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PROVISIONS ON PROCEDURAL FAIRNESS IN EXISTING WTO AGREEMENTS

Background Note by the Secretariat

This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

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I. INTRODUCTION

1. This note has been prepared in response to a request made by the Working Group at its meeting of 26-27 September 2002,[1] as an input to the Group's consideration of the relevance to its work of the principle of procedural fairness, which is referred to as a core principle in paragraph 25 of the Doha Ministerial Declaration.[2] It complements a previous paper[3] prepared by the Secretariat on the other core principles that are explicitly mentioned in paragraph 25 of the Doha Declaration,[4] namely transparency and non-discrimination.

2. As requested by the Working Group, the aim of this note is to provide factual background on the location, purpose and content of the principle of procedural fairness as it is incorporated in existing WTO Agreements. The note does not seek to analyse the relevance of the principle of procedural fairness for competition law and policy since that was not part of the mandate given to the Secretariat. Rather, it was understood that this was a task for Members in the Working Group.

3. As will be evident from the analysis below, existing WTO Agreements contain a large number of provisions relating to the matter of procedural fairness. The note seeks to set out and, to the extent possible, categorise the relevant provisions, focussing on the three main WTO Agreements, notably the GATT, GATS and TRIPS Agreements, and some key Annex 1 A Agreements, in particular, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Agreement on Anti-Dumping Measures" or "AD"), the Agreement on Subsidies and Countervailing Measures ("SCM") and the plurilateral Agreement on Government Procurement ("GPA"), which address important additional aspects of procedural fairness.

4. The note is limited to WTO requirements on procedural fairness at the domestic level. It does not deal with WTO procedural fairness requirements regarding the treatment of WTO Members as such, for example in the context of WTO dispute settlement and other procedures.[5]

5. As a further introductory point, it should be noted that the term "procedural fairness" is not to be found in any WTO Agreement. As indicated in paragraph 16 below, while some broad principles relating to procedural fairness are generally applicable throughout the WTO, the same conclusion cannot be drawn for the more elaborate provisions of this nature found in a number of specific WTO Agreements. These provisions have been negotiated in order to respond to the specific needs of individual agreements and subject-matters, rather than as part of any common overall design or pattern. While much of this paper is necessarily taken up with enumerating these more detailed provisions, it would be inappropriate for the reader to over-generalise their applicability in the WTO system.

6. As background to the analysis and in order to facilitate future discussions on this topic in the Working Group, Part I of this note summarises the observations made by Members on the relevance of procedural fairness for competition law and policy in recent meetings of the Working Group.

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[1] Report on the Meeting of 26-27 September (WT/WGTCP/M/19), paras. 14 and 86.

[2] Doha Ministerial Declaration adopted on 14 November 2001, 20 November 2001, WT/MIN(01)/DEC/1, para. 25.

[3] Background Note by the Secretariat on The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency (WT/WGTCP/W/114, issued 14 April 1999).

[4] Doha Ministerial Declaration adopted on 14 November 2001, 20 November 2001, WT/MIN(01)/DEC/1, para. 25.

[5] For example, the Understanding on Rules and Procedures Governing the Settlement of Disputes; the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1); the Working Procedures of Appellate Review (WT/AB/WP/4); the rules of procedure of various WTO bodies; and the procedures contained in the TBT and SPS Agreements regarding notification of proposed technical regulations.

Part II describes various types of WTO requirements relating to procedural fairness. Part III addresses the issue of the beneficiaries of procedural fairness safeguards.

II. OBSERVATIONS BY MEMBERS[6]

7. The view has been expressed in the Working Group that all effective competition policy regimes include guarantees that the rights of parties facing adverse decisions and sanctions will be recognised and respected. Such guarantees can vary both in content and in form, reflecting the tools of the legal system and the traditions that generated the competition regime. The suggestion has been made that four broad categories of guarantees are relevant. First, there should be guarantees relating to access to the system, including the right of firms to have notice that a formal investigation by the competition authority is pending against them, and what the authority's objections to their conduct are. A second basic guarantee relates to the defence of the firms involved. Firms should have the opportunity and the time to make their views known to the authority in writing or by participating in hearings, by submitting evidentiary proof or documents, and by having an opportunity to introduce testimony from witnesses who might corroborate their views on the facts. These types of guarantees would typically include some right of access to the authority's file. A third guarantee is the right of firms involved in competition proceedings to have decisions affecting them reviewed by an independent judicial body. Finally, the protection of confidential information, including business secrets, should also be guaranteed. These basic guarantees do not need to be harmonised across regimes, but should be described in a future agreement with some clarity.[7]

8. The view has also been expressed that four broad concepts can be identified that are likely to promote fairness, namely: (i) the right of access and rights to petition a competition authority; (ii) the right of a firm subject to an investigation to know the basis for an antitrust authority's objection before the authority takes action, and the right of that firm to respond; (iii) the right to appeal an agency's decision; and (iv) timeliness.[8]

9. A number of questions, concerns and reservations have been noted regarding the proposal to incorporate the principle of procedural fairness in a multilateral framework on competition policy. First, the point has been made that there is not yet a broad consensus on the meaning of procedural fairness in the context of competition law enforcement, partly because notions of fundamental fairness differ between legal systems, and are also influenced by domestic political and legal cultures.[9] Second, a number of specific questions have been posed regarding how the principle of procedural fairness would work in practice, including: who should have rights of access to the system and whether access should be equal or differentiated for different classes of parties? Should procedural rights be accorded to third parties that might be harmed by a merger transaction but not in a traditional antitrust sense? Would the agencies of Members whose legal systems allow for broad rights of private action to pursue competition law claims directly through the use of the courts be required to provide as much formal access to the agency as those that do not? Would all Members be required to have private rights of action? What form should the right to respond take? Would objections need to be notified formally and in writing or could this be done on a more informal basis? What types of decisions ought to be reviewable?

