

**FURTHER CONTRIBUTION OF THE UNITED STATES TO THE IMPROVEMENT  
OF THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO  
RELATED TO TRANSPARENCY – REVISED LEGAL DRAFTING**

Communication from the United States

The following communication, dated 20 April 2006, is being circulated at the request of the delegation of the United States.

Over 10 years of experience under the WTO dispute settlement system has demonstrated that the system would be improved by enhancing its transparency. The recommendations and rulings of the Dispute Settlement Body ("DSB") can affect large sectors of civil society, and increased membership in the WTO has also meant that more governments and their nationals have an interest in those recommendations and rulings.

The United States recalls its pending proposals to help achieve a more open and transparent dispute settlement process (TN/DS/W/13), including proposed textual amendments to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("Dispute Settlement Understanding" or "DSU") or proposed decisions of the Dispute Settlement Body (TN/DS/W/46) and its observations on some practical considerations involved in open meetings (TN/DS/W/79). After further discussion with delegations related to the legal drafting of those proposals and in light of some of the legal drafting guidelines that have been suggested<sup>1</sup>, the United States would propose revising the drafting of those proposals in certain places. These revisions are reflected in the following.<sup>2</sup> For Members' convenience, the United States is also including an annex that specifies the drafting changes.

(1) Open meetings

*US proposal:*

*The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration<sup>3</sup> meetings with the parties except those portions dealing with*

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<sup>1</sup> In particular the United States appreciates the suggested guidelines to use the same term throughout to mean the same concept and, wherever possible, to use singular rather than plural terms and avoid the use of the passive voice.

<sup>2</sup> Additional conforming amendments, such as corrections to Article references, may be needed or appropriate once the substantive text has been agreed upon.

<sup>3</sup> This would include arbitration under Articles 21.3(c), 22.6, and 25 of the DSU.

*confidential information (such as business confidential information or law enforcement methods). The DSU could provide a basic set of procedures for this purpose with some flexibility for the relevant body to refine these in light of the particular circumstances of a specific proceeding. For example, the procedures could provide a number of options for allowing the public to observe the meetings, such as broadcasting meetings to special viewing facilities.*

To reflect the proposal in the text of the DSU:

- (a) Article 18 of the DSU is amended by inserting the following new paragraph 3:

"3. Each substantive meeting with the parties of a panel, the Appellate Body, or an arbitrator, and each meeting of a panel or arbitrator with an expert, shall be open for the public to observe<sup>4</sup>, except for any portion dealing with confidential information.<sup>5</sup>"

- (b) Appendix 3 is amended by deleting paragraph 2.

Conforming changes to reflect the inclusion of arbitrators in Article 18:

- (c) Article 18 is amended by deleting in the title "with the Panel or Appellate Body".
- (d) Paragraph 1 of Article 18 is amended by deleting "panel or Appellate Body" and inserting in its place "panel, Appellate Body, or arbitrator," both places that it occurs and by inserting the following footnote after the first appearance of the term "arbitrator": "<sup>6</sup>".
- (2) Timely access to submissions

*US proposal:*

*The DSU should provide that parties' submissions and written versions of oral statements in panel, Appellate Body, or arbitration proceedings are public, except those portions dealing with confidential information.*

*To help facilitate public access to these documents, the Secretariat should maintain them in a central location that would be responsible for making these documents available to the public.*

To reflect the proposal:

- (e) Paragraph 2 of Article 18 is amended to read as follows:

"2. Any document<sup>7</sup> that a Member provides to a panel, the Appellate Body, or an arbitrator shall be public, except for confidential information. Nothing in this

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<sup>4</sup> The expression "observe" does not require physical presence in the meeting.

<sup>5</sup> For purposes of this Article, the term "confidential information" means certain factual information designated as such by the Member at the time that Member submitted the information.

<sup>6</sup> As used in this Article, the expression "arbitrator" means any arbitrator under paragraph 3(c) of Article 21, Article 22, or Article 25. [NOTE: this list is intended to include all arbitration proceedings under the DSU and the references would need to be updated to reflect any amendments to the DSU.]

<sup>7</sup> The term "document" does not include a document concerning an interim report or that is purely administrative in nature.

Understanding precludes a Member from disclosing statements of its own positions to the public. A Member shall not disclose another Member's confidential information. The Member submitting the confidential information shall provide within 15 days of the request of another Member a non-confidential summary of the information."

- (f) Appendix 3 is amended by deleting paragraph 3 and renumbering the subsequent paragraphs accordingly.
- (g) A decision by the DSB:

"The Dispute Settlement Body directs the Secretariat to maintain the documents referenced in paragraph 2 of Article 18 in a central location and to make these documents available to the public, except for confidential information."

(3) Timely access to Final Reports

*US proposal:*

*The WTO should make a final panel report available to WTO Members and the public once it is issued to the parties, although only circulation would trigger the relevant DSU deadlines.*

*Text to reflect the proposal:*

- (h) A decision by the DSB:

"A final report issued by a panel to the parties is an unrestricted document, except for any confidential information (as defined in Article 18). Any interim report considered final by operation of the last sentence of paragraph 2 of Article 15 is unrestricted when considered final.

