relevance to the proceedings would be insignificant”; “the need to respect the personal privacy of covered persons”; and “disclosure requirements not so administratively burdensome as to make it impracticable for otherwise qualified persons to serve in dispute settlement functions”.<sup>41</sup> The use of such open terminology is in itself little surprising, and appears to a degree inevitable in provisions on the scrutiny of decision-makers. The important thing about such provisions is obviously who is to decide on their interpretation. Who eventually ‘controls the controllers’?<sup>42</sup> In the case of these Rules of Conduct, it will in the first place be the persons concerned themselves who have to decide which information to disclose, and therefore how to interpret these open concepts. If such discretion on what to disclose and what not is to be exercised by the very person whose participation in dispute settlement procedures may be affected by the information disclosed, there should be thorough checks on that discretion. An open question is whether such checks are sufficiently provided by the remainder of Article VI and by Article VIII. Addressing this important question is somewhat difficult because of a number of textual obscurities in these Rules.

According to Article VI(4.a), information is to be disclosed by panellists, arbitrators and experts to the DSB Chair “for consideration by the parties to the dispute”. What happens next? May a dispute party ask the covered person for additional information?<sup>43</sup> What happens if the DSB Chair or any dispute party considers that the disclosed information casts doubt as to the covered person’s impartiality? Why is there not a provision specifying what action is to be taken in such cases, as can be found in Article VI(4.b(i, ii)) regarding Appellate Body members and support staff, and in the Staff Regulations referred to in Article VI(4.c) regarding Secretariat members?

According to Article VI(4.b), information from Appellate Body members and support staff is to be disclosed to the Appellate Body, but not for consideration by the dispute parties. Likewise, information from Secretariat members is disclosed to the Director-General of the WTO in accordance with Article VI(4.c), but not to the dispute parties. It is noteworthy that par

40. Art. VI(2) of the Rules of Conduct, *supra* note 1.

41. *Id.*, Art. VI(3).

42. Or, if one wishes to emphasize the adjudicatory character of the new dispute settlement system, ‘who judges the judges’?

43. *E.g.*, Is there any information the disclosure of which the covered person deems too great an intrusion on his personal privacy?

ties to a dispute do not get the chance themselves to consider the information disclosed by Secretariat members, Appellate Body support staff, and especially Appellate Body members. The fact that dispute parties are allowed to consider information disclosed by panellists only seems related to the less adjudicatory and more *ad hoc* character of the panel procedure as compared to the Appellate Body procedure.<sup>44</sup>

Finally as regards Article VI, its paragraph 5 prescribes new information to be disclosed by covered persons “at the earliest time they become aware of it”. Perhaps this somewhat subjective phrasing should be brought into line with the more objective terminology in Article VI(2). A suggestion would be,

[d]uring a dispute, all covered persons shall also disclose any new information relevant to paragraph VI:2 above at the earliest time *they can reasonably be expected to become aware of it*.<sup>45</sup>

It should also be made explicit that the limitations to the disclosure requirements mentioned in Article VI(3) are applicable in the event of new information as well.

Concerning Article VIII, its first two paragraphs apply important concepts such as “evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest” and “relevant interest, relationship or matter”,<sup>46</sup> however without clearly defining them and the relationship between them. Article VIII(2) is in my opinion especially unclear. It stipulates that,

*when evidence as described in Article VIII(1) (i.e. evidence of a material violation) is based on an alleged failure of a covered person to disclose a relevant interest, relationship, or matter, that failure to disclose as such shall not be a sufficient ground for disqualification unless there is also evidence of a material violation,*<sup>47</sup>

and that the impartiality of the dispute settlement mechanism would be impaired thereby. The phrasing is confusing, as it mentions evidence of a material violation twice, first by referring to Article VIII(1), and then explicitly.

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44. Whereas the Appellate Body is composed of a closed group of seven persons, three of which serve on each case (Art. 17(2) DSU, *supra* note 3), panellists are proposed to the dispute parties by the Secretariat, which maintains “an indicative list of [...] individuals”, which is open to change. Only if the dispute parties do not agree on the choice of panellists, the composition of the panel is decided by the Director-General, after consultation of the dispute parties (Art. 8 paras. 4, 6, and 7 DSU, *supra* note 3). Obviously, the Secretariat and Appellate Body Support Staff are also of a less *ad hoc* character than panels.

45. Art. VI(5) of the Rules of Conduct, *supra* note 1 (emphasis added).

46. *Id.*, Art. VIII.

47. *Id.*, Art. VIII(2). (emphasis added).



The words italicised above, *when* and *also*, in my view make it unnecessary to refer two times to the same concept.