10. As to the implications for developing countries, the concern has been expressed that the principle of procedural fairness could require a Member to set up and maintain a judicial framework for handling appeal cases. Requirements for comprehensive notification and publication of competition laws and related information might also be resource-intensive. More studies and

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[6] This part of the paper is based on the Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council (WT/WGTCP/6), especially paras. 30-36 and 44-46.

[7] Report of the Meeting of 26-27 September 2002 (WT/WGTCP/M/19), para. 41.

[8] *Id.*, para. 18.

[9] *Id.*, para. 18.

discussions are necessary so that developing countries can more realistically assess the costs and benefits of such provisions before Ministers decide on the modalities of negotiations.[10] In particular, it would be useful to clarify whether Article X of GATT is an appropriate reference for the discussion of procedural fairness in the Working Group, or whether a more specific concept of procedural fairness has to be developed for competition policy.[11] In any case, it is important to address this issue in ways that take account of the diversity of Members' legal cultures and the established practices of national judicial systems and competition authorities, where the latter exist.[12]

11. In response to these concerns, the view has been expressed that all competition systems respect certain basic criteria of fairness. Further, experience in other areas of the WTO has shown that procedural fairness can be addressed in ways that are simple and practical, and yet take account of the evident diversity in Members' legal cultures and systems. For instance, there are a number of provisions in the WTO agreements stipulating an obligation to provide for judicial review without any interference whatsoever on how judicial reviews are organised in a given country, or the scope of such judicial reviews. In practice, these provisions have not created problems of the type which have been alluded to, and have been useful in terms of reassuring traders and investors that the national systems of countries with which they often have, at best, limited familiarity, respect certain basic norms.[13] As to the interaction of a possible multilateral framework on competition policy, in particular its procedural fairness elements, with the necessity of policy space for promoting domestic goals unrelated to economic efficiency, the point has been made that the guarantees of non-discrimination and procedural fairness embodied in a Member's Constitution and the existence of a competition law respecting those guarantees has not prevented the implementation of industrial and social policies even where the application of such policies requires the selective promotion of particular interest groups.[14]

12. With regard to the general architecture of possible provisions on core principles, including procedural fairness, in a multilateral framework on competition policy, the suggestion has been made that such a framework might embody only general provisions with regard to the core principles, while also offering more detailed interpretations or possible approaches for the application of the core principles in the form of non-binding guidelines or a menu of options. This would foster common understanding of the core principles among Members, while also taking into consideration the diversified approaches of competition law enforcement adopted by each Member.[15] The view has been also expressed that, although non-binding arrangements could be part of a possible way forward, a purely non-binding framework would not be sufficient.[16]

13. The suggestion has also been made that giving content to the principle of special and differential treatment might facilitate reaching agreement on the appropriate meaning and scope of procedural fairness and the other proposed core principles.[17] In particular, the view has been expressed that developing countries should be given a time-frame to build transparency and due process in the administration and enforcement of their competition laws.[18] The view has been also expressed that special and differential treatment should not necessarily be limited to developing

[10] *Id.*, paras. 27 and 28.
[11] *Id.*, para. 54.
[12] *Id.*, paras. 15, 28 and 63.
[13] *Id.*, paras. 41, 42 and 68.
[14] *Id.*, para. 31.
[15] *Id.*, para. 80.
[16] *Id.*
[17] *Id.*, para. 32.
[18] *Id.*, para. 12.

countries. Rather, flexibility could be extended to all countries that have no competition law,[19] regardless of their stage of economic development.[20]

14. Pursuing a specific aspect of the debate, the view has been expressed that even the more basic procedural fairness rules that might be envisioned in a multilateral agreement might raise problems for national enforcement processes. For instance, as to the right to receive a notice of an investigation, there would be no problem if the notice is supposed to be addressed to the party being investigated, but the situation is different if there is to be widespread notification, for example, to the WTO and/or its Members. Certain Members' practice is not to disclose publicly the existence of an investigation when it has not been determined that the target of an investigation did anything wrong, out of respect for the rights of the person being investigated.[21] In response, the point has been made that there is a need for a clear distinction between notification of investigations to the parties, and notification to the WTO. To show compliance with a procedural fairness obligation in the WTO, Members should simply be in a position to demonstrate that they have made provision for targets of an investigation to be notified in an appropriate manner.[22] The suggestion has also been made that any eventual multilateral framework on competition policy should be non-binding; in this context, the question of obligations relating to procedural fairness would not arise.[23]

15. Finally, the view has been expressed that the principles referred to in paragraph 25 of the Doha Ministerial Declaration are the basis of the multilateral trading system and are known by all countries. To bring them over to competition legislation would not be difficult if Members engaged themselves positively in the exercise. No competition law is opposed to these principles; on the contrary, competition policy and the WTO principles are mutually supportive. Furthermore, the proposed principles are important to the credibility of competition agencies. Delegations should therefore adopt a positive stance in this area, starting with an analysis of how the principles are reflected in their own legislation. In this way, common approaches and positions could be readily identified.[24]

III. THE SCOPE OF PROCEDURAL FAIRNESS IN WTO AGREEMENTS

16. Provisions on procedural fairness in WTO agreements can be divided into two main categories:

(a) First, broad provisions on procedural fairness based on three central concepts:

(i) that governmental measures of general application be published and that this be done, as a general rule, before they are applied;

(ii) that such measures be administered in a uniform, impartial and reasonable manner or in a fair and equitable way; and

(iii) possibilities for appeal or review of decisions on the application of such measures.

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[19] *Id.*, para. 55.
[20] *Id.*, para. 15.
[21] *Id.*, para. 69.
[22] *Id.*
[23] *Id.*, para. 26.
[24] *Id.*, para. 82.

Provisions based on these concepts can be found in Article X of the GATT,[25] Articles III and VI of the GATS and Articles 41.2-4 and Article 63 of the TRIPS Agreement and are also reflected in many other WTO agreements.