"This decision is without prejudice to the practice concerning the date of circulation of the report.<sup>8</sup>"

(4) *Amicus curiae* submissions

*US proposal:*

*In light of the experience to date with amicus curiae submissions to panels and the Appellate Body, Members may wish to consider whether it would be helpful to propose guideline procedures for handling amicus curiae submissions to address those procedural concerns that have been raised by Members, panels and the Appellate Body.*

The United States notes with interest the procedures proposed by the European Communities for handling *amicus curiae* submissions (TN/DS/W/1) and looks forward to working with the

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<sup>8</sup> That practice was established on a trial basis and under that practice a document is deemed to be circulated on the "date printed on the WTO document to be circulated with the assurance of the Secretariat that the date printed on the document was the date on which this document was effectively put in the pigeon holes of delegations in all three working languages." (WT/DSB/M/2).

European Communities and other Members on this issue. The United States does not believe that an amendment to the Dispute Settlement Understanding is necessary for this purpose.

Annex: Revised Legal Drafting Showing Changes from Proposed Text in WT/DS/W/46

This Annex reproduces and marks the revised legal drafting proposed above to show changes from the text proposed in WT/DS/W/46 (additions in bold and underline, deletions in strike-through).

(1) Open meetings

(a) Article 18 of the DSU is amended by inserting the following new paragraph 3:

"3. **Each** ~~All~~ substantive meetings with the parties of a panel, the Appellate Body, or an arbitrator,<sup>3</sup> **and each meeting of a panel or arbitrator with an expert,** shall be open for the public to observe<sup>1</sup> except for **any** ~~those~~ portions dealing with confidential information.<sup>2</sup>"

[NOTE: the text in footnote 3 of TN/DS/W/46 has been moved to the new footnote proposed in subparagraph (d) for paragraph 1 of Article 18. Changes to footnote 3 of TN/DS/W/46 are marked in the footnote in subparagraph (d).]

(b) Appendix 3 is amended by deleting paragraph 2.

Conforming changes to reflect the inclusion of arbitrators in Article 18:

(c) Article 18 is amended by deleting in the title "with the Panel or Appellate Body".

(d) Paragraph 1 of Article 18 is amended by **deleting "panel or Appellate Body" and inserting in its place "panel, Appellate Body, or arbitrator,"** inserting "~~-, arbitrator,~~" after "panel" both places that it occurs **and by inserting the following footnote after the first appearance of the term "arbitrator":**<sup>3</sup>

(2) Timely access to submissions

(e) Paragraph 2 of Article 18 is amended to read as follows:

"2. **Any** ~~A Member's~~ document<sup>4</sup> **that a Member** provides~~d~~ to a panel, the Appellate Body, or an arbitrator shall be public, except for confidential information. Nothing in this Understanding ~~shall precludes~~ a **Member** ~~party to a dispute~~ from disclosing statements of its own positions to the public. A Member shall not disclose another Member's confidential information. The Member submitting the confidential information shall provide within 15 days of the request of another Member a non-confidential summary of the information."

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<sup>1</sup> The expression "observe" does not require physical presence in the meeting.

<sup>2</sup> For purposes of this Article, the term "confidential information" ~~shall~~ means certain factual information designated as such by the **Member** ~~party or third party to the dispute~~ at the time that **Member** ~~party or third party~~ submitted the information.

<sup>3</sup> As used in this Article, the expression "arbitrator" means any arbitrator under paragraph 3(c) of Article 21, ~~paragraph 6 of Article 22,~~ or Article 25. [NOTE: this list is intended to include all arbitration proceedings under the DSU and the references would need to be updated to reflect any amendments to the DSU.]

<sup>4</sup> The term "documents" does not include ~~a~~ documents concerning an interim report or that ~~is~~ ~~are~~ purely administrative in nature.

(f) Appendix 3 is amended by deleting paragraph 3 and renumbering the subsequent paragraphs accordingly.

(g) A decision by the DSB:

"The Dispute Settlement Body directs the Secretariat to maintain the documents referenced in paragraph 2 of Article 18 in a central location and **to** make these documents available to the public, **except for other than** confidential information."

(3) Timely access to Final Reports

(h) A decision by the DSB:

"A final report issued by a panel to the parties ~~is shall be~~ an unrestricted document, except for any confidential information (as defined in Article 18). Any interim report considered final by operation of the last sentence of paragraph 2 of Article 15 ~~is shall be~~ unrestricted when considered final.

"This decision is without prejudice to the practice concerning the date of circulation of the report.<sup>5</sup>"

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<sup>5</sup> That practice was established on a trial basis and under that practice a document is deemed to be circulated on the "date printed on the WTO document to be circulated with the assurance of the Secretariat that the date printed on the document was the date on which this document was effectively put in the pigeon holes of delegations in all three working languages." (WT/DSB/M/2).