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## TRANSPARENCY AND PUBLIC PARTICIPATION IN WTO DISPUTE SETTLEMENT



Center for International Environmental Law



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## EXECUTIVE SUMMARY

In order to offer a comprehensive analysis of transparency and public participation in the WTO dispute settlement system, this memorandum first considers the current participatory practice throughout the various steps of the dispute settlement process. Secondly, the current state of the DSU negotiations is analyzed along with positions and arguments of relevant WTO Members. Finally, several recommendations for the next steps in the negotiations are presented, including suggested language for possible amendments to the current text of the DSU.

The analysis of current practice reveals that the WTO dispute settlement system already allows for an important measure of transparency and public participation. Requests for consultations, panel establishment or appeal and final reports are published promptly on the WTO website. A number of hearings of panels and the Appellate Body are open to the public and NGOs have the possibility to submit *amicus curiae* briefs. The mostly informal efforts of the adjudicating bodies and WTO Secretariat through extensive DSU interpretation and transparency measures, respectively, thus have already led to some DSU review in practice.

More formal changes of the DSU towards transparency and participation would require the political will of WTO Members to reach consensus on an amendment of the DSU in the ongoing review under the Doha mandate. The current state of the negotiations indicates that WTO Members are generally in favor of open hearings and public submissions but also try to include a prohibition of *amicus curiae* submissions into the DSU. Any recommendation for DSU review therefore has to consider whether it is necessary to amend the DSU or whether the current practice of WTO bodies is sufficient to create avenues for transparency and participation. While an amendment of the DSU has certainly more legitimacy as it includes all WTO Members and not only those that frequently use the dispute settlement system, a continuing DSU review in practice might be more realistic in light of the lengthy and difficult negotiation process.

## I. INTRODUCTION

1. This memorandum offers an analysis of transparency and public participation in the dispute settlement system of the World Trade Organization (WTO) with specific regard to current practice and the on-going review of the Dispute Settlement Understanding (DSU). In this context public participation and transparency are not understood as separate concepts. Transparency is rather seen as a form of public participation. More precisely, public participation is conceptualized as including two interrelated dimensions: the transparency of an institution's decision-making process (or indirect participation), and the engagement of non-state actors in that process (or direct participation).<sup>2</sup>

2. The debate on public participation in the WTO is not limited to the dispute settlement system but originated in the general criticism of insufficient public participation in WTO activities, in particular in its intergovernmental negotiations.<sup>3</sup> In view of the considerable impact of WTO activities at the national level, people have increasingly felt under-represented by their own governments and begun to use internationally operating NGOs to express their political views and/or promote their interests. Effective involvement in and influence over the policy-making, policy implementation, compliance-monitoring and dispute settlement activities of international organizations is a primary objective of international NGOs.<sup>4</sup>

3. The WTO does not have very strict criteria for NGO participation in its activities. In general, NGOs only have to fulfill two informal criteria to be granted limited access to the WTO: first, they have to be independent from their government and operate on a non-profit basis according to their respective national laws; second; they have to proof that their activities are linked to the WTO.<sup>5</sup> The United Nations (UN) has a much stricter accreditation procedure which includes an examination of accountability mechanisms and representation. The WTO argues that it has decided against such a procedure to keep the system as inclusive

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<sup>2</sup> Y. Bonzon, 'Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues' (2008), 11 *Journal of International Economic Law* 751, at 753.

<sup>3</sup> The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement explicitly empowers the WTO with NGOs. Article V:2 of the WTO Agreement provides: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations which are concerned with matters related to those of the WTO." For more information on the general debate on public participation in the WTO see P. Van den Bossche, *The Law and Policy of the World Trade Organization* (2008), 153.

<sup>4</sup> P. Van den Bossche, 'NGOs Involvement in the WTO: A Comparative Perspective', (2008) 11 *Journal of International Economic Law* 717, at 718.

<sup>5</sup> These criteria were first developed during the Seattle Ministerial Conference in 1999.

and flexible as possible. Yet the downside is that NGOs may only participate in seminars or workshops, such as the “WTO Public Forum”, without those formal rights of participation comparable to those granted to NGOs in other intergovernmental *fora* such as the UN.<sup>6</sup>

4. As a result of this lack of more formal participatory rights for NGOs, the WTO is often accused as being “one of the least transparent international organizations”.<sup>7</sup> Although this study focuses on the dispute settlement system, it therefore also has to consider the broader debate on public participation and transparency at the WTO. In fact, many of the points advanced for and against public participation in WTO rule-making are also very relevant for the dispute settlement system.

5. Several arguments speak in favor of public participation. First, greater NGO involvement will enhance the WTO decision-making process because NGOs will provide information, arguments, and perspectives that governments do not bring forward. Second, public participation will promote the legitimacy of the WTO which is often perceived as secretive organization making rules with considerable regulatory effects at the national level, unsupervised by parliaments and national civil society. Third, transnational interests may often not be adequately represented by national governments. And fourth, civil society participation in decision-making only takes place in democratic states; the voices of citizens in undemocratic states remain unheard.<sup>8</sup>

6. Different arguments have been voiced against more public participation by certain stakeholders. First, as NGOs seeking access to the WTO do not represent the general public, the WTO may risk being captured by special interests. Second, many NGOs are criticized for a lack in legitimacy because they are not sufficiently accountable to an electorate or representative of different stakeholders.<sup>9</sup> Third, some developing country Members object to

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<sup>6</sup> Such formal rights of participation amount the right to be present during intergovernmental sessions and to make statements, depending on the status of the respective NGO under the accreditation scheme of the Economic and Social Council (ECOSOC). See Consultative Relationship between the United Nations and Non-Governmental Organizations, ECOSOC Res. 1996/31, U.N. Doc. E/1996/31 (July 5, 1996). Resolution 1996/31 updated the arrangements previously set out in Arrangements for Consultation with Non-Governmental Organizations ECOSOC Res. 1296 (XLIV), U.N. Doc. E/1296 (XLIV) (May 23, 1968).

<sup>7</sup> UNDP, Human Development Report 2002: Deepening Democracy In A Fragmented World (2002), at 120-121.

<sup>8</sup> P. Van den Bossche, ‘NGOs Involvement in the WTO: A Comparative Perspective’, (2008) 11 *Journal of International Economic Law* 717, at 720.

<sup>9</sup> This criticism focuses on the lack in traditional democratic accountability. However, different authors have discussed other forms of accountability such as reputational accountability, legal accountability, peer

more NGO involvement as they think these NGOs promote labor and environmental issues that do not benefit their current state of economic development.<sup>10</sup> Finally, they have expressed concern that more NGO involvement may make consensus-based decision-making process of the WTO even more difficult.<sup>11</sup>

7. Under more systemic considerations, certain WTO members use these arguments to oppose greater public or external participation as long as there is no sufficient internal participation, in other words, possibilities of participation for WTO members in WTO decision-making activities. Any amendment of the Dispute Settlement Understanding in view of greater public (or external) participation therefore also needs to consider more internal participation of WTO Members, in particular developing countries.<sup>12</sup>

8. The DSU review with regard to transparency and public participation is a difficult balancing act between different interests, actors and arguments. In the absence of clear consensus among WTO Members, panels and the Appellate Body have thus developed jurisprudence on transparency and public participation, in particular on public hearings and *amicus curiae* briefs submitted by NGOs. As a result, dispute settlement practice has brought some amount of DSU reform, without directly addressing the problems of political renegotiations of the DSU text.<sup>13</sup> However, it remains to be seen whether WTO Members will continue this route towards a more rule-orientation system, or whether the renegotiated text of the DSU will return to a more negotiation based and diplomatic approach. Only time will tell.

9. The first part of this study will therefore examine the current practice of the adjudicatory bodies and WTO members relating to transparency and public participation in the different

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accountability etc.. R. W. Grant and R. O. Keohane, 'Accountability and Abuses of Power in World Politics' (2004), *IILJ Working Paper* 2004/7 (Global Administrative Law Series); R. O. Keohane, 'Commentary on the Democratic Accountability of Non-Governmental Organizations' (2002), 3 *Chicago Journal of International Law* 477 (introducing a special edition of the Chicago Journal of International Law on the accountability of non-governmental organizations).

<sup>10</sup> As Orellana points out, the Ministerial Conference in Cancun has actually this argument as most accredited NGOs strengthened the bargaining position of numerous countries that had effectively been excluded during the Uruguay Round. See M.A. Orellana, 'WTO and Civil Society', in D. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law* (2009), 672 at 676.

<sup>11</sup> See P. Van den Bossche, 'NGOs Involvement in the WTO: A Comparative Perspective', (2008) 11 *Journal of International Economic Law* 717, at 721.

<sup>12</sup> While the formal rules of participation in WTO activities establish equality between developing country and developed country members, the former often perceive inequalities in the participation in informal mechanisms. see P. Van den Bossche, *The Law and Policy of the World Trade Organization* (2008), 148.

<sup>13</sup> T. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (2006), 218.

stages of the dispute settlement process while the second part will embed this practice in the context of the on-going DSU negotiations. Based on this analysis of current practice and negotiations, the third part will ultimately assess the necessity of amendments of the DSU with regard to various aspects in the dispute process and recommend different options for a DSU review that will lead to more direct and indirect participation.

## **II. CURRENT PRACTICE IN THE WTO DISPUTE SETTLEMENT SYSTEM**

### **A. Consultation Stage and Establishment of Panels**

#### **1. Dispute Initiation**

10. Although it is not a direct component of the DSU, mechanisms surrounding Member State domestic dispute initiation are important for the overall positioning and understanding of the WTO dispute settlement procedure and public participation in the dispute settlement system.

11. It is one of the characteristics of WTO dispute settlement that only governments have access to WTO dispute settlement in terms of dispute initiation. Private economic actors such as exporters, importers, consumers or NGOs do not have the right to bring complaints. More generally, private parties do not have standing at the WTO as pointed out above. Although this is a common feature of intergovernmental organizations, it merits emphasis because private actors are those mostly affected by trade measures.

12. Considering the importance of this stage in the mechanism, it is surprising that only a few countries have published procedures that allow companies or industries to request their governments to initiate a dispute settlement proceeding. Many countries do not have publicly known rules, and the question on whether to initiate a dispute rests primarily in the hands of the government which has considerable discretion to decide. Probably the best-known national trade policy instrument is Section 301 of the Trade Act of 1974 in the United States which does also include the initiation procedure for US complainants. Private entities are not only given the possibility to participate in the initiation of a dispute but also kept informed and asked for input during the whole dispute settlement process. The EC established its own procedure with the so-called New Commercial Policy Instrument (NCPI) in 1984 which was

replaced by the Trade Barriers Regulation (TBR) in 1994 and which co-exists with other procedures for government-initiated disputes.<sup>14</sup>

## 2. Publication of Requests

13. With respect to public access to DSU documents, the WTO has made great strides in de-restricting documents and making information available online on its ever expanding website, in particular on the so-called Dispute Settlement Gateway. There is now so much information available on the WTO website that it has become difficult to find specific pertinent information, much less keep up to date with the most recent developments. The most distinctive features of the WTO website are full text search of derestricted WTO documents, including panel and Appellate Body reports, the texts of the WTO Agreements, and schedules of WTO meeting as well as announcements of public panel and Appellate Body hearings. The availability of these dispute settlement documents has to be seen in the context of the de-restriction policy of WTO documents adopted by the General Council.<sup>15</sup>

14. Once a request for consultations has been made, it is usually published on the WTO website within three to four days. Delays are only due to translation into the three official WTO languages. However, if such consultations were successful, mutually agreed solutions are often not appropriately notified to the DSB. Article 3.6 DSU provides that “(m)utually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.” This unwillingness of disputing parties to notify such solutions is notorious and arose as a problem very early in dispute settlement practice.<sup>16</sup> Insufficient notification of mutually agreed solutions does also have repercussions on public participation: If WTO Members are not even internally informed, there will also be no external participation.

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<sup>14</sup> See OJ L349 of 31 December 1994, last modified by Council Regulation no 356/95; OJ L41 of 23 February 1995.