(b) Second, more detailed and specific provisions regarding procedural fairness that can be found in many of the specific Annex 1A agreements as well as in the TRIPS Agreement and the plurilateral Agreement on Government Procurement. These provisions aim to regulate the way in which specific measures are applied. Examples are found in the provisions in:

(i) the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures on the way in which investigations on anti-dumping and countervailing are to be conducted;

(ii) the Agreement on Safeguards on the way in which safeguard investigations and the review of safeguard measures should be carried out;

(iii) the Agreement on Import Licensing Procedures on the way in which import licences should be administered;

(iv) the Agreement on Preshipment Inspection on the way in which Members using preshipment inspection should ensure that such inspections are carried out;

(v) the plurilateral Agreement on Government Procurement on the way in which government procurement contracts should be awarded; and

(vi) the TRIPS Agreement on the enforcement of intellectual property rights and the acquisition and maintenance of such rights.

17. The above provisions apply to a broad range of situations relating to the application of measures affecting trade. One way of categorising these is as follows:

(a) The situation where an administrative authority is simply applying a measure, without there being any significant legal proceedings enabling the interests of different parties to be taken into account in a decision on the measure. Examples would be the levying of tariffs, including the determining of customs valuation, the application of import licensing and government procurement.

(b) A second situation would be where an administrative authority is applying a measure whose application involves legal proceedings intended to provide an opportunity for the interests of different parties to be taken into consideration in reaching a decision on the measure, and where the administrative authority is required to have regard to certain norms of due process in conducting investigations and/or administering the measures. Examples would include the application of anti-dumping and countervailing duties and safeguard measures and the acquisition and maintenance of intellectual property rights.

(c) A third situation concerns the procedures to be followed by administrative tribunals operating in a quasi-judicial way. Examples can be found in Article X:3 (b) of the

[25] For a thorough analysis of Article X of the GATT and the relevant jurisprudence, *see* Background Note by the Secretariat on "Article X of the GATT 1994 – Scope and Application" (G/C/W/374).

GATT, Articles 49 and 50.8 of the TRIPS Agreement and Article XX of the Agreement on Government Procurement.

(d) Finally, procedures to be followed by judicial authorities in carrying out their functions. The main example of this is Part III of the TRIPS Agreement.

18. Another situation addressed by WTO procedural provisions which might briefly be mentioned is that of procedures regarding the preparation of national legislation aimed at ensuring that interested parties in other Members have advance notice that a Member proposes to introduce a measure. Examples can be found in the Agreements on Technical Barriers to Trade and the Application of Sanitary and Phyto-Sanitary Measures. Mention might also briefly be made of two other sets of provisions relating to procedural fairness in WTO agreements which do not fall readily under any of the above categories:

(a) The Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 of the Agreement on Technical Barriers to Trade. This instrument is not limited to the application of governmental measures but is open for acceptance by any standardising body within a WTO Member, whether governmental or non-governmental. It contains a number of procedural norms to be followed by such bodies, designed to ensure the fair treatment of interested parties within WTO Members.

(b) The independent review procedures provided for in the Agreement on Preshipment Inspection. Under these provisions, an international mechanism to settle disputes between preshipment inspection entities and exporters is established and certain provisions on procedural fairness are specified. In the WTO scheme of things, this mechanism is exceptional in that provision is made for disputes to be brought by a private party to an international dispute resolution entity. This mechanism, which is administered by the WTO Secretariat, has yet to be used.

19. Given the focus of the work of the Working Group on the Interaction between Trade and Competition Policy and in the light of the views expressed on the issue of procedural fairness in the Working Group so far, this note focuses on WTO provisions relating to situations referred to in paragraphs 17 (b)-(d) above. In particular, it focuses on WTO provisions relating to procedural fairness where there is an allegation that a private party has engaged in conduct that involves some measure of wrong-doing or is otherwise actionable and where remedies are being sought. It also covers WTO procedural fairness provisions applicable to procedures for review of administrative decisions.

20. The relevant WTO provisions are addressed in the note under the following headings:

(a) some general aspects of procedural fairness;

(b) access to justice/action by the authorities;

(c) characteristics of the authorities to which recourse can be had;

(d) notice of the initiation of proceedings;

(e) information on applicable rules, provisions and requirements;

(f) access to evidence put forward by authorities and other parties;

(g) right to be heard, including the right to submit evidence and the right to respond to allegations and concerns;

(h) obligations to disclose evidence;

(i) right to be represented;

(j) provisional measures;

(k) main characteristics of decisions on the merits;

(l) right of review/existence of an appeal mechanism; and

(m) protection of confidential information.

A. GENERAL ASPECTS OF PROCEDURAL FAIRNESS

1. Transparency

21. As will be clear from the paragraphs below, many procedural fairness requirements are closely related to the principle of transparency.[26] Some WTO Agreements specifically provide for a transparency requirement. For instance, under the Agreement on Government Procurement, "[e]ach Party shall provide… transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest."[27] The Agreement on Subsidies and Countervailing Measures provides that "any method used by the investigating authority to calculate the benefit to the recipient conferred… shall be provided in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained".[28] The Agreement on Preshipment Inspection provides that "[u]ser Members shall ensure that preshipment inspection activities are conducted in a transparent manner."[29]

2. Non-discrimination

22. As a general rule, the WTO national treatment and MFN rules apply to procedural requirements. Further, some WTO Agreements specifically apply a non-discrimination standard to procedures of the sort under review in this note. For instance, the Agreement on Government Procurement provides that "[e]ach Party shall provide non-discriminatory… procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest."[30]

3. Timeliness

23. Some procedural fairness provisions relate to the overall timeliness of procedures. For instance, Article 41.2 of the TRIPS Agreement provides that "[p]rocedures for the enforcement of intellectual property rights… shall not… entail unreasonable time-limits or unwarranted delays." Similarly, the Agreement on Preshipment Inspection provides that "[u]ser Members shall ensure that

[26] *See*, in particular, the paragraphs addressing notices of the initiation of proceedings; information on applicable rules, provisions, and requirements; access to evidence put forward by authorities and other parties; provisional measures; and main characteristics of decisions on the merits.