What Article VIII(2) really seems to be saying, is that a failure to disclose relevant information as such is not enough to have a person disqualified. Even if such a failure occurs, the appropriate body<sup>48</sup> still has the discretion to decide whether the obligations of Article II have been violated, and whether the integrity of the dispute settlement system is impaired. If this reading is correct, the paragraph would be much clearer if the first part had been left out, and if it had started as follows: “[a]n alleged failure to disclose a relevant interest, relationship or matter shall as such not be sufficient for disqualification, unless there is also evidence of a material violation”<sup>49</sup> etc.

The above reading of Article VIII(2), however, would still leave open the question what exactly a “material violation” and a “relevant interest, relationship or matter” are, and what their relationship is. “Material violation”, as described in Article VIII(1), seems to refer to both Article I (Preamble) and Article II (Governing Principle). Probably, though not explicitly, “relevant interest, relationship or matter” refers to Article III, laying down the obligation to disclose

[a]ny interest, relationship or matter that (the covered) person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to that person's independence or impartiality.<sup>50</sup>

Judging from Article VIII(2), it would seem that failure to disclose a relevant interest, relationship, or matter is not the same as a material violation.<sup>51</sup> Yet there does seem to be considerable overlap between the two concepts. The question of the difference and relationship between them is not just of academic importance. Assuming that the two concepts are not the same, a situation is conceivable where a party submits information it considers to constitute a material violation, and the appropriate body disagrees on this, but nevertheless considers a relevant interest, relationship, or matter has not been disclosed? If so, would a cumulative effect be possible of pieces of relevant information, in themselves not constituting material violations, but taken together amounting to such a violation?

Other questions arising in relation to Article VIII are, regarding Article VIII(8), why are the words “would decide” used here? Is the DSB Chair not obliged to take a decision? And, in the same paragraph, does “the parties” in “[w]here the parties agree that a material violation of these Rules has oc-

48. I.e. the DSB Chair, the Director-General, or the Appellate Body, as the case may be.

49. Art. VIII(2) of the Rules of Conduct, *supra* note 1, as changed by the author.

50. *Id.*, Art. III.

51. If it were, Art. VIII(2) would be superfluous apart from its last part requiring evidence that the impartiality of the dispute settlement mechanism would be impaired.

curred<sup>52</sup> refer to the parties to the dispute, or to the DSB Chair, the Director-General, and the Chair or Chairs of the relevant Council or Councils deciding together? Finally, regarding Article VIII(20), to what decision does “[e]xcept to the extent strictly necessary to carry out this decision” refer?

#### 4. CONCLUDING REMARKS

There appear to be a number of obscurities in these Rules of Conduct. To some extent, these are inevitable consequences of applying concepts requiring a degree of interpretative assessment. Partially, however, they seem in need of textual clarifications. This appears especially to be the case for Articles VIII(2) and VIII(8). Perhaps such clarification can be achieved by the end of 1998, when the Rules of Conduct are to be reviewed. However, important changes to the Rules seem unlikely to be brought about so fast, as the Dispute Settlement Body and the WTO members have as yet little working experience with the Rules of Conduct.<sup>53</sup>

Regarding the potential interpretative issues pointed out in the comments above, it would not be altogether surprising if these were slow to arise. The dispute settlement system is increasingly burdened with work. The bodies having the ultimate discretion in deciding whether or not persons should serve in dispute settlement roles, i.e. the DSB Chair, the Director-General of the WTO, and the Appellate Body, may be hesitant to take such decisions in a way which would endanger the timely handling of disputes. Considering the expectations the WTO and its members have of the new dispute settlement system, great importance can be expected to be attached to speed and efficiency. However, the system’s credibility and acceptability will have to be established not only through speed and efficiency, but also through independence and impartiality beyond doubt. It is therefore to be hoped that all persons playing a role in this system realize the importance of exercising self-scrutiny, and that dispute parties will perform their function of watchdogs with fervour.

52. Art. VIII(8) of the Rules of Conduct, *supra* note 1.

53. There is no mention whatsoever of the Rules of Conduct in Panel Report – EU Measures Concerning Meat and Meat Products, 18 August 1997, WT/DS26/R/USA and WT/DS48/R/CAN; and Appellate Report – EU Measures Concerning Meat and Meat Products, 16 January 1998, WT/DS26/AB/R and WT/DS48/AB/R. The experts consulted in that dispute were nationals of the parties, so the Rules could have played a role here. However, the Panels in this dispute had been established in May 1996 (USA) and October 1996 (Canada), i.e. before the adoption of the Rules. As the Rules will probably hardly if at all have been invoked by December 1998, little should be expected from their upcoming review as prescribed by Art. IX.