<sup>15</sup> Procedures for the circulation and de-restriction of WTO documents (WWT/L/160/Rev.1) were adopted by the General Council on 18 July 1996 and were applied retroactively to all WTO documents circulated after the date of entry into force of the WTO Agreement, and also apply to all documents circulated up to and including 14 May 2002. These procedures are described in the following document: WWT/L/160/Rev.1. Revised procedures for the circulation and de-restriction of WTO documents (WT/L/452) were adopted by the General Council on 14 May 2002. These procedures are described in the following document: WT/L/452.

<sup>16</sup> See, for instance, the discussions in the Dispute Settlement Body on 24 April 1996 (WT/DSB/M/15, no 4) and the statement made by the chairman of the DSB on 19 July 1995 (WT/DSB/M/6, no 6).

15. If the consultations fail and a Member State makes a request for the establishment of a panel, this request will equally be published on the WTO website within three to four days. Pursuant to Article 6.2 of the DSU, such a request identifies at least the specific measures at issue and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, and possibly the terms of reference of the panel if deviating from the standard terms.

## **B. Panel Proceedings**

### **1. Written Submissions**

#### *(a) Submissions by Parties*

16. In spite of the general trend towards publication of WTO documents, full pleadings of parties or communications by third parties in Appellate Body and panel proceedings both during the dispute settlement process and after the issuance of the opinion are not independently published by the WTO Secretariat. According to Article 18.2 of the DSU a party's submissions are confidential except if a party decides to make its submissions available to the public on its own. The United States (US), Canada, and the European Communities (EC), for instance, generally publish their submissions at an early stage of the dispute. They are therefore also in favor of increased transparency through public submissions in the DSU review. The current practice of the WTO Secretariat, however, is for panels and the Appellate Body to include summaries, or at times even full text versions, of party submissions and questions as annexes to the final panel report which is made public directly after adoption, delays depending sometimes on translation issues.

17. Besides the specific intent of parties to withhold certain information or arguments during the dispute, reasons for non-publication of submissions by the WTO Secretariat may be closely linked to the costs associated with translation which are currently borne solely by the WTO, and could likely be resolved easily if WTO Members chose to do so.<sup>17</sup> Additionally, it may not be necessary for the WTO Secretariat to separately publish party arguments as summaries tend to be included in the final opinions as explained above.

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<sup>17</sup> Id.

18. If an NGO proves to have particular expertise in a given field, WTO Members may even decide to include this NGO on their delegation which may then contribute to drafting a party's submission. It has been accepted since the Appellate Body ruling in *EC – Bananas III* that parties and third parties are free to decide about the composition of their delegation at hearings of panels and the Appellate Body.<sup>18</sup> Consequently, parties or third parties have the possibility to allow NGOs to participate on their delegation which might be particularly attractive for developing countries which may not be able to hire a law firm due to limited resources.<sup>19</sup>

**(b) Amicus Curiae Briefs**

19. If NGOs are not part of a party's delegation, a timely publication of submissions is crucial for NGOs that wish to directly participate in judicial proceedings on their own behalf. In general, NGOs may participate in judicial proceedings in three capacities: as party, as "intervener", and as *amicus curiae*.<sup>20</sup> However, as only states have a right to standing in the WTO dispute settlement system, NGOs can merely participate by submitting *amicus curiae* briefs. As Orellana notes, the possibility to submit such briefs depends on the availability of the parties submissions;<sup>21</sup> direct participation is thus conditioned by transparency.

20. *Amicus curiae*, the "friend of the court", has its origins in Roman law and was subsequently integrated into English and American common law.<sup>22</sup> Civil law countries such

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<sup>18</sup> See *EC – Regime for the Importation Sale and Distribution of Bananas (EC-Bananas III)*, Appellate Body Report, 2 July 2001, WT/DS27, para. 10. The ruling in *EC – Bananas III* concerned only the freedom of parties to decide on the composition of their delegations at hearing of the Appellate Body. However, the reasoning leading this decision also applied to the composition of delegations at panel meetings. The latter was explicitly stated in *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr. 1, 2, 3, and 4, adopted on 23 July 1998, para. 14.1.

<sup>19</sup> This practice is not only a feature of the Dispute Settlement System but also of the WTO trade negotiations.

<sup>20</sup> NGOs may gain a right of standing under certain circumstances. Some human rights courts, for instance, grant NGOs the right to initiate a dispute as does the International Center for the Settlement of Investment Disputes (ICSID) with companies. Others courts such as the European Court of Justice (ECJ) give NGOs or organs the opportunity to intervene in judicial proceedings. In addition to giving standing to NGOs, these dispute settlement *fora* may also give NGOs the right to participate as *amicus curiae* or "friend of the court".

<sup>21</sup> Orellana refers to the *Brazil-Retreaded Tyres* case in which only Brazil published its submissions while the EC only published them after the hearings. See Orellana, *op. cit.*, at 692.

<sup>22</sup> In this context, the development of *amicus* participation generally be seen as a result of the common law procedures that made third-party intervention difficult, if not impossible. The United States Supreme Court shapes the rights and duties of states, organizations and individuals throughout the country but it maintains strict the requirements for intervention as those in English common law. The US government, for instance, has no right to participate as a party in cases concerning major constitutional questions. The *amicus* and other forms of third-party participation developed as reaction, through exercise of "inherent power of the court of law to control its processes" (*Kirppendorf v. Hyde*, 110 U.S. 276, 283 (1884)).

as France have only recently begun to make use of *amicus curiae* briefs.<sup>23</sup> Although *amicus curiae* briefs may add to the workload of courts and parties, the institutional interests of courts do generally favor *amicus* participation.<sup>24</sup> *Amicus* participation may serve at least four different functions which are reminiscent of the arguments mentioned in favor of public participation in general: (1) providing legal analysis and interpretation, including arguments not brought forward by the parties for tactical or other reasons; (2) providing factual analysis as well as evidence; (3) placing the trade dispute into a broader political and social context; and (4) improving public opinion of the dispute settlement system and its reports if limited participation was possible.<sup>25</sup>

21. It is important to note that *amici* only provide written information of legal or factual character, they cannot control the direction and management of the judicial proceedings and they generally do not receive all the relevant documents of the case. As a procedural step, potential *amici* in national courts must generally request leave of the court to file, justifying that the questions of law to be addressed by the organization have not been adequately presented by the parties, or otherwise illustrating that the *amicus* brief will be helpful for the court. The *amicus* brief may also contain issues of fact although this may create evidentiary problems.

22. As the statutes of most other international courts, the DSU does not contain any provision relating to the submission of *amicus curiae* briefs by NGOs or individuals (or Non-Member States of the WTO). Following practice established under the GATT 1947, the panels in the

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<sup>23</sup> L. Johnson and N. Amerasinghe, *Protecting the Public Interest in International Dispute Settlement: the Amicus Curiae Phenomenon*, Center for International Environmental Law (2009).

<sup>24</sup> As Dinah Shelton notes: "The long-term institutional interests of the Court may be best served by ensuring that its opinions are based upon the fullest available information and reflect consideration of the public interest, as well as the desires and concerns of the litigating parties." D. Shelton, 'The Participation of Non-Governmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 617, at 625.

<sup>25</sup> See P. Van den Bossche, 'NGOs Involvement in the WTO: A Comparative Perspective' (2008) 11 *Journal of International Economic Law* 717, at 739. In a comparative study on *amicus curiae* participation, Dinah Shelton argues that According to Dinah Shelton, *amicus curiae* brief may have a number of advantages over other forms of NGO participation in international dispute settlement processes. It generally consumes less financial resources and time than a the preparation of a full case which allows the organization to share the litigation burden with the parties; the decision is also not binding on *amici*; unlike experts and witnesses, they may raise any issue the court could raise *proprio motu* and are not limited by the submissions or pleadings of the parties; and they generally have to prove a lesser level of interest than required for intervention. The participation as *amicus* also has disadvantages. *Amici* cannot control the direction and management of the judicial proceedings; they generally do not receive all the relevant documents of the case; they cannot provide evidence or examine witnesses; they cannot be heard without special notice of the court; and they do not receive any compensation for their expenses as parties to a dispute do. D. Shelton, *op. cit.*, at 625.

cases of *United States – Standards for Reformulated and Conventional Gasoline* and *EC Measures Concerning Meat and Meat Product Products (Hormones)* did not accept the submitted *amicus curiae* briefs.<sup>26</sup>

23. The first time a panel ever explicitly addressed the issue of *amicus curiae* participation was in the *Shrimp-Turtle* litigation.<sup>27</sup> Several NGOs had submitted *amicus curiae* briefs. The plaintiff parties – India, Malaysia, Pakistan and Thailand – requested that the panel does not accept the NGO communications. In contrast, the United States insisted that the panel examine the *amicus* briefs.

24. In its response to the diverging views of the parties, the panel had to interpret Article 13 of the DSU that allows a panel “to seek information and technical advice from any individual or body which it deems appropriate” and was thus regarded as the most pertinent DSU provision with regard to *amicus* participation. The panel decided not to accept the *amicus* submissions because it had never requested them. In the panel’s opinion, the verb “to seek” in Article 13 reflects the idea that panels only have the initiative to request information. In any other situation only parties and third parties can directly submit information to the panel. However, the panel admitted that the parties to the dispute could attach the *amicus* briefs to their submissions (which correspond to former GATT practice). Interestingly, the panel also gave the respective opponent two more weeks to respond to the additional material if such material was submitted as part of either submissions.

25. The panel’s interpretation of Article 13 does obviously not facilitate *amicus curiae* participation. On the contrary, it even distorts the original idea of *amicus curiae* participation: if a condition for the admissibility of *amicus curiae* briefs is that they are introduced by a party to the dispute (in other words, a state), as part of its own submission, then *amici* will be reduced to instruments of the dispute settlement process and the parties.<sup>28</sup> Moreover, in her

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<sup>26</sup> *US – Standards for Reformulated and Conventional Gasoline*, Panel Report, 29 January 1996, Doc. WT/DS/R; *EC – Measures Concerning Meat and Meat Product Products (Hormones)*, Report of the Panel, 18 August 1997, Doc. WT/DS/DS26/R/USA, WT/DS48/R/CAN. Under the GATT, third parties’ communications were only admitted if they had been adopted by one of the parties of the dispute. See, for example, *Japan – Commerce des semi-conducteurs*, in E. Canal-Forgues and T. Flory, *GATT/OMC – Recueil des contentieux* (2001), pp. 256-271.

<sup>27</sup> *US – Import Prohibition of Certain Shrimp and Shrimp Products* (hereafter referred to as *Shrimp-Turtles* cases), Panel Report, 15 May 1998, Doc. WT/DS58/R, para. 3.129.

<sup>28</sup> L. Boisson de Charzournes and M. Moise Mbengue, ‘The Amici Curiae and the WTO Dispute Settlement System: The Doors Are Open’, (2003) 2 *The Law and Practice of International Courts and Tribunals* 215.

comparative study on *amicus curiae* participation in national and international courts, Dinah Shelton notes that “all courts probably have the inherent power to request anyone to assist their deliberations or to refuse volunteers.”<sup>29</sup>

26. It is therefore not unexpected that the Appellate body modified the panel’s finding in the appeal of the *Shrimp-Turtle case*.<sup>30</sup> In the Appellate Body’s view the panel’s interpretation of Article 13 was too restrictive. The Appellate Body had already established in the *EC Hormones* case and in the *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel, and other Items* case that panels are generally endowed with large discretionary competence to seek information and technical advice.<sup>31</sup> The Appellate Body specified that a panel’s authority under Article 13 embraces more than the choice and evaluation of the source of the information or advice but includes the “authority to *accept or reject* any information or advice which it may have sought and received, or to make some other *appropriate disposition* thereof.”<sup>32</sup> The Appellate Body thus opened the door for future *amicus curiae* participation in panel proceedings, even without an explicit invitation.<sup>33</sup>

27. Following the *Shrimp-Turtle* appeal, the panels have respected the Appellate Body’s ruling in their very own way. In *United States-Section 110(5) of the US Copyright Act* case, for instance, the panel noted that

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<sup>29</sup> D. Shelton, ‘The Participation of Non-Governmental Organizations in International Judicial Proceedings’, (1994) 88 *American Journal of International Law* 617, at 617.