[27] Article XX:2 GPA.

[28] Article 14.1 SCM.

[29] Article 2.5 of the Agreement on Preshipment Inspection.

[30] Article XX:2 GPA.

preshipment entities avoid unreasonable delays in inspection of shipments."[31] Some other provisions require the timeliness of individual stages of procedures, such as anti-dumping and countervailing duty investigations[32] or review.[33] Certain WTO Agreements prescribe a specific maximum length of time available for certain procedural steps,[34] while certain provisions set out a minimum deadline for the relevant procedural steps, for instance for certain steps in investigations[35] or the initiation of review procedures.[36]

4. Indemnification

24. The TRIPS Agreement prescribes that "judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse."[37]

B. ACCESS TO JUSTICE/ACTION BY THE AUTHORITIES

25. One aspect of this issue concerns WTO provisions that relate to the possibility for an interested party to obtain the initiation of action to remedy a practice by another party which the first party considers to involve a measure of wrong-doing or to be otherwise actionable. These include both private rights of action and the possibility to obtain the initiation of procedures by public authorities on petition by private parties. The main agreements where this issue arises are the TRIPS Agreement and the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures.

26. The TRIPS Agreement handles this issue in three ways:

(a) It requires the provision of a private right of action under civil law before the judicial authorities against any act of infringement of intellectual property rights covered by the Agreement.[38]

(b) In regard to counterfeit trademark and pirated copyright goods, it stipulates that right holders must have the right to seek, through administrative or judicial channels, action by the customs authorities to suspend the importation of such products. Certain conditions have to be met. The Agreement does not explicitly state that the request would have to be accepted if these conditions have been met, but provides that the competent authorities shall inform the applicant within a reasonable period whether they have accepted the application.[39]

(c) In regard to criminal procedures, the TRIPS Agreement requires that Members provide for such procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. It does not explicitly address the issue of the extent to which the relevant public authorities

[31] Article 2.15 of the Agreement on Preshipment Inspection.
[32] Articles 5.10 AD and 11.11 SCM.
[33] Articles 11.4 AD and 21.4 SCM.
[34] Article XVIII:1 GPA.
[35] Articles 6.1.1 AD and 12.1.1 SCM.
[36] Article XX:5 GPA.
[37] Article 48.1 TRIPS.
[38] Article 41.1 TRIPS.
[39] Article 51 TRIPS.

would have to take to initiate such action in response to complaints from right holders.[40]

27. As regards the initiation of action against allegedly dumped or subsidised imports that might lead to the imposition of anti-dumping or countervailing duties, the WTO agreements in these areas specify, in a fair degree of detail, the requirements that Members should ensure are met before an investigation is initiated, for example in regard to the evidence to be submitted by the requesting domestic industry and the standing of the requesting party to represent the domestic industry.[41] They provide that an interested party – that is to say the domestic industry of a Member – has the right to request the relevant authorities in that Member to initiate an investigation[42] but they do not require that an investigation must actually be initiated on the basis of such a request. In this regard, it should be recalled that the underlying purpose of the procedural provisions in these agreements is not to protect the interests of the domestic industry requesting such an investigation; rather they are aimed at protecting the legitimate interests of other WTO Members from which products that might be affected by such an investigation come and the producers, exporters and importers of such products.

28. A second aspect of the question of access to justice/action by the authorities concerns WTO provisions relating to the initiation of action *ex officio* by the public authorities. The above paragraphs have already discussed the question of the initiation of action by a public authority in response to a complaint from a private party. The issue discussed here is that of the initiation of action by the public authorities which is not based on an explicit complaint.

29. In this regard, the TRIPS Agreement contains no explicit requirement for such *ex officio* action. The issue of *ex officio* action is addressed in the Section on Special Requirements Related to Border Measures, but this provision only lays down requirements that the competent authorities should meet before taking *ex officio* action and does not require them to initiate such action.[43] It might also be recalled that the Section on Criminal Procedures referred to above states that "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale".[44]

30. Regarding the initiation of anti-dumping and countervailing duty investigations, the relevant WTO Agreements explicitly recognise that in special circumstances such investigations can be initiated on an *ex officio* basis, but do not *require* any such *ex officio* action. Rather, they specify requirements that would have to be met before such action is taken.[45]

C. CHARACTERISTICS OF THE AUTHORITIES TO WHICH RECOURSE CAN BE HAD

31. The GATT and the GATS specify that "judicial, arbitral or administrative tribunals or procedures"[46] must be available for the prompt review and correction of administrative action relating to customs matters and matters affecting trade in services. Those Agreements call for such tribunals or procedures to be independent of the agencies entrusted with administrative enforcement. The GATT provides for an exception where pre-existing procedures already provided "for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement".[47] The GATS applies this possibility to new as well as pre-existing procedures and also provides for an exception where the

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[40] Article 61 TRIPS.
[41] Articles 5.2 AD, and 11.2 SCM.
[42] Articles 5.4 AD and 11.4 SCM.
[43] Article 58 TRIPS.
[44] Article 61 TRIPS.
[45] Articles 5.6 AD and 11.6 SCM.
[46] Articles X:3 (b) GATT and VI:2 (a) GATS.
[47] Article X:3 (c) GATT.

institution of the tribunals or procedures would be inconsistent with a Member's constitution or structure or the nature of its legal system.[48]

32. The Agreement on Government Procurement requires parties to establish mechanisms by which interested suppliers can challenge alleged breaches of the Agreement in the context of a procurement. It requires that the challenges be heard by a court or by "an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of the appointment".[49] If the review body is not a court, the Agreement provides that either its decisions must be subject to judicial review or that its procedures must conform to a number of more detailed requirements of procedural fairness set out in the Agreement.[50] If the review body is a court or its decisions are subject to judicial review, there are no comparable requirements specified in the Agreement.

33. Most of the enforcement provisions in the TRIPS Agreement relate to the proceedings of judicial authorities, the characteristics of which are not specified. The Agreement requires that, if a final administrative decision has been taken in enforcement proceedings before an administrative body, parties to the proceeding must have an opportunity for review of the decision by a judicial authority. If the procedures concern the acquisition or maintenance of intellectual property rights, or administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation, final administrative decisions must be subject to review by a judicial or quasi-judicial authority.[51] Other formulations in regard to the nature of review bodies can be found in Article 31 on compulsory licensing which requires that decisions on legal validity and remuneration be subject to judicial review or other independent review by a distinct higher authority, and in Article 32, which requires that an opportunity for judicial review of any decision to revoke or forfeit a patent be available.

34. In regard to anti-dumping and countervailing duty investigations, the relevant WTO agreements do not address the characteristics that the bodies carrying out these investigations should have.[52] They do, however, require that administrative actions relating to final determinations and administrative reviews concerning the need for the continued imposition of duties shall be subject to judicial, arbitral or administrative tribunals or procedures which must be independent of the authorities responsible for the determination or review in question.[53]

D. NOTICE OF THE INITIATION OF PROCEEDINGS

35. The TRIPS Agreement requires that defendants in civil judicial proceedings for the enforcement of intellectual property rights shall have the right to written notice which is timely and contains sufficient detail, including on the basis of the claims against them.[54] The Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures set out that "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation,… interested parties known to the investigating authorities to have an interest therein shall be notified".[55] Furthermore, those Agreements provide that "as soon as an investigation has been initiated, the

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[48] Article VI:2 (b) GATS.

[49] Article XX:6 GPA.

[50] *Id.*

[51] Except in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures. Article 62.4 TRIPS.

[52] Footnote 3 to Article 2.2.1 AD provides that "[w]hen in this Agreement the term 'authorities' is used, it shall be interpreted as meaning authorities at an appropriate senior level."

[53] Articles 13 AD and 23 SCM.

[54] Article 42 TRIPS.

[55] Articles 12.1 AD and 22.1 SCM.

authorities shall provide the full text of the written application received… to the known exporters, and shall make it available, upon request, to other interested parties involved".[56]

36. Some provisions of the WTO Agreements safeguard against the premature public disclosure of information about a possible proceeding. For example, the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures provide that "the authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the application for the initiation of an investigation".[57] However, once the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation, the same Agreements require public notice of the initiation of the investigation,[58] and they prescribe the types of information to be contained in such notices.[59]

E. INFORMATION ON APPLICABLE RULES, PROVISIONS AND REQUIREMENTS

37. As mentioned earlier, a basic aspect of procedural fairness that is found in various WTO agreements is that laws, regulations and requirements of general application should be published and that this should be done, wherever possible, before they are applied, at least where they involve more burdensome requirements. These provisions apply to both substantive and procedural requirements. Some agreements contain additional provisions regarding the availability of information on procedures and standards to be applied in legal proceedings. For example, the Agreement on Government Procurement requires, in its Article XX:3, each Party to provide its challenge procedures in writing and make them generally available. The Agreement on Subsidies and Countervailing Measures provides that the method to be used by the investigating authority to calculate the benefit to the recipient of a subsidy shall be provided for in the national legislation or implementing regulations of the Member concerned and that the application of this method by the investigating authority shall be "adequately explained" to all parties involved.[60] The Agreement on Anti-Dumping Measures requires the authorities to indicate to the parties in question what information is necessary to ensure a fair comparison between the export price and normal value in the context of anti-dumping investigations.[61]

38. Furthermore, there are a number of other provisions in these agreements setting out requirements to provide information about specific procedural steps during investigations, including in regard to the information that authorities require[62], on-the-spot investigations[63], the inclusion of non-governmental experts in investigating teams[64] and the reasons for not accepting evidence or information.[65]

F. ACCESS TO EVIDENCE PUT FORWARD BY AUTHORITIES AND OTHER PARTIES

39. The Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures include explicit requirements on access to evidence. For instance, they require that in the context of

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[56] Articles 6.1.3 AD and 12.1.3 SCM.

[57] Articles 5.5 Ad and 11.5 SCM.

[58] Articles 12.1 AD and 22.1 SCM.

[59] *Id*.

[60] Article 14 SCM.

[61] Articles 2.4 and 6.1 AD.

[62] For instance, Articles 6.1 AD and 12.1 SCM, and paragraph 1 of Annex II to the Agreement on Anti-Dumping Measures.

[63] Articles 6.7 AD and 12.6 SCM and paragraphs 1, 3, 5, 7 and 8 of Annex I to the Agreement on Anti-Dumping Measures, and paragraphs 1 and 3 of Annex VI to the Agreement on Subsidies and Countervailing Measures.

[64] Paragraph 2 of Annex VI to the SCM Agreement, and paragraph 2 of Annex I to the Agreement on Anti-Dumping Measures.

[65] Paragraph 6 of Annex II to the Agreement on Anti-Dumping Measures.

anti-dumping and countervailing investigations, "evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation."[66] Further, in the context of investigations, those Agreements provide that "whenever practicable"[67] authorities shall provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, and that is used by the authorities in an anti-dumping or countervailing measures investigation. Moreover, before a final determination is made, authorities must inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.[68] In particular, "[s]uch disclosure should take place in sufficient time for the parties to defend their interests."[69] Further, the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures require that oral information be taken into account by authorities only in so far as written reproductions thereof have been made available to other interested parties.[70]

40. The TRIPS Agreement provides that "defendants shall have the right to written notice which… contains sufficient detail, including the basis of the claims."[71] Furthermore, an implicit requirement of access to evidence can be found in the requirement in the TRIPS Agreement that decisions on the merits of a case be based only on evidence in respect of which parties were offered the opportunities to be heard.[72]

G. Right to Be Heard, Including the Right to Submit Evidence and the right to respond to Allegations and Concerns

41. The right to be heard can be found in various WTO Agreements, typically in the form of provisions regarding the right to make comments,[73] to submit information,[74] to present views and make arguments,[75] to prepare presentations,[76] to substantiate claims,[77] to respond,[78] and parties' right to defend their interests.[79]

42. Most of the Agreements under consideration provide for the right to be heard in the context of procedures leading to decisions on the merits:

(a) The Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures require that, before a final determination is made, the authorities shall disclose to all interested parties the essential facts under consideration which form the basis for the decision whether to apply definitive measures "in sufficient time for the parties to defend their interests".[80] Further, "the authorities shall whenever practicable provide timely opportunities for all interested parties… to prepare presentations"[81] on the basis of "information that is relevant to the presentation of

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[66] Articles 6.1.2 AD and 12.1.2 SCM.
[67] Articles 6.4 AD and 12.3 SCM.
[68] Articles 6.9 AD and 12.8 SCM.
[69] *Id*.
[70] Articles 6.3 AD and 12.2 SCM.
[71] Article 42 TRIPS.
[72] Article 41.3 TRIPS, and by reference to that provision, Article 62.4 TRIPS.
[73] Articles 6.10.1, 7.1 (i) and 8.3 AD, and 17.1 (a) and 18.3 SCM.
[74] Articles 6.2, 6.12 7.1 (i) AD, and 12.10 and 17.1 (a) SCM.
[75] Article 6.2 AD.
[76] Articles 6.4 AD, and 12.3 and 19.2 SCM.
[77] Articles 42 and 57 TRIPS.
[78] Article XX:6 GPA.
[79] Articles 6.2 AD and 12.8 SCM.
[80] *Id*.
[81] Articles 6.4 AD and 12.3 SCM.

their cases, that is not confidential…, and that is used by the authorities"[82] in an anti-dumping or countervailing duty investigation.[83] The Agreement on Anti-Dumping Measures also provides that in order to have a full opportunity for the defence of their interests throughout anti-dumping investigations, on request, "the authorities shall… provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered,"[84] although "there shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case."[85]

(b) In the TRIPS Agreement, Article 41.3 prescribes the right to be heard as a limit on the evidence that can be relied upon by authorities in decisions on the merits.[86]

43. Under certain WTO Agreements, parties' right to present evidence is a specific element of the right to be heard. For instance, the TRIPS Agreement requires that all parties to civil judicial procedures concerning the enforcement of any intellectual property right covered by the TRIPS Agreement "shall be duly entitled to… present all relevant evidence."[87] In a similar vein, the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures provide that all interested parties in an anti-dumping/countervailing duty investigation "shall be given ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."[88] Further, the Agreement on Subsidies and Countervailing Measures provides that "it is desirable"[89] that Members establish procedures "which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty."[90]

44. A specific aspect of the right to present evidence is stipulated by paragraph 6 of Annex II to the Agreement on Anti-Dumping Measures, which provides that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor by the authority, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation."[91] As a further guarantee in such situations, "[i]f the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations."[92] The Agreement on Government Procurement prescribes the right to present witnesses in the context of challenge procedures before certain non-judicial bodies.[93]

H. Obligations to Disclose Evidence

45. The TRIPS Agreement requires that, in civil procedures relating to the enforcement of intellectual property rights, the judicial authorities must have the authority, where a party to a proceeding has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to the substantiation of its claims which lies in the control of the opposing

[82] *Id*.
[83] *See also* Article 19.2 SCM.
[84] Article 6.2 AD.
[85] *Id*.
[86] Article 41.3 TRIPS, and by reference to that provision, Article 62.4 TRIPS.
[87] Article 42 TRIPS.
[88] Articles 6.1 AD and 12.1 SCM.
[89] Article 19.2 SCM.
[90] Article 19.2 SCM.
[91] Paragraph 6 of Annex II to the Agreement on Anti-Dumping Measures.
[92] *Id*.
[93] Article XX:6 (f) GPA.

party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.[94]

46. The TRIPS Agreement also addresses the situation where a party to a proceeding voluntarily, and without good reason, refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action. In such a situation, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.[95]

47. The Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures prescribe that "all interested parties shall be given notice of the information which the authorities require".[96] Further, under those Agreements, "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available".[97]

I. RIGHT TO BE REPRESENTED

48. Article 42 of the TRIPS Agreement states that parties to civil judicial procedures concerning the enforcement of intellectual property rights covered by the TRIPS Agreement "shall be allowed to be represented by independent legal counsel."[98] A similar provision can be found in the Agreement on Government Procurement, which sets out that challenge procedures before a review body that is not a court and not subject to judicial review shall ensure that participants can be represented and accompanied.[99]

J. PROVISIONAL MEASURES

49. A number of WTO agreements explicitly provide for the possible taking of provisional measures.[100] Given that such measures are taken without a full hearing on the merits, particular attention is paid in these agreements to procedural safeguards:

- In general, it is required that such measures be preceded by adequate opportunities for interested parties to submit information and evidence, and to make comments.[101] An exception to this can be found in the TRIPS Agreement which requires that judicial authorities shall have the authority to adopt provisional measures "*inaudita altera parte*" where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being

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[94] Article 43.1 TRIPS.

[95] Article 43.2 TRIPS.

[96] Articles 6.1 AD and 12.1 SCM. Under the Agreement on Anti-Dumping Measures, this also covers the "manner in which such information should be structured", and eventually the medium in which it should be provided. Paragraphs 1 and 2 of Annex II to the Agreement on Anti-Dumping Measures.

[97] Articles 6.8 AD and 12.7 SCM. Under the Agreement on Anti-Dumping Measures, such facts include " those contained in the application for the initiation of the investigation by the domestic industry". Paragraph 1 of Annex II to the Agreement on Anti-Dumping Measures.

[98] Article 42 TRIPS also provides that "procedures shall not impose overly burdensome requirements concerning mandatory personal appearances."

[99] Article XX:6 (b) GPA.

[100] Articles 50 TRIPS, 7 AD and 17 SCM.

[101] Articles 7.1 (i) AD, 17.1 (a) SCM and 50.1 (b) TRIPS.

destroyed.[102] In such cases, the party subject to the measure must have a right to a review within a reasonable period.

- Under the TRIPS Agreement, provisional measures should only be taken after a *prima facie* case has been established.[103] The Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures require that "provisional measures may be applied only if… a preliminary affirmative determination has been made that [dumping/a subsidy] exists"[104] and that there is injury to a domestic industry caused by dumped or subsidized imports.

- Under the TRIPS Agreement, judicial authorities must have the authority to order the party applying for a provisional measure to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.[105]

- Some WTO agreements provide for time-limits on the period of application of provisional measures.[106]

- The TRIPS Agreement provides that the judicial authorities must have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by a provisional measure that is subsequently found not to have been justified.[107]

K. MAIN CHARACTERISTICS OF DECISIONS ON THE MERITS

50. Certain WTO Agreements include specific provisions on the characteristics that must be met by decisions on the merits. For instance, the TRIPS Agreement provides that "[d]ecisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard".[108]

51. There are various provisions in WTO Agreements requiring that decisions on the merits be written. For instance, the TRIPS Agreement provides that decisions on the merits regarding the enforcement of intellectual property rights shall "preferably" be in writing.[109] Likewise, the Agreement on Government Procurement requires written opinions and decisions in challenge procedures before certain non-judicial challenge bodies.[110]

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[102] Article 50.4 TRIPS.

[103] Article 50.3 TRIPS.

[104] Articles 7.1 AD and 17.1 SCM.

[105] Article 50.3 TRIPS.

[106] The Agreement on Subsidies and Countervailing Measures specifically prescribes that "[t]he application of provisional measures shall be limited to as short a period as possible, not exceeding four months." (Article 17.4 SCM) While prescribing a similar four-month period, the Agreement on Anti-Dumping Measures allows the extension to specific longer periods "upon request by exporters representing a significant percentage of trade involved" and/or "[w]hen authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury." (Article 7.4 AD) The TRIPS Agreement does not explicitly provide for the length of time for which provisional measures shall be applied but it allows defendants to request that provisional measures be revoked or otherwise cease to have effect "if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures." If no such determination is made, the "reasonable period" shall not "exceed 20 working days or 31 calendar days, whichever is the longer." (Article 50.6 TRIPS).

[107] For instance, Articles 50.7 and 56 TRIPS.

[108] Article 41.3 TRIPS, and by reference to that provision, Article 62.4 TRIPS.

[109] Article 41.3 TRIPS. *See also* Article 62.4 TRIPS, which references that provision.

[110] Article XX:6 (e) GPA.

52. Certain WTO Agreements include explicit requirements that decisions on the merits be reasoned. For instance, in general terms, Article 41.3 of the TRIPS Agreement provides that decisions on the merits shall be "preferably" reasoned. Further, the Agreement on Subsidies and Countervailing Measures requires that the public notice of the conclusion or suspension of an investigation shall include "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking,"[111] "[i]n particular,… the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers."[112] The Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures also specifically describe the kinds of factors to be taken into account and the criteria to be used when determining the margin of dumping or subsidy, injury and the causal relationship between the two.[113] Moreover, the Agreement on Government Procurement requires reasoned opinions and decisions in challenge procedures before certain non-judicial review bodies.[114]

53. Certain WTO Agreements also include explicit requirements that decisions on the merits be made known to the parties or be made public. The TRIPS Agreement provides that written and reasoned decisions on the merits shall be made available "at least to the parties to the proceeding without undue delay."[115] The Agreement on Subsidies and Countervailing Measures requires the publication of a public notice of "any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking…, of the termination of such an undertaking, and of the termination of a definitive countervailing duty."[116] In addition to prescribing the types of information that such notices shall contain, the same provision also establishes the obligation that such notices and reports "be forwarded… to other interested parties known to have an interest therein."[117]

54. A final aspect of decisions on the merits is the obligation set out in various provisions of the WTO Agreements that authorities in some way take into account or consider the information provided and the arguments advanced by parties while exercising their right to be heard. For example, paragraph 3 of Annex II to the Agreement on Anti-Dumping Measures provides that "[a]ll information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made." Furthermore, paragraph 5 of the same Annex provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." As a further example, by providing that "[a]ny selection of exporters, producers, importers or types of products… shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned",[118] the Agreement on Anti-Dumping Measures requires that authorities take the views of exporters, producers or importers into account.

L. Right of Review/Existence of an Appeal Mechanism

55. The aforementioned requirements of procedural fairness concern procedures regarding allegations of wrongdoing or other actionable conduct before judicial bodies and in administrative investigations. Most of the WTO Agreements which provide for procedures of that nature also

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[111] Articles 12.2 AD and 22.5 SCM.
[112] *Id*.
[113] Articles 2 and 3 AD and 14 and 15 SCM.
[114] Article XX:6 (e) GPA.
[115] Article 41.3 TRIPS. *See also* Article 62.4 TRIPS, which references that provision.
[116] Articles 12.2 AD and 22.3 SCM.
[117] *Id*.
[118] Article 6.10.1 AD.

provide for the possibility of review by a higher body of first instance decisions by administrative or judicial tribunals or of the results of investigations in which the interests of different parties are taken into account.[119]

56. The relevant WTO Agreements include relatively few and rather limited provisions as to the actual scope of review/appeal procedures. For instance, Article 41.4 of the TRIPS Agreement prescribes the minimum scope of review of final administrative decisions by judicial authorities, by providing that such review shall extend to "at least the legal aspects of initial judicial decisions on the merits of a case", albeit this is "subject to jurisdictional provisions in a Member's law concerning the importance of a case". As already explained in the context of the characteristics of the authorities to which recourse can be had, the scope and nature of the right of review depends in some instances on the nature of the first instance proceeding. Where the first instance proceeding is of an administrative nature, some of the agreements provide for more requirements.[120]

57. While the above paragraphs relate to review/appeal by a higher instance authority or body, it might also be noted that the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures include provisions on procedures to review the continued application of definitive anti-dumping or countervailing duties to be conducted by the investigating authority itself.[121] This kind of review is either initiated on request or on an *ex officio* basis.

M. PROTECTION OF CONFIDENTIAL INFORMATION

58. Some WTO Agreements contain broad, horizontal provisions regarding the protection of confidential information. For instance, the GATS provides that "nothing in this agreement shall require any Member to provide confidential information, the disclosure of which… would prejudice legitimate commercial interests of particular enterprises, public or private."[122] The TRIPS Agreement provides that civil judicial procedures for the enforcement of intellectual property rights "shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements."[123]

59. Some other provisions specifically require the protection of confidential information in the context of specific stages of procedures. In the context of notices about the initiation of investigations, the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures set out that in providing the full text of the written application to the known exporters and, upon request, to other interested parties, "[d]ue regard shall be paid to the requirement for the protection of confidential information."[124] Some other provisions protect confidential information potentially becoming available during investigations.[125] Further, some provisions protect confidential information in the context of parties' access to evidence put forward by authorities and other parties. For instance, under the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures the authorities are required to request parties to prepare non-confidential summaries of confidential information.[126] Further, the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures protect confidential information as regards access of parties to evidence and oral information presented in writing.[127] Under the Agreement on Anti-Dumping Measures, similar

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[119] *See*, for instance, Articles 41.4 TRIPS, 13 AD and 23 SCM.

[120] For instance, Articles X:3 (b) and (c) GATT, VI:2 GATS and XX:6 GPA.

[121] Articles 11.2 and 11.3 AD and 21.2 and 21.3 SCM.

[122] Article III *bis* GATS.

[123] Article 42 TRIPS.

[124] Articles 6.1.3 AD and 12.1.3 SCM.

[125] Articles 6.5, 6.7 and 12.2.3 AD, 12.4, 12.6 and 22.5 SCM, and paragraph 2 of Annex I to the Agreement on Anti-Dumping Measures.

[126] Articles 6.5.1 AD and 12.4.1 SCM.

[127] Articles 6.1.2 AD and 12.1.2 and 12.2 SCM.

protection applies with regard to opportunities for all interested parties to meet parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered.[128]

60. As shown by most of the aforementioned provisions, the most common way of protecting confidential information in the relevant WTO Agreements is by establishing direct obligations for Members and authorities to protect confidential information, and prohibitions to disclose confidential information. Some provisions seek to protect confidential information by requiring the imposition of sanctions on individuals breaching the protection of confidential information. Paragraph 2 of Annex I to the Agreement on Anti-Dumping Measures and paragraph 2 of Annex VI to the Agreement on Subsidies and Countervailing Measures both provide that "[i]f in exceptional circumstances it is intended to include non-governmental experts in the investigating team… [s]uch non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements."[129] Some provisions allow the disclosure of confidential information under certain conditions, such as requiring the approval by the relevant parties of the disclosure of confidential information. For instance, Article XIX:4 of the Agreement on Government Procurement provides that "confidential information… shall not be revealed without formal authorisation from the party providing the information."[130] Similarly, the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures require "specific permission of the party submitting [confidential information]".[131] Further, those Agreements provide that authorities are required to request parties to provide non-confidential summaries of confidential information but in exceptional circumstances it allows parties not to prepare such a summary where it is not possible and provided that it is sufficiently reasoned by the party in question.[132]

61. With regard to the matter or trade secrets, the TRIPS Agreement provides that "natural or legal persons shall have the possibility to prevent information lawfully in their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices"[133] so long as such information is secret, has commercial value because it is secret and has been subject to reasonable steps by the person lawfully in control to keep it secret.

IV. BENEFICIARIES OF PROCEDURAL FAIRNESS SAFEGUARDS

62. Under the Agreements on Anti-Dumping Measures and Subsidies and Countervailing Measures, the main provisions on procedural fairness are directed towards protecting the interests of so-called "interested parties". These are defined as:

> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
>
> (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.[134]

Certain procedural provisions of the Agreement on Subsidies and Countervailing Measures are also directed towards the interests of industrial users and consumers of the product under investigation.[135]

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[128] Article 6.2 AD.

[129] Paragraph 2 of Annex I to the Agreement on Anti-Dumping, and paragraph 2 of Annex VI of the Agreement on Subsidies and Countervailing Measures.

[130] Article XIX:4 GPA.

[131] Articles 6.5 AD and 12.4 SCM.

[132] Articles 6.5.1 and 6.5.2 AD and 12.4.1 and 12.4.2 SCM.

[133] Article 39.2 TRIPS.

[134] Articles 6.11 AD and 12.9 SCM. Under Article 6.11 AD, "interested parties" also comprise "the government of the exporting Member".

63. Under the TRIPS Agreement, the beneficiaries are the nationals of other Members, who are defined as the natural or legal persons of other Members who meet the criteria set out in the main WIPO conventions dealing with the relevant subject-matter.[136]

64. Under the Agreement on Government Procurement, the provisions on procedural fairness are essentially directed towards protecting the interests of the suppliers of other Parties. Under that Agreement, the right to invoke challenge procedures is limited to suppliers of Parties who "have, or have had, an interest"[137] in the procurement in question.

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[135] Articles 6.12 AD, 12.10 and 19.2 SCM and the footnote 50 to Article 19.2 SCM.
[136] Article 1.3 TRIPS.
[137] Article XX:2 GPA.