<sup>30</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, 12 October 1998, Doc. WT/DS58/AB/R.

<sup>31</sup> *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel, and other Items*, Appellate Body Report, 27 March 1998, Doc. WT/DS56/AB/R, para. 84-86: “Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves ‘to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate’. Just as a panel has the discretion to determine how to seek expert advice, so also does the panel have the discretion to determine whether to seek information or expert advice at all.”

<sup>32</sup> *Id.*, para. 104. [Emphasis added]

<sup>33</sup> Moreover, it used the opportunity to specify the extent to which extent it is possible for the quasi-judicial bodies to interpret the DSU, thus emancipating themselves from political supervision. It made clear that: “The thrust of articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, *ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts*. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to ‘make an *objective assessment* of the facts of the case’ and *the applicability of and conformity with the relevant covered agreements*.” *Id.*, para. 106. [Emphasis added]

“in this dispute, we do not reject outright the information contained in the letter from the from the law firm representing ASCAP to the USTR that was copied to the [...] the Appellate Body has recognized the authority of panels to accept non-requested information. However, we share the view expressed by the parties that this letter essentially duplicates information already submitted by the parties. We also emphasize that the letter as not addressed to the Panel but only copied to it. Therefore, while not having refused the copy of the letter, we have not relied on it for our reasoning or our findings.”<sup>34</sup>

28. In current practice, *amicus curiae* briefs are usually submitted to the chairperson of a panel or the Appellate Body. No clear guidelines exist with regard to their content and the organizations that are authorized to submit *amicus curiae* briefs. Moreover, the impact of *amicus curiae* submissions is difficult to measure, although occasional judicial reference to them and quotes from them indicate that they can be influential.<sup>35</sup> Several observers note that panels and the Appellate Body have so far not attributed decisive influence to *amicus curiae* briefs and limited their use in the respective proceedings.<sup>36</sup>

## 2. Public Hearings at the Panel Level

29. WTO dispute settlement is different from national criminal, civil, and administrative tribunals in that only WTO Members are directly subject to the mandatory adjudication. However, Members must also have confidence in the WTO dispute settlement system. Such confidence can only be fostered if WTO Members who have seldom or so far never made use of the WTO dispute settlement system have the opportunity to follow dispute settlement hearings directly. The fact that dispute settlement hearings at the WTO have traditionally taken place behind closed doors may have contributed to doubts about the unbiased manner in which panels and the Appellate Body conduct trade disputes.<sup>37</sup>

30. Historically, public access to hearings is a fundamental feature of legitimate judicial systems dating back to the French Revolution which introduced public scrutiny as a means to eliminate arbitrary trial outcomes. Further, public scrutiny brings many benefits to a judicial

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<sup>34</sup> *United States-Section 110(5) of the US Copyright Act*, Panel Report, 15 June 2000, Doc. WT/DS160/R, para. 6.8.

<sup>35</sup> In her analysis of *amicus curiae* participation with regard to other international tribunals, Dinah Shelton comes to the same conclusion. D. Shelton, *op. cit.*, at 635.

<sup>36</sup> For an overview of panel and Appellate Body practice with regard to *amicus curiae* briefs see N. Bernasconi et. al., *Environment and Trade: A Guide to WTO Jurisprudence* (2006), 326-360.

<sup>37</sup> L. Ehring, 'Public Access to Dispute Settlement Hearings in the World Trade Organization', (2008) 4 *Journal of International Economic Law* 11, at 1023.

process, among them including the ability to prevent or reveal abuses including corruption and incompetence. Additionally, public scrutiny strengthens trust and confidence in fair justice and thereby the judiciary's legitimacy through the public which is required to accept its decisions.

31. Some opponents of open, public hearings express their desire to maintain collegiality and comity within the proceedings. They fear that in making the process public, it will lead government representatives to indulge in various grandstanding tactics to impede the process and create legal and technical roadblocks intended only to confuse the panelists. Some have even argued that public discussion of national submissions during deliberations could exert undue influence on panelists.<sup>38</sup>

***(a) Legal Basis for Public Hearings Before Panels***

32. In 2005, the EC, the United States and Canada were the first WTO Members to jointly request that a panel open its hearings to the public. On 1 August 2005, the first panels in the parallel disputes *US - Continued Suspension of Obligations (Hormones)* and *Canada - Continued Suspension of Obligations (Hormones)* decided that the public was allowed to observe the hearings along with the parties.

33. Article 12.1 of the DSU refers to a non-compulsory standard working procedure which panels can modify after consulting the parties and obtaining their consent. The panels further determined, and the parties agreed, that Article 14.1 of the DSU does not prohibit open hearings by stipulating that panel “deliberations” must be conducted confidentially. The panel then interpreted “deliberations” to refer only to the panel's internal work in deciding on the issues of the case, including the internal process of decision formulation. The panel therefore determined that Article 14.2 was not applicable to the formal panel proceedings with the parties and that the hearings could then be opened to viewing by the public.<sup>39</sup> Despite the resistance of many third parties, the panel agreed to the request and in doing so marked the first instance in over sixty years of GATT/WTO where dispute settlement proceedings were not kept behind closed doors.<sup>40</sup>

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<sup>38</sup> Id.

<sup>39</sup> *US and Canada - Continued suspension of obligations*, Communication from the Chairman of the Panels of 1 August 2005, WT/DS321/8, 2 August 2005.

<sup>40</sup> Id.

34. During the first open panel hearings, the public and other WTO Members were, for the first time, able to directly witness the hearings with the exception of the third party session, through a closed-circuit broadcast of picture and sound to a separate room at or near the WTO in Geneva. This method was chosen for reasons of room capacity as well as to minimize any risks of interference by the public to the proceedings.<sup>41</sup> Additionally, it was important to the panel to retain the ability to interrupt the broadcast at any time should it become necessary. At the beginning of the first hearing, slightly over 200 persons made use of the first opportunity to witness a WTO dispute.<sup>42</sup> The attendance later dropped to around 60, among which were many delegates from WTO Members.

35. With respect to concerns about open panel hearings, there was no discernable effect on the conduct of the hearings, in particular no “trial by media”, no security or other incident, no additional pressure on the panelists or the parties, and particularly no effect on the serenity and professionalism with which the litigators argued their case before the panel.<sup>43</sup> Moreover, following the proceedings it was determined that the passive public observation did not change the intergovernmental nature of the WTO or the government-to-government nature of dispute settlement, as was previously anticipated.<sup>44</sup>

36. As the first experience with open hearings at the WTO was successful, it changed both the dynamic and nature of the debate on this issue in the DSU negotiations. In particular, the Chairman's text of July 2008 now contains the proposal to open all panel and Appellate Body hearings to the public, as was submitted by the United States.<sup>45</sup> Of particular interest was the fact that delegates from WTO Members and particularly developing countries accounted for a considerable share of the people attending the public viewings.

37. The next series of cases before the panel with substantial media interest were the EC and US *Large Civil Aircraft* cases; however, due to the considerable amounts of commercially sensitive business information associated with the cases, they did not lend themselves to

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<sup>41</sup> L. Ehring, *op. cit.*, at 1025.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1026.

<sup>44</sup> *Id.*

<sup>45</sup> See submission by the United States, TN/DS/W/86.

public access. Nevertheless, the EC and the US pushed for a higher level of transparency that involved videotaping the non-confidential portions of the hearings and then showing the tape a few days later, which allowed for the possible editing if necessary. More commonly, other cases before the panel have operated with the closed-circuit real-time broadcast to a separate room at the WTO; however, in yet other cases the public has been allowed to sit in the gallery in the room of the panel hearing.

38. To date, the regular attendance at recent panel hearings has substantially decreased from the first open panel meeting in 2005. This decrease is to be expected given the rather specialized and technical subject matter of many WTO disputes. The low level of actual attendance tends to be expected in domestic lawsuits and in no way detracts from the importance of open access, the purpose of which is to give those interested the opportunity to observe a hearing within existing capacity constraints.<sup>46</sup>

***(b) Third Party Rights During Panel Proceedings***

39. With respect to third parties and open panel hearings, panels have opted for different treatment. This is due to the fact that some third parties have opted to make their statements in public view while others have felt strongly about maintaining confidentiality. In an effort to balance these opposing views, WTO panels have employed the principle that third parties should never be forced to make their statements in public; however they have the option should they decide to do so. Surprisingly, the necessity to clearly choose has led a number of Members to make their first public intervention in a WTO dispute. In *EC - Bananas III, Article 21.5 (US)*, this included Belize, Cameroun, Colombia, Dominican Republic, Cote d'Ivoire, Dominica, Ecuador, Jamaica, Panama, Japan, Nicaragua, Saint Vincent and the Grenadines, St Lucia and Suriname. Several of these Members had not previously supported the concept of open hearings. Only Brazil and Mexico insisted upon confidential third party statements in that specific dispute. In *US - Zeroing*, third parties Japan, Norway, and Taiwan elected to make their statements in public while Brazil, China, India, Korea, and Mexico made their statements during the closed portion of the proceedings.

40. Most recently, in *Australia - Apples*, all third parties including EC, Chile, Pakistan, Japan, Taiwan, and the United States agreed to make their statements during an open third party

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<sup>46</sup> L. Ehring, *op. cit.*, at 1027.

session, which made this the first entirely open panel procedure. The panel did retain the possibility to interrupt the public observation for purposes of protecting business confidential information; however, this has not been necessary to date.

### **3. Panel Reports**

41. With respect to the publication of adopted panel reports, the WTO has a notable history of promoting openness in relation to such documents and information; however, timeframes and practicality of access have only substantially improved in recent years with the advancement of the WTO website. Additionally, the time necessary for translation into the three official WTO languages may directly contribute to delays in publication of documents, including adopted panel reports. In general, panel reports are directly published after their adoption through the Dispute Settlement Body.

42. The publication of panels report is equally important for the implementation of panel recommendations in terms of monitoring but also possible measures of retaliation which especially affect private actors. Reto Malacrida therefore suggests to amend the DSU to include a national notice-and-comment procedure, similar to the above- described procedure for dispute initiation, so that private actors will be notified of any proposal for a retaliatory measure and given the chance to comment on the proposal.<sup>47</sup>

## **C. Appellate Body Proceedings**

### **1. Initiation of Appellate Proceedings**

43. When a government decides to initiate appellate proceedings, the respective notice will usually be published within three to four days on the Appellate Body homepage. However, the content of the appeals notice is not always clearly formulated, neither for the public nor WTO Members. In the *Shrimp-Turtle* case, for instance, India, Pakistan and Malaysia had previously complained that the United States' notice of appeal had been too "vague and cursory".<sup>48</sup> Some developing countries therefore suggested the establishment of additional

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<sup>47</sup> R. Malacrida, 'Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures', (2008) 42 *Journal of World Trade* 3, at 27.

<sup>48</sup> See WT/DS58/AB/R, para 92.

guidelines on the nature of the notice of appeal in order to make sure that such notices are sufficiently clear.<sup>49</sup>

44. Although these concerns regarding sufficient clarity of the notice of appeal have been addressed in the DSU negotiations, they have also been considered by the Appellate Body itself in the meantime. New Working Procedures for Appellate Review entered into force on 1 January 2005. The modified rules require, *inter alia*, more detail on the nature of the appeal. Appellants are now requested to include a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying, and to provide an indicative list of the paragraphs of the panel report containing the alleged errors.<sup>50</sup> These working procedures do thus contribute to internal and external transparency in dispute settlement.

## **2. Written Submissions**

### ***(a) Submissions by Parties***

45. Submissions of parties or third parties to a dispute before the Appellate Body are similarly confidential as submissions in panel proceedings. In that regard, Article 18.2 of the DSU also applies to appellate proceedings.<sup>51</sup> Some States may therefore voluntarily publish their submissions but are not legally obliged to do so. Their motivation may rather stem from domestic legal tradition or pressure from civil society pushing for more transparency.

46. NGOs that wish to participate directly in the appellate proceedings are therefore faced with the same dilemma as at the panel stage. It will be difficult to draft relevant and adequate *amicus curiae* briefs without knowing the arguments of the parties. However, a facilitating factor in this regard may be availability of the panel report in combination with the appeals notice which gives at least some indication of the parties' possible lines of argumentation and the Appellate Body's possible assessment.

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<sup>49</sup> See TN/DS/W/18 and TN/DS/W/18 Add 1, no VI (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

<sup>50</sup> See the modified Rule 20(2), as contained in WT/AB/WP/5.

<sup>51</sup> Article 18.2 states: "Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

*(b) Amicus Curiae Briefs*

47. Does the Appellate Body's open stance towards *amicus curiae* briefs before panels extend to its own proceedings? This question is particularly relevant as this phase of the proceedings tends to be even more attractive to *amicus* submissions. As the practice of other international courts has illustrated, *amici* participate especially in cases about important issues with broader public interest implications. In line with its earlier pronouncements on *amicus* participation at the panel stage, the Appellate Body did allow for *amicus* participation at the appeals stage and eventually put into place a procedure for *amici* to make communications.

48. Already in the *Shrimp-Turtle* case the Appellate Body accepted three *amicus curiae* briefs as a part of US submissions and a revised version of a brief by the Center for International Environmental Law (CIEL) submitted directly to the Appellate Body. As a result, the Appellate Body drew a clear line between *amicus* briefs that are 'attached' to a party's submission and 'unattached' briefs. If attached, the *amicus* brief becomes part of the party's submission. The Appellate Body thus considered "that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that applicant's submission."<sup>52</sup>

49. As Article 13 of the DSU only refers to panel proceedings, the Appellate Body thus had to find another legal basis for allowing *amicus curiae* participation. It did so in the *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* case in which the Appellate Body found that it disposed of authority to accept *amicus curiae* briefs similar to that of the panels pursuant to Article 13 of the DSU.<sup>53</sup> For this purpose, the Appellate Body primarily based its argumentation on Article 17, paragraph 9, of the DSU, holding that "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information." It also stated that Rule 16(1) of the Working Procedures allows the Appellate Body to develop an appropriate

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<sup>52</sup> *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, *op. cit.*, para. 83.

<sup>53</sup> *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (hereafter referred to as *Bismuth* case), Appellate Body Report, 10 May 2000, Doc. WT/DS138/AB/R, para. 42.

procedure where a procedural question arises that is not covered by the Working Procedures. The Appellate Body therefore came to the conclusion that it had the competence to accept or to reject and to examine *amicus curiae* briefs in the context of the appellate proceedings.<sup>54</sup>

50. This interpretation of the DSU has led to much criticism by WTO Member States.<sup>55</sup> The Appellate Body was specifically accused of having ignored Articles 3.2 and 19.2 of the DSU which provide that “the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” While Article 13 of the DSU confers a right on panels to accept unsolicited information and advice, the DSU does contain any similar provision with regard to the Appellate Body.<sup>56</sup> It might therefore be difficult to argue that the Appellate Body’s acceptance of *amicus curiae* briefs does not affect the rights and obligations of WTO Members.<sup>57</sup> However, as Bernasconi et al. emphasize, the Appellate Body is aware of the limits of its mandate: In the EC-Sardines case, it explicitly rejected all factual information in the *amicus curiae* brief presented, considering that appeals are limited to issues of law and legal interpretation according to Article 17.6 of the DSU.<sup>58</sup>

51. In spite of continuous criticism, the Appellate Body went even further in the case of *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* by developing the following procedural conditions for the submission of *amicus curiae* briefs:

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<sup>54</sup> It thus further extended the authority that is had already established in the appeal of the *Shrimp-Turtles* case in which it had accepted *amicus curiae* briefs attached to member states submissions. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, *op. cit.*, para. 39.

<sup>55</sup> See Minutes of the DSB of 14 December 1998 (WT/DSB/M/50) of 7 June 2000 (WT/DSB/M83), of 19 June 2000 (WT/DSB/M/84), and document WT/DSB/W/137.

<sup>56</sup> Boisson de Charzournes, L. and M. Moise Mbengue, ‘The Amici Curiae and the WTO Dispute Settlement System: The Doors Are Open’, (2003) 2 *The Law and Practice of International Courts and Tribunals* 215, at 219.

<sup>57</sup> During the DSB meeting on 19 June 2000 concerning the *Bismuth* case, the Chairman of the DSB made the following statement (Doc. WT/DSB/W/137): “The Appellate Body did not consult with me or with the Director-General. This was because the Appellate Body was not drawing up new Working Procedures for Appellate Review. The Appellate Body had merely been asked in this specific case by the European Communities as appellee in the case to rule on whether it could accept and consider two unsolicited briefs which had been presented by two US steel industry associations to the division hearing this appeal. I would like to point out that paragraph 39 of the Appellate Body report merely notes that nothing in the DSU or in the Working Procedures for Appellate Review provides for acceptance of *amicus curiae* briefs or for prohibition thereof. [...] To recapitulate, the Appellate Body was merely ruling on a specific procedural objection made by one of the parties to the dispute concerning these two unsolicited briefs. It was not and I emphasize that it was not drawing up new Working Procedures and therefore was not under an obligation to consult me, as Chairman of the DSB, or the Director-General. Indeed, I have to say that in the context of deciding issues raised in a particular appeal, in fact, *it would seem to me to be highly inappropriate for the Appellate Body to consult either with the Chairman of the DSB or with the Director-General in that specific context.*” [Emphasis added]

<sup>58</sup> *EC – Trade Description of Sardines*, Appellate Body Report, 26 September 2002, WT/DS231/AB/R, para. 169, cited in Bernasconi et al., *op. cit.*, 322.

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.
2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon on Thursday, 16 November 2000*.
3. An application for leave to file such a written brief shall:
  - (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
  - (b) be in no case longer than three typed pages;
  - (c) contain a description of the applicant, including a statement of the Membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
  - (d) specify the nature of the interest the applicant has in this appeal;
  - (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
  - (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
  - (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.
4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave
5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.
6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon on Monday, 27 November 2000*.
7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:
  - (a) be dated and signed by the person filing the brief;
  - (b) be concise and in no case longer than 20 typed pages, including any appendices; and
  - (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the

Panel Report with respect to which the applicant has been granted leave to file a written brief.

An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon on Monday, 27 November 2000*.

The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure.<sup>59</sup>

52. The publication of this procedure on the WTO website, which was interpreted as an invitation by the Appellate Body to file *amicus curiae* briefs, resulted in another storm of criticism by WTO Members, although the Appellate Body ultimately dismissed all applications for leave to file an *amicus curiae* brief. In the end, the procedure developed by the Appellate does not diminish any of the rights of WTO Members but rather emphasizes some important substantive and procedural questions that have to be answered if *amicus curiae* participation should ever be effective in panel or appellate proceedings.<sup>60</sup>

### 3. Public Hearings at the Appellate Level

53. When the *US/Canada - Continued Suspension of Obligations (Hormones)* case reached the Appellate Body in late May 2008, the EC, the US, and Canada continued pushing for increased transparency through open Appellate Body hearings.<sup>61</sup> In this context, it should be noted that a number of NGOs had previously sent letters to the three parties in the case to congratulate them on the open panel hearings of the same dispute and to advocate in favor of open hearings before the Appellate Body.<sup>62</sup> The successful experience with many recent open panel hearings was a good basis from which to start; however, the law with respect to hearings of the Appellate Body is substantially different from the law governing panel proceedings.

54. The moment the Appellate Body first opened its hearings to the public in July 2008, the parties to nine subsequent panel procedures agreed on the opening of their respective

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<sup>59</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, 12 March 2001, Doc. WT/DS135/AB/R, para. 52. [Original emphasis]

<sup>60</sup> See the recommendations for *amicus curiae* participation in part IV of this study.

<sup>61</sup> *US - Continued Suspension of Obligations*, Appellate Body Report, 31 March 2008, Doc. WT/DS320/AB/R, paras 6.19-6.31.

<sup>62</sup> For the letters to the EC, the US and Canada, see [http://ciel.org/Tae/WTO\\_DisputeSettlement\\_11Oct06.html](http://ciel.org/Tae/WTO_DisputeSettlement_11Oct06.html) (last accessed on 29 November 2009).

hearings.<sup>63</sup> The first public WTO appellate proceeding took place by using simultaneous a closed-circuit broadcast system to a separate room at the WTO. The Appellate Body allowed third parties to choose whether to make their interventions publicly or confidentially and most made their choice in accordance with their previously expressed positions at the panel level, however only Brazil and India actually made non-public interventions during the hearing.

55. With respect to public Appellate Body hearings, it is important to note that a substantial majority of WTO Members have never seen or participated in an Appellate Body session. As of the beginning of 2008, only 66 WTO Members had participated directly or indirectly as third parties in an appellate review.<sup>64</sup> Although the *US/Canada - Continued Suspension of Obligations (Hormones)* case was the first opportunity for many WTO Members, academics, WTO Secretariat officials and others to see the Appellate Body in action, the late notice and short registration deadline, combined with the then intensive Doha negotiations resulted in a rather small turnout.

**(a) Legal Basis for Public Hearings Before the Appellate Body**

56. Issues related to the legal justification for public Appellate Body hearings surround Article 17.10 of the DSU. It stipulates that "the proceedings of the Appellate Body shall be confidential," and therefore many Members believed that it would not be possible for the Appellate Body to open their hearings to the public.<sup>65</sup> To further complicate matters, the Appellate Body in *Canada - Aircraft* had already, although superficially, interpreted the term "proceedings" in Article 17.10 to include the oral hearing.<sup>66</sup> That interpretation, however, was differentiable because it addressed a request for additional procedures for the protection of confidential business information. Further, to the Appellate Body, the concept that it lacked the ability to do something that was possible for panels made no sense from a policy perspective; however, it also could not withstand the more detailed legal enquiry into the text, context, object and purpose, as well as the negotiating history of Article 17.10. It was necessary for the Appellate Body to strike a balance.

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<sup>63</sup> Id. at 1028.

<sup>64</sup> Appellate Body Annual report for 2007, WT/AB/9, 30 January 2008 at 33.

<sup>65</sup> WTO, *Handbook on the WTO Dispute Settlement System, A WTO Secretariat Publication Prepared by the Legal Affairs Division and the Appellate Body* (2004), 70.

<sup>66</sup> *Canada - Aircraft*, Appellate Body Report, 20 August 1999, WT/DS70/AB/R, paras 141-147 and *Brazil - Aircraft*, Appellate Body Report, 20 August 1999, WT/DS46/AB/R, paras 119-125.

57. The specific Appellate Body enquiry took place at the beginning of the two merged appeals in *US/Canada - Continued Suspension of Obligations (Hormones)*. It lasted more than a month and involved in total of nearly 120 pages of primarily legal submissions by the parties and third parties.<sup>67</sup> Additionally, a special (closed) oral hearing took place before the Appellate Body announced its decision on this issue.

58. In a succinct procedural ruling of 10 July 2008, the Appellate Body decided that the DSU permitted open Appellate Body hearings. In doing so, the Appellate Body set aside the vigorous opposition by Brazil, China, India, and Mexico. To achieve this end, the Appellate Body provided a rather flexible interpretation to the confidentiality requirement of Article 17.10 of the DSU, by rejecting that this requirement entails the same in all relations, is absolute and incapable of adaptation.<sup>68</sup> Based on a contextual reading of Article 17.10, the Appellate Body agreed with the EC, United States, and Canada in their interpretation that parties are free to forego confidentiality for themselves and their statements during Appellate Body hearings. The Appellate Body also relied heavily on other indications demonstrating that complete hearing confidentiality is not possible due to the fact that Appellate Body reports are always published as are notices of appeals, as well as letters to the Dispute Settlement Body in all cases where the appeal lasts longer than sixty days.<sup>69</sup>

59. Given that the standing Appellate Body is a more judicially legitimate institution than the *ad hoc* composed panels, it would have been unusual had the Appellate Body been barred from doing what panels had been doing during three years of practice with open hearings. It is important to recall that rulings of the Appellate Body obtain a higher level of authority than do those of a panel. Additionally, Appellate Body rulings are directly relevant for the entire Membership of the WTO. The decision of the Appellate Body to hold open hearings consolidated and affirmed the panel practice.

***(b) Public Notification of Open Hearings***

60. Regarding the administrative aspects associated with registration and public notification of the public hearings, the WTO Secretariat is still in the process of designing the necessary

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<sup>67</sup> *US/Canada - Continued Suspension of Obligations, op. cit.* paras 31-33 and Annex IV

<sup>68</sup> *US/Canada - Continued Suspension of Obligations, op. cit.* Annex IV.

<sup>69</sup> *Id.*

administrative procedures. In domestic judicial litigation, prior registration for public attendance tends not to be necessary; however, in the WTO it is useful for planning purposes, given that some must travel to Geneva. Additionally, seating capacity at the WTO is quite limited and prior security screening is necessary for all visitors to the WTO.

61. In preparation for the first open WTO hearing the WTO Secretariat published a notice on its website and collected registrations directly. In the two *Civil Aircraft* cases, the panels refused to provide public notice on the WTO website and left it directly to the parties to advertise the public hearing and to collect registrations from citizens. In the two *US - Zeroing* cases brought by the EC, as well as in *EC - Bananas III (US) Article 21.5*, the WTO Secretariat agreed to provide a public notice but redirected all interested persons to the parties for them to collect registrations to be then forwarded back to the WTO Secretariat for processing. This overly cumbersome practice will likely be eliminated particularly after the Appellate Body organized a direct public notice and registration for its first two open hearings in July and October 2008, as did the panel for *Australia - Apples* in September 2008. Further, the practice of leaving the advertisement of WTO public hearings and the registration for attendance to the parties is not optimal because it creates the false impression that the parties are able to directly assert influence over who may attend.

***(c) Logistical Issues Relevant to Public Hearings***

62. The jurisprudence on the legality of open hearings for both panels and the Appellate Body and the practice that panels and the Appellate Body open their respective hearings has been well established, even though clear consensus among Members has not been reached. To some degree, variation and experimentation will likely occur regarding the practical methods relating to open hearings which will likely consider whether the public is admitted to a separate room with closed-circuit links or allowed into the actual hearing room itself. There are benefits and drawbacks to all options in that the public would likely prefer to be in the actual room; however, security constraints, logistical issues and non-interference would favour the public being granted access only to a separate room.

63. The issue of web-casting has been discussed which would broaden considerably public access to hearings. Web-casting has also been opposed by some given that inequalities do exist among possible participants in that a computer is necessary along with access to high-speed internet. Additionally, some Members have expressed concern with the internet option

in that once the material is placed on the internet there is currently no way to limit the public's manipulation of that material. Several Members have voiced concern that special interest groups could take the internet material, manipulate it to suit their particular purposes and rebroadcast it. It would be possible to change the nature of particular statements if they are recorded, cut, reassembled and used again in a different context. The risk of potential distortion of public recordings may therefore directly affect the behavior of participants during the hearing, making them act less natural which may in turn disturb the serenity of the hearing.<sup>70</sup>

#### **4. Appellate Body Reports**

64. With respect to the publication of adopted Appellate Body reports, the WTO includes all adopted Appellate Body reports on the WTO website; however, timeframes and practicality of access have only substantially improved in recent years. As with panel reports, the time necessary for translation into the three WTO official languages directly contributes to delays in the publication of Appellate Body reports as does their relatively lengthy nature.

65. In sum, current practice at the different stages of the dispute settlement process already allows for a substantial degree of direct and indirect participation. Requests for consultations, panel establishment or appeal and final reports are published relatively fast on the WTO website. Many hearings of panels and the Appellate Body are open to the public and NGOs have the possibility to submit *amicus curiae* briefs. However, these efforts have mostly been of an informal nature, promoted through an extensive interpretation of the DSU through the adjudicating bodies and transparency measures implemented by the WTO Secretariat. More formal changes towards transparency would require the political will of WTO Members to amend the DSU in the on-going DSU negotiations.

### **III. CURRENT STATE OF THE DSU NEGOTIATIONS**

66. The DSU review had initially been mandated by the Ministerial Decision on the “Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes”. This decision, which had been adopted on 14 April 1994, called upon ministers to “complete a full review of dispute settlement rules and procedures” within four years after the entry into force of the WTO agreement and “to take a decision on the

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<sup>70</sup> Id. at 1026.

occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures”. However, although informal negotiations began in 1997, the DSU negotiations were not completed until 1998, as originally foreseen, so that the General Council granted the first of several extensions to the deadline for DSU review.<sup>71</sup>

67. It was not until the Doha Ministerial Conference that the DSU review was placed into a formal framework which was to be based on previous negotiations. Accordingly, the Doha Declaration stipulated:

“30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.”<sup>72</sup>

68. The DSU review was not finalized in May 2003, as anticipated in the Doha Declaration, but is on-going. In the meantime WTO Member States decided to once again extend (until May 2004) and finally to abolish any time limit.<sup>73</sup>

69. In his comprehensive analysis of the DSU negotiations, Zimmermann identifies several reasons that account for the repeated shift in deadlines and the final decision against a target date: First, on a more systemic level, it is difficult to reform a system that is in use while the review negotiations are taking place. In this context, key decisions of the adjudicative bodies and Members’ experience with the system have secondly created controversial views on specific aspects of the system that have become increasingly difficult to bridge. Public participation is certainly one of these aspects that, in particular, is characterized by a North-South divide. Third, amendment to the DSU requires consensus which is difficult to achieve. Fourth, Members do therefore not seem to see a need to change the DSU in the light of a general sense of satisfaction with the functioning of the current DSU and a fundamental concern which is not to do any damage to the system by opening the consensus reached in 1994. These concerns are fourthly all the more important as the current discussion reveals a more fundamental controversy regarding the overall direction of the dispute settlement

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<sup>71</sup> See WT/GC/M/32 15.

<sup>72</sup> Doha Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1, para. 30.

<sup>73</sup> See WT/L/579.

system, namely whether it should continue its route towards more rule-orientation and adjudication, or whether it should return to a more negotiatory, diplomatic approach. In the absence of a decision by Member States, the panels and Appellate have further developed the dispute settlement system towards more rule-orientation, especially with regard to public participation, which has resulted in some amount of “DSU review in practice”.<sup>74</sup>

70. Against the background of these various factors, the following part will analyze whether the current state of the DSU negotiations with regard to public participation reflects this “DSU review in practice” or whether it goes more into the direction of a power-oriented system. De-restricted documents relating to the DSU negotiations can be found on the WTO website. The findings included in this part are based on an analysis of different member positions and chairman texts elaborated in the Doha review of the DSU, in particular the most recent report of the current chairman of the DSU negotiations, Ambassador Ronald Saborio Soto.<sup>75</sup>

## **A. Negotiations on Transparency**

### **1. Public Documents**

#### *(a) Submissions by Parties*

71. The first major issue with regard to public participation in the dispute settlement system is the access to the submissions of the parties to the dispute. In this regard, Ambassador Saborio explained that a significant number of Members have expressed support during the current negotiations for making submissions to the panels and the Appellate Body public.<sup>76</sup> However, there are some Members which remain unconvinced that this would be desirable. Ambassador Saborio emphasized that certain relevant clarifications have emerged from the discussions. In particular, it has been clarified that the protection of strictly confidential information would be ensured. Also, it was suggested that the member making the submission would not be required to take any particular steps to ensure the publicity of its

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<sup>74</sup> T. A. Zimmermann, *op. cit.*, 201.

<sup>75</sup> Report by the Chairman, *Special Session of the Dispute Settlement Body*, 18 July 2008, JOB(08)/81. See also Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee, *Special Session of the Dispute Settlement Body*, 5 December 2008, TN/DS/23.

<sup>76</sup> Report by the Chairman, *Special Session of the Dispute Settlement Body*, *op. cit.*. See also Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee, *op. cit.*

submission, and that this could be done through a central registry mechanism maintained by the WTO Secretariat.<sup>77</sup>

72. During the DSU negotiations Members have indicated the opinion that the DSU already foresees, in Article 18.2, the presentation, upon request of a Member, of a non-confidential version of the information contained in submissions to a panel or the Appellate Body, so that the principle of access to a non-confidential version of submissions is already present in the DSU.<sup>78</sup> However, it is notable that DSU Article 18.2 does not contain specific details as to when and how such non-confidential versions might be requested and obtained.

73. Despite existing skepticism a considerable number of Member States seems to be in favor of an automatic publication of submissions. This conclusion can be drawn from the consolidated draft legal text attached to the Saborio report which would amend paragraph 2 of Article 18 as follows:

2. [ [Any document<sup>d</sup>] **[The written submissions] that a Member provides to a panel, the Appellate Body, or an arbitrator [(other than any submission made subsequent to the issuance of the interim report to the parties)] shall be public except for information designated as strictly confidential information [in accordance with the procedures referred to in paragraph 3].** ~~Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute.]~~

**[<sup>d</sup> For the purposes of this paragraph, the term "document" does not include a document concerning an interim report or that is purely administrative in nature.]**

Nothing in this Understanding ~~shall precludes a Member party to a dispute from disclosing statements of its own positions to the public. [ Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. [A Member shall not disclose information designated by another Member as strictly confidential information in accordance with the procedures referred to in paragraph 3.]~~

A party **[or third party]** to a dispute shall also, upon request of a Member, provide a non-confidential summary of ~~the information contained in~~ its written submissions that could be disclosed to the public. **[A Member submitting strictly confidential information in accordance with the procedures referred to in paragraph 3 shall provide a non-confidential summary of the information within 15 days of the request of another Member].**<sup>79</sup>

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<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Proposed deletions to the current DSU text are indicated in ~~strikeout~~ text. Proposed new text is shown in **bold**. For clarity, proposed footnotes are identified with letters rather than numbers, and would be renumbered as appropriate if agreed to. Single square brackets reflect text requiring further work, decision or confirmation. In

**(b) Final Reports**

74. During the current DSU negotiations Member support was expressed for allowing an early release of the panel's final report in its original language without affecting the official circulation of the report in the three working languages of the WTO.<sup>80</sup> However, concern was also expressed during recent negotiations that this may effectively prejudice those Members whose working language is not the same as the report. To address this concern, it was suggested during negotiations that only the relevant findings and conclusions of the report be released early. Additionally, Members during the negotiations clearly indicated that timely access to final reports of panels and the Appellate Body is closely related to the time required for the translation of the reports into the three official languages, which can be considerable. It was further noted that the substantial time necessary for translation is directly related to the length of the reports themselves, including argument summaries and annexes.<sup>81</sup>

75. Given the general support for a timely publication of the final reports, the Saborio text contains the following draft text to be included in the proposed Annex 5 of the DSU "Procedures Governing Strictly Confidential Information":

**II. PROPOSED DSB DECISIONS  
[PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION]**

**Decision by the Dispute Settlement Body**

**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 [strictly] confidential information [designated as such by a Member in accordance with the procedures referred to in paragraph 3 of Article 18].**

**A final report issued by a panel to the parties is an unrestricted document, except for any [strictly] confidential information, as defined in [paragraph 3 of] 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>9]</sup>**

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<sup>9</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).**

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some cases, square brackets are used to reflect alternative texts for consideration. Text in *italics* and double square brackets indicates text on which no convergence is apparent at this stage. Proposed textual changes by the Chairman are shaded in grey. Where proposed text by the Chairman involves deletions to text proposed by Members, this is not expressly reflected in this text. Report by the Chairman, *Special Session of the Dispute Settlement Body*, 18 July 2008, JOB(08)/81.

<sup>80</sup> Id.

<sup>81</sup> Id.

## 2. Public Hearings

76. It remains to be seen whether the current practice of open hearings will also directly affect the negotiations on the DSU's reform. Currently the formalization of open hearings remains controversial even if the actual practice of open hearings has greatly modified the aspects considered in the debate.

77. As reported on 5 December 2008 by Chairman Saborio, during the recent negotiations a number of Members have expressed support for enhanced transparency through opening panel and Appellate Body hearings to the public. In doing so they have suggested that such openness could contribute directly to greater public confidence in the dispute settlement process of the WTO.<sup>82</sup> However, other Members, while not necessarily opposed to transparency as such, continue to maintain reservations as to whether the proposed systematic opening of meetings would be beneficial or appropriate.<sup>83</sup>

78. This resistance, due to the diplomatic character of the negotiations within the WTO, may be largely tactical, stemming from the desire to trade transparency against other valuable reciprocal concessions. Member reservations to the concept of open hearings remain largely unclear.

79. The Saborio report explains that during the DSU negotiations concerns had been expressed in relation to the preservation of the intergovernmental character of dispute settlement proceedings, the protection of confidential information, as well as practical modalities and potential budgetary implications.<sup>84</sup> Additionally, not even Members who are third parties currently have the right to attend the entirety of panel meetings and that balance should be maintained between enhancing external transparency and the rights of Members in the context of WTO dispute settlement.

80. Resistance to the formalization of open WTO dispute proceedings may also stem from a fear of increased public scrutiny, industry pressure in relation to a Members' argumentation

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<sup>82</sup> Report by the Chairman, *Special Session of the Dispute Settlement Body*, *op. cit.*. See also Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee, *op. cit.*

<sup>83</sup> *Id.*

<sup>84</sup> Report by the Chairman, *Special Session of the Dispute Settlement Body*, *op. cit.*

and their ability to settle the dispute.<sup>85</sup> In practice, though, a WTO Member will not be able to directly deceive its constituents with respect to its argumentation and statements which ultimately become public record in the panel or Appellate Body report. Other reservations centre on capacity and fairness issues in that hearings should remain closed in order not to discriminate against developing country citizens who lack the means to travel to the WTO Headquarters in Geneva.<sup>86</sup> Further, issues related to the expense borne by the WTO lacks merit just as the proposition that open hearings only benefit developed or northern countries.

*(a) Member Positions*

81. Canada, the EC, and the US are the main proponents for increased transparency in the WTO dispute settlement system. Over the years they have submitted proposals to increase WTO transparency. In its 2002 submission, the EC proposed that the DSU should provide sufficient flexibility for the parties to decide whether or not to open certain parts of panel or Appellate Body proceedings to the public.<sup>87</sup> The Canadian and US submissions went a step further by proposing that all panel and Appellate Body proceedings be made public automatically. Both the US and Canadian proposals did not include the caveat that parties to the dispute must agree to public hearings beforehand. In addition, they proposed that all parties' written submissions be made automatically public as well.<sup>88</sup> The only exception to the automatic transparency included was that the public should not be allowed access to business confidential information. Japan has also submitted a very similar proposal. Japan proposes that except for confidential information, parties' submissions should be made available to the public within two weeks from the date of the hearing.<sup>89</sup>

82. However, not all WTO Members support a more transparent dispute settlement system. The African Group has repeatedly stated that external WTO transparency is not a priority when compared to the overall Doha Development Agenda. The Group says that if transparency is aimed at assisting delegates and other government representatives to observe the process and determine their interests, then this should be expressly stated and the

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<sup>85</sup> South Centre Quarterly on Trade Disputes, Vol. 1:3 (2005), at 7.

<sup>86</sup> Id. at 8.

<sup>87</sup> TN/DS/W/1, 13 March 2002.

<sup>88</sup> TN/DS/W/13, 22 August 2002 and TN/DS/W/79, 13 July 2005 (US); and TN/DS/W/41, 24 January 2003 (Canada).

<sup>89</sup> TN/DS/W/22, 28 October 2002 (Japan).

appropriate technical assistance should be considered.<sup>90</sup> The African Group submission in the DSU negotiations asserts that it is not appropriate to open the WTO dispute settlement to the public at this time; and certainly not before weighing the usefulness for both business and WTO Members.<sup>91</sup>

83. Chinese Taiwan has varying views when considering the issue of transparency. Part of its submission states that it strongly favors greater transparency in the WTO DSU process because that would establish a powerful dynamic for compliance with the covered agreements by all Members. It also expresses support for the US proposal relating to timely circulation of panel and Appellate Body reports.<sup>92</sup> However, the submission contains reservations about the proposal to open proceedings to the public. It states that taking the dispute settlement process into the public domain could complicate Members' ability to reach efficient settlement.<sup>93</sup> The submission attempts to remind Members that the WTO dispute settlement mechanism was originally conceived to be a diplomatic "government-to-government" process and not a process for public involvement.

84. Another argument for opposing transparency is that open proceedings could lead to "trial by media" and could eventually place unwarranted public pressure on the panelists or Appellate Body Members. Developing countries are apprehensive that increased transparency could allow developed countries to make use of the media to pressure Member delegates, the WTO Secretariat, and WTO panelists to consider their views when adjudicating cases, thereby advancing developed country interests unfairly. This of course would be at the expense of developing countries because they do not have the resources to exert counterbalancing pressure on the media.

85. What is less convincing is the argument that closed dispute settlement proceedings should be maintained because public proceedings would complicate and jeopardize efficient settlement options. Over the years, parties have rarely settled a case after the establishment of a panel. Therefore, opening panel or Appellate Body proceedings may not directly affect the ability and efficiency of Members to settle because if they were going to settle they would

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<sup>90</sup> TN/DS/W/15, 25 September 2002.

<sup>91</sup> Id.

<sup>92</sup> TN/DS/W/25, 27 November 2002.

<sup>93</sup> Id.

already have done so. It is conceivable though that publicizing a government's arguments might tie the government's hands in other cases. However, this can occur even without public hearings because the public has direct access to panel and Appellate Body reports which contain summaries of the parties' arguments.

86. The original drafters of the WTO dispute settlement mechanism did not foresee it to be a public process. This was because the GATT disputes were seen as matters belonging solely to governments.<sup>94</sup> Since dispute settlement was simply "diplomacy through other means", and since "confidentiality is the hallmark of diplomacy", it was natural for proceedings to be secret.<sup>95</sup> However, today proceedings in the panel and the Appellate Body no longer be characterized as diplomacy. By the time a conflict reaches a panel hearing usually all avenues for political compromise have been exhausted. Governments do not negotiate during the panel and Appellate Body hearings; they argue the merits of their cases.

87. Additionally, opposition for transparency tends to be more about timing than principle. For example, the African Group says that it is currently not the time to open panel and Appellate Body proceedings. They say that for now, transparency is not their priority. From this statement it could be interpreted that the African Group is not opposed to transparency per se, but that they would like to weigh the utility and the implications first and determine whether it is necessary for them to devote their limited resources towards negotiations on transparency. Furthermore, the African Group position was adopted at a time when the DSU negotiations were set against a specific deadline. The absence of a new deadline for the DSU negotiations indicates the possibility of more flexibility in the negotiations.

#### ***Recent Proposals and Chairman's Summary***

88. Given the opposition to improving transparency, the decision to open both panel and Appellate Body proceedings in the *US/Canada - Continued Suspension of Obligations (Hormones)* case could be viewed as a way of highlighting and advancing the Canadian, EC and US proposals on transparency. It may also serve to attract support from those Members who were indifferent or opposed to improved transparency and public hearings at the time. The current draft text of the Saborio report certainly confirms this impression with the

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<sup>94</sup> J.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', (2000) *Jean Monnet Working Paper* 9/00, at 6-7.

<sup>95</sup> *Id.*

following textual proposal which is to be added to Article 18 of the DSU as a new paragraph 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>6</sup>, except for any portion dealing with strictly confidential information [submitted in accordance with the procedures referred to in paragraph 3.] ]**

## **B. Negotiations on Participation**

### **1. *Amicus Curiae* Briefs**

89. *Amicus curiae* briefs have been an important topic throughout the DSU review discussions since 1998 not only because the issue was attributed “constitutional significance”.<sup>96</sup> The political negotiations on the DSU review inevitably have to be seen against the background of on-going dispute settlement cases. In this context, the *Shrimp-Turtle* and the *Asbestos* case are particularly relevant and have been treated by extensive legal scholarship.<sup>97</sup> Apart from the fundamental legal reasoning established in these two cases with regard to *amicus* participation, the former was decided at the outset of the DSU review in 1998 while the latter was adjudicated by the Appellate Body only shortly before the beginning of the Doha Round. Although the Appellate Body had rejected all the *amicus curiae* applications filed in the *Asbestos* case, the way it had approached the applications had provoked outrage by a great number of WTO Members, particularly developing countries. Following a special meeting of the General Council convened to discuss the issue, the chairman of the General Council announced that he would recommend the Appellate Body to “exercise extreme caution” on these matters in the future.<sup>98</sup> The positions of WTO Member States with regard to *amicus*

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<sup>96</sup> See G.C. Umbricht, *op. cit.*, at 773ff.

<sup>97</sup> See W. J. Davey, ‘Proposals for Improving the Working Procedures of WTO Dispute Settlement Panels’, in E.-U. Petersmann (ed.), *Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding* (2002), 27; D. B. Hollis, ‘Private Actors in Public International Law – *Amicus curiae* and the Case for the Retention of State Sovereignty’, (2002) 25 *Boston College International and Comparative Law Review* 235; G. Marceau and M. Stilwell, ‘Practical Suggestions for *Amicus Curiae* Briefs Before WTO Adjudicating Bodies’, (2001) 4 *Journal of International Economic Law* 155; P. C. Mavroidis, ‘*Amicus Curiae* Briefs Before The WTO: Much Ado About Nothing’, Jean Monnet Working Paper 2/01 (2001); A. Padideh, ‘Judicial Lobbying at the WTO – The Debate over the Use of *Amicus Curiae* Briefs and the US Experience’, (2000) 24 *Fordham Journal of International Law* 84; G. C. Umbricht, ‘An “*Amicus Curiae* Brief” on *Amicus Curiae* Briefs at the WTO’, (2001) 4 *Journal of International Economic Law* 773; G. A. Zonnekeyn, ‘The Appellate Body’s Communication in *Amicus Curiae* Briefs in the *Asbestos* Case – An Echternach Procession?’, (2001) 35 *Journal of World Trade* 553; J. A. Ragosta, ‘Unmasking the WTO – Access to the DSB System – Can the WTO DSB Live Up to the Moniker “World Trade Court”?’, (2000) 31 *Law and Policy in International Business* 739; G. Marceau and P. N. Pedersen, ‘Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non- Governmental Organisations and Civil Society’s Claims for More Transparency and Public Participation’, (1999) 33 *Journal of World Trade* 5.

<sup>98</sup> Special meeting of the General Council held on 22 November 2000; the minutes are contained in document WT/GC/M/60.

*curiae* are therefore not only illustrated by their actual submissions in the DSU negotiations but also by their statements during General Council meetings on the issue.

**(a) Member Positions**

90. The Member States supporting the *amicus curiae* participation are the United States and the EC, which is slightly more hesitant in its approach. During the negotiations under the Doha mandate, the EC suggested in its first proposal to “define better the framework and the conditions for allowing such *amicus curiae* briefs in potentially all cases”. According to the EC, this framework should be based on the two-stage approach (first application for leave, then effective submission) already developed by the Appellate Body in the *Asbestos* case.<sup>99</sup> A similar move was made by the United States, which – in its first submission – called upon Member States to consider the proposal of a guideline procedure for handling *amicus curiae* briefs.<sup>100</sup> In its second submission, however, the US stated that it did “not believe that an amendment to the Dispute Settlement Understanding was necessary”.<sup>101</sup> Similarly, *amicus briefs* no longer appeared as an issue in the EC’s second proposal (although the proposal formally noted that “(t)hose EC proposals that were included in Document TN/DS/W/1, and do not appear in the present document, remain unaltered”).<sup>102</sup>

91. Considering that *amicus curiae* participation is an established practice in the English and American common law systems, and is now also partly used in continental Europe, it is not surprising that the US and EC support an official amendment of the DSU in favor of *amicus curiae* briefs. The US Supreme Court as well as the European Court of Human Rights allow for *amicus curiae* briefs in their different fields of competence and have therefore proven the benefits of such participation to their respective Member States.<sup>103</sup>

92. Nonetheless, similar to the positional divide between WTO Members on the issue of transparency, in particular public hearings, major developing countries have opposed any such

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<sup>99</sup> See TN/DS/W/1, no IV and Attachment, no 10 (EC).

<sup>100</sup> See TN/DS/W/13, no V (United States).

<sup>101</sup> See TN/DS/W/46, no 4 (United States).

<sup>102</sup> See TN/DS/W/38, no 1 (EC).

<sup>103</sup> See generally D. Shelton ‘The Participation of Non-Governmental Organizations in International Judicial Proceedings’ (1994) 88 *American Journal of International Law* 617.

opening of the process to *amicus* participation even before the Doha DSU negotiations.<sup>104</sup> In the current discussion under the Doha mandate, the African Group strongly argued against any interpretation of the “right to seek information” that would include acceptance of unsolicited *amicus curiae* briefs by the panel or the Appellate Body. According to the Group, new rules should be adopted stipulating that unrequested information should be directed only to the parties and not to the panels. Moreover, the Group emphasized that the right to seek information pursuant to Article 13 only applies to panels but not to the Appellate Body which, according to the group, has the exclusive function of examining issues of law and legal interpretations raised on appeal. In turn, panels should consult the parties and their legal advisers in deciding whether to seek information.<sup>105</sup> Nonetheless, the second proposal by the African Group was less far-reaching. This proposal only called for the inclusion of a paragraph according to which the right to seek information should not be construed as a requirement to receive unsolicited information or technical advice.<sup>106</sup>

93. Another group of developing countries equally opposed the acceptance of *amicus* briefs. Referring to the negotiating history of the Uruguay Round and the ordinary meaning of the term ‘seek’ which is “ask for, request, demand”, they requested the incorporation of a footnote to Article 13. According to this footnote, “[s]eek’ shall mean any information that is sought or asked for, or demanded or requested by the panels. Unsolicited information shall not be taken into consideration by the panels”. A similar footnote would also apply to the Appellate Body.<sup>107</sup>

94. With reference to the EC proposal, Taiwan argued that accepting unsolicited *amicus curiae* submissions and even systematizing this practice in a new Article would create a situation where Members that do not have the social resources such as think tanks, academic institutions and NGOs would be put at a disadvantage. With reference to the US proposal for the establishment of guidelines, Taiwan points out that the handling of *amicus curiae*

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<sup>104</sup> See the heated discussion in the Dispute Settlement Body on 6 November 1998 when both the Appellate Body report and the panel report as modified by the Appellate Body report were adopted (WT/DSB/M/50, no 1); see also ‘WTO Appeals Body Faults Implementation of Shrimp-Turtle Law’, in 15 *International Trade Reporter*, 14 October 1998.

<sup>105</sup> See TN/DS/W/15 (African Group).

<sup>106</sup> See TN/DS/W/42, no V (African Group).

<sup>107</sup> See TN/DS/W/18, no III (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe), and TN/DS/W/47 (India, Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia).

submissions was already covered by precedents from past cases which the panels and the Appellate Body could follow.<sup>108</sup> Jordan finally made an interesting proposal with regard to *amicus* submissions that would seek to remedy the differences in Members' capabilities to deal with *amicus* briefs. It proposed a fund that would be established by industrial countries with the aim of remitting costs or expenses that may be incurred by developing countries or least developed countries (LDCs) in reviewing, analyzing or responding to *amicus* briefs.<sup>109</sup>

95. In the context, it should be noted that the bigger developing countries that have sufficient resources are most strongly opposed to *amicus curiae* participation. Smaller developing countries – which rarely participate in the dispute settlement system as main parties anyways – may even benefit from additional materials submitted by *amicus curiae*.

#### ***(b) Recent Proposals and Chairman's Summary***

96. In light of the apparently irreconcilable positions on the issue, the consensus-oriented draft of the first DSU review chairman Balás did not make any suggestions with regard to *amicus* participation or Article 13 DSU. In its analysis of the DSU negotiations, Zimmermann thus comes to the conclusion that “a review of the proposals made under the Doha mandate suggests that the debate has lost some of its acrimony, compared with the discussion in 1998/1999. Parties seem to become aware of the fact that the Appellate Body *has* already developed a practice on this issue.”<sup>110</sup> On the one hand, this practice leaves the door open to public participation in principle, thereby satisfying those countries interested in more transparency and more participation to some extent. On the other hand, several scholars note that the Appellate Body does not seem to have attached decisive weight to *amicus* briefs in those cases where they have so far been submitted, thus supporting the argument of opponents of *amicus* briefs that such briefs do factually play a limited role.<sup>111</sup> Finally, interested governments always have the possibility to cooperate with NGOs in the preparation of submissions and to include the arguments put forward by NGOs into their own submissions.

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<sup>108</sup> See TN/DS/W/25, no I.2 (Taiwan).

<sup>109</sup> See TN/DS/W/43, no XI (Jordan) and TN/DS/W/53 (Jordan).

<sup>110</sup> T. A. Zimmermann, *op. cit.*, 175. (referring to TN/DS/W/5 (EC), Answers to Questions 28–39 (EC)).

<sup>111</sup> T. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (2006); L. Boisson de Chazournes and M. M. Mbengue, ‘The Amici Curiae and the WTO Dispute Settlement System: The Doors Are Open’, (2003) 2 *The Law and Practice of International Courts and Tribunals* 205.

97. Notwithstanding Zimmermann’s careful analysis of the DSU negotiations, the wording of the most recent proposals reflects that parties’ insistence on a modification of the DSU in either direction has not weakened in view of the practice of the adjudicating bodies.<sup>112</sup> The current compromise text presented by the Chairman of the DSU negotiations, Ambassador Saborio, adds a third paragraph to Article 13 stating the following:

**“[In exercising the right to seek information and technical advice, the panel shall not accept or consider information or technical advice provided by any individual or body from whom the panel has not sought it.]”.**

Similarly, the proposed Article 17, paragraph 4 lit. e) seems to prohibit the Appellate Body to accept *amicus curiae* submissions through the following formulation:

**“[The Appellate Body shall consider only the submissions of parties and third [participants], and shall not accept or consider any submission beyond those submitted by the parties and the third [participants].]”**<sup>113</sup>

98. In his summary document, Ambassador Saborio underlines that some progress has been made in addressing the concerns underlying Members' respective positions. Member States share the view that *amicus curiae* briefs should not lead to an undue burden for the Members involved in the relevant dispute. However, their means to reach this goal are quite different. For some Members, this undue burden would be best prevented through the introduction of a general prohibition on unsolicited briefs, which would be in line with the intergovernmental nature of WTO dispute settlement. Other Members emphasize that regulating the timing of *amicus* briefs, their length and the procedures to address the admissibility and contents of *amicus* briefs would ensure that appropriate guarantees are in place to handle such briefs. Those Members also argue that this would be an improvement on the current *ad hoc* practice of WTO adjudicators concerning unsolicited *amicus* briefs, and that it could enhance the image of the WTO and its dispute settlement system.<sup>114</sup>

99. As a result, Saborio encourages any Members interested in regulating the acceptance and consideration of *amicus* briefs to develop draft language to that effect, addressing issues such

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<sup>112</sup> Zimmermann also argues that the issue of *amicus curiae* participation and transparency more generally increasingly appears as some kind of bargaining chip which could be traded for concessions on more substantive issues. T. A. Zimmermann, *op. cit.*, 175.

<sup>113</sup> See JOB(08)/81 (18 July 2008). The brackets [...] indicate that the proposal is under discussion. One could certainly argue that the term “participants” might include *amici curiae*.

<sup>114</sup> See JOB(08)/81 (18 July 2008).

as: (i) the timing and procedure for submitting *amicus* briefs; (ii) the maximum length of *amicus* briefs; (iii) the procedure and preconditions for adjudicators addressing the admissibility and, once considered admissible, the content of *amicus* briefs; and (iv) the implications of such procedures for Members involved in the relevant dispute. Moreover, he underlined that further work on this issue would also need to take into account the concern expressed by several Members that non-Members should not have more opportunities to participate in the proceedings than Members themselves. However, he also emphasized that this issue that some Members correctly observed that this issue relates to access to the dispute settlement system, rather than to transparency *per se*.<sup>115</sup>

## 2. Third Party Participation

100. A proper analysis of *amicus* participation therefore also needs to consider the closely connected issue of third party rights in dispute settlement which are equally part of the DSU negotiations. Many Members have argued that admitting *amicus* briefs, particularly at the appellate stage, would put Members at a disadvantage compared to non-Members such as NGOs, which would normally not enjoy standing at the WTO. The reason is that a Member, which is not directly involved in a case as either complainant or defendant, is subject to specific rules on third party participation. These rules establish that in order to participate as a third party in an appellate review, a member must have previously participated as a third party in the prior panel proceedings.

101. In the *Sardines* case, this led to a situation where Morocco filed an *amicus* brief as a WTO Member because it had not participated as a third party in the panel proceeding.<sup>116</sup> Although Morocco was accused by other Members of circumventing the provisions on third party participation, the Appellate Body held that it was “entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it”.<sup>117</sup> At the same time, Colombia had been prevented from presenting its views as a third party due to the restrictive provisions on third party participation.<sup>118</sup> Members subsequently criticized the Appellate Body for its approach

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<sup>115</sup> See JOB(08)/81 (18 July 2008).

<sup>116</sup> *EC – Trade Description of Sardines* (Peru), Panel Report, 29 May 2002, WT/DS231.

<sup>117</sup> See *EC – Trade Description of Sardines*, Appellate Body Report, 26 September 2002, WT/DS231/AB/R, paras 160–68 and para 314.

<sup>118</sup> See ‘WTO Appellate Body Braces for Criticism for Easing Rules on Third Party Participation’, in *WTO Reporter*, 10 October 2002; and ‘WTO Appellate Body Chair Offers to Discuss Appellate Review Rules’, in *WTO Reporter*, 23 October 2002.

because both the *amicus curiae* issue and third party rights were part of the ongoing DSU review which could be prejudiced.<sup>119</sup>

102. The rules and practice in place for both third party rights and *amicus curiae* briefs should thus be seen in close context, and a “package deal” could bring about a solution for both issues.<sup>120</sup> Accordingly, it is a positive sign that in the Saborio draft, third party rights are strengthened, for instance, by allowing third parties at the appellate stage which have not participated in the panel proceedings. Accordingly, Article 17, paragraph would be amended as follows:

Only parties to the dispute, not third parties, may appeal a panel report.

**Each third party, Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 [and any other Member having notified to the Appellate Body, the DSB and each party to the dispute its interest to do so no later than 5 days after the date of circulation of the notification of appeal referred to in paragraph 5(a)], may participate [as a third participant] in a proceeding before the Appellate Body.**

- (b) **Each third [participant] shall have an opportunity to be heard by and to make a written submissions to, and be given an opportunity to be heard by, the Appellate Body.**
- (c) **Each third [participant] shall give its submission to each party to the dispute and to every other third participant. The Appellate Body shall reflect the submissions of third participants in its report.**

The close link between third party rights and *amicus curiae* participation is succinctly illustrated by the proposed lit. e) which includes the above-mentioned prohibition of unsolicited information.<sup>121</sup>

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<sup>119</sup> See ‘WTO Appellate Body Under Fire Again for *Amicus* Rulings in Dispute Proceedings’, in *WTO Reporter*, 25 October 2002; ‘Appellate Body Procedural Moves Stir Controversy at WTO’, in *Inside US Trade*, 25 October 2002.

<sup>120</sup> T. A. Zimmermann, *op. cit.*, 176.

<sup>121</sup> The rights of third parties in panel proceedings will also be extended as follows:

- 2. (b) **Each third party has the right to:**
  - (i) **be present at the substantive meetings of the panel with the parties to the dispute preceding the issuance of the interim report to the parties, except for portions of such meetings when information [designated by a Member as strictly confidential in accordance with the procedures referred to in paragraph 3 of Article 18] is discussed;**

#### IV. RECOMMENDATIONS FOR DSU REVIEW

103. As parts II and III of this study reveal, the participatory deficit of the WTO dispute settlement system can be reduced by different avenues and actors. On the one hand, panels and the Appellate Body, logistically supported by the WTO Secretariat, have developed a notable practice on increasing public participation in line with the practice of national and other international courts which could be considered a valid interpretation of the DSU.<sup>122</sup> On the other hand, the ideal solution to reduce the participatory deficit of the dispute settlement system would be that WTO Members negotiate amendments to the text of the DSU in the ongoing negotiations pursuant to Article X:8 of the Agreement Establishing the WTO. Of course, such amendments would reduce the flexibility of WTO Members to rely on *ad hoc* arrangements of participation for each individual dispute.<sup>123</sup> While this method of case-specific changes might lead to some DSU review in practice, if undertaken in a consistent manner, a formal DSU amendment through consensus of all WTO Members would ultimately have more legitimacy.

104. The difficulty of a DSU review is that WTO Members have generally not been consistent in their proposals for reform. Members have wavered in their support for either a more judicial or a more diplomatic dispute settlement system. Some Members have proposed amendments that would effectively pull the DSU in opposing directions.<sup>124</sup> Any

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- (ii) **make a written submission prior to the first substantive meeting;**
  - (iii) **make an oral statement to the panel, and respond to questions at a session of the first substantive meeting set aside for that purpose; and**
  - (iv) **respond in writing to questions arising out of such a session.**
  - (c) **The panel may grant third parties rights additional to those listed in paragraph (b) [only upon agreement by][after consulting] the parties to the dispute.**
  - 3. (a) **Each party to the dispute shall make available to each third party its [written] submissions to the panel (other than any submission made subsequent to the issuance of the interim report to the parties) at the time such submissions are made, except for information [designated by a Member as strictly confidential in accordance with the procedures referred to in paragraph 3 of Article 18]. [b]**

<sup>122</sup> For instance, if the practice on public hearings or *amicus curiae* submissions continues in a consistent manner, it might be considered a valid interpretation of the DSU in light of the Art. 31 (3) lit. b) of the Vienna Convention on the Law of Treaties (VCLT).

<sup>123</sup> G. Marceau and M. Stilwell, 'Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies', (2001) 4 *Journal of International Economic Law* 155, at 176.

<sup>124</sup> The US, for example, is a major proponent of external transparency and by extension should reasonably be in favour of a rules-based system. However, some of its other DSU submissions advocate for increased Member control of WTO dispute settlement in that the US has proposed that there be an interim review in appellate proceedings and also that parties should be allowed to agree to delete from a report findings that are not directly

recommendation for DSU review therefore needs to consider whether it is really necessary or realistic to amend the text of the DSU or whether compromise can be found below the level of a formal amendment.

## **A. Recommendations on Transparency**

### **1. Public Documents**

105. It is essential for the WTO to establish clear rules relating to transparency which provide for the publication of all government documents submitted pursuant to a panel or Appellate Body proceeding at the time those documents are presented. Once agreed upon, the best method for the formalization of these clear rules, whether through an amendment to the text of the DSU or merely through consistent practice, remains unclear.

106. As current practice shows, the WTO publishes most de-restricted dispute settlement documents, such as requests for consultations, panel establishment or appeal and final reports. Delays are often due to translation issues. Even without an amendment of the DSU, this practice thus speaks of a degree of transparency or indirect public participation although there is still room for improvement.

### **2. Public Hearings**

107. The WTO, in opening dispute hearings to public observation, has allowed the public to directly witness that WTO panelists and Appellate Body Members are highly professional, engaged, impartial, and objective.<sup>125</sup> Moreover, observers to the WTO dispute settlement proceedings are able to appreciate that panels and the Appellate Body fully explore each case, are mindful of the interests at stake, and that they grant the parties a full opportunity to present their positions. There is no reasonably available alternative to open hearings that could achieve a similar level of transparency. The publication of a panel or Appellate Body report only after the conclusion of the procedure does not achieve this same level of transparency, neither would the publication of a verbatim transcript of all the proceedings.

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helpful or necessary for resolving the dispute. US submission: TN/DS/W/13, 22 August 2002; TN/DS/W/46, 11 February 2003; and TN/DS/W/79, 13 July 2005.

<sup>125</sup> L. Ehring, 'Public Access to Dispute Settlement Hearings in the World Trade Organization', (2008) 4 *Journal of International Economic Law* 11, at 1023.

108. Public dispute settlement hearings therefore strengthen the legitimacy and credibility of the system. Given the inertia and practice of closed hearings, it is important for the WTO to demonstrate that it has nothing to hide. WTO Members who are not yet sufficiently familiar with the actual conduct of WTO disputes can learn directly about the procedure, as can private lawyers who intend to improve their capability to represent WTO Members in WTO disputes. Of particular note however, is the necessity, where required, to maintain confidentiality where there is an overriding interest of protecting legitimately strictly confidential information. The exact procedures for application of such procedures have yet to be developed.

109. At this point, the most direct method for formalizing the current practice of open panel and Appellate Body hearings would be through a textual amendment to the DSU. Such an amendment would also solidify the Appellate Body's interpretation of the DSU allowing the public in its own hearings. In terms of a textual proposal, a formulation similar to that proposed by the consolidated text of the Saborio Report included above would be desirable.<sup>126</sup>

## **B. Recommendations on Participation**

### **1. National Procedures**

110. The current DSU negotiations do not discuss an amendment of the DSU to include a provision that would stipulate the establishment of national procedures allowing for public participation in WTO dispute settlement. Such a provision would counteract the current absence of national dispute initiation and participation structures in most WTO Members. Moreover, it would not be unusual to include a provision on participation by interested private parties into a WTO Agreement. Examples of such procedures are already contained in the Agreement on Technical Barriers to Trade (Article 2.9.) and the Agreement on Sanitary and Phytosanitary Measures (Annex B.5).<sup>127</sup>

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<sup>126</sup> See para. 88 *supra*.

<sup>127</sup> Article 2.9 of the Agreement on Technical Barriers to Trade stipulates the following:

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

- 2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
- 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such

111. Accordingly, Article 2 of the DSU on General Provisions could be amended to include a phrase such as:

“Members shall establish national procedures to facilitate the public to be heard on matters related to international trade. Members shall also establish national public notification mechanisms to inform the public of the initiation of a dispute under the WTO Dispute Settlement Understanding.”

## **2. *Amicus Curiae* Briefs**

112. With regard to participation at the international level, various options exist to consolidate the current practice on *amicus curiae* submissions. However, this direct *amicus* participation generally faces more opposition by WTO Members than indirect participation. The best case scenario would evidently also be that Member States amend the DSU to allow for *amicus* participation.

113. The working procedures of the panels, included in Annex 3 of the DSU, should then contain a procedure on the treatment of *amicus curiae* briefs. Article 17 of the DSU could explicitly allow the Appellate Body to draft procedures for *amicus* participation, as it did in the *Asbestos* case. The procedures for panels and the Appellate Body would be similar; however, there are also important differences such as the limitation that the Appellate Body may only consider legal questions.

114. Instead of including a specific reference to *amicus curiae* participation in the DSU, a second-best option is to promote a continuation of the current practice of the panels and the Appellate Body based on their judicial discretion; this would also be in line with the practice of other judicial bodies.

115. Even with this second-best option, the respective working procedures should include a procedure on regarding *amicus curiae*, for reasons of legal certainty and due process. Such a procedure would also give adjudicating bodies enough flexibility to reject *amicus curiae*

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notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

briefs if the circumstances of the case deem it necessary. As pointed out by Ambassador Saborio, a procedure for *amicus curiae* admission would need to fulfill certain procedural and substantive preconditions.<sup>128</sup>

### 3. Third Party Rights

116. As pointed out above, amendments to the DSU with regard to third parties rights are crucial in order to obtain any concessions by Member States on indirect or direct public participation. Considering the current draft text of the Saborio Report, there seems to be consensus among Member States to allow for more third party participation in a formal way.

## V. CONCLUSIONS

117. The comprehensive analysis of current practice in the WTO dispute settlement process and the on-going review of the DSU with regard to transparency and public participation has resulted in the following conclusions and summary recommendations:

- Transparency and public participation of private entities in the different stages of WTO dispute settlement – from dispute initiation to the implementation stage – begin at the national level. Possibilities to stipulate the establishment of such national participatory procedures are currently not being discussed but should be addressed in the DSU negotiations.
- At the international level, the WTO Secretariat notifies WTO Members and the interested public about requests for consultations, panel establishment and appeals on its website as soon as possible. This practice has to be seen in larger context of the de-restriction policy for WTO documents pursued by the General Council.
- Written submissions of parties to a dispute are not public; however, some parties, such as the US, Canada and the EC make them publicly available at an early stage of the dispute. NGOs may directly participate in drafting the submissions on behalf of the WTO Members as part of a party's delegation. The current negotiations show some support for including a provision on public submissions into the DSU.

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<sup>128</sup> Report by the Chairman, *Special Session of the Dispute Settlement Body*, 18 July 2008, JOB(08)/81, at 39. The following substantive questions should be addressed when admitting *amicus curiae* briefs: (1) What is the character or nature of the prospective *amicus*?; (2) What is the quality and relevance of the *amicus curiae* brief?; (3) Is the submission of *amicus* briefs appropriate in the respective circumstances?. Moreover, several procedural questions might be relevant: (4) What is the appropriate timing to file an *amicus curiae* brief?; (5) Which format should *amicus curiae* briefs have?; (6) By which means should the parties to the dispute and WTO Members be notified of the submission of *amicus curiae* briefs? See generally G. Marceau and M. Stilwell, *op. cit.*

- As only WTO Members have standing pursuant to the DSU, the only means for NGOs to directly participate on their own behalf is through *amicus curiae* submissions. The current practice on *amicus curiae* briefs suggests that neither panels nor the Appellate Body attribute decisive influence to their content. Nonetheless, some WTO Members have tried to incorporate an explicit prohibition of accepting unsolicited information into the DSU. Such a prohibition should be prevented in favor of a continued practice of the adjudicating bodies, complemented by an *amicus curiae* admission procedure.
- Although the DSU does not contain any provisions on public hearings, panels and the Appellate Body have interpreted the applicable provisions of the DSU to allow for public access in hearings with the consent of the parties to the dispute. While the logistical and notification aspects of public hearings still need to be institutionalized, a considerable number of WTO Members do support (or at least not oppose) a corresponding DSU amendment.
- Panel and Appellate Body reports are published on the WTO website in a timely manner. Delays are mainly due to translation issues. Their quality promotes transparency as they contain extensive factual and/or legal analyses, including accounts on external reference such as expert advice.
- The issue of more external public participation is directly linked with more internal participation in the dispute settlement process, in other words, third party rights. The current state of the DSU negotiations indicates that third parties will be granted more participatory rights under the reviewed DSU.

118. Participation in WTO dispute settlement is a comprehensive concept which includes an internal and external as well as a direct and indirect dimension. The window of opportunity offered by the on-going DSU negotiations should be used to achieve more internal and external participation in order to ensure the effective and legitimate functioning of the WTO dispute settlement system.

**ANNEX I:  
TRANSPARENCY AND PUBLIC PARTICIPATION IN THE STAGES  
OF THE DISPUTE SETTLEMENT PROCESS**

	<b>Questions</b>	<b>Current Status</b>
<b>Dispute Initiation</b>	What are the participatory structures with regard to trade-related matters at the national level?	Insufficient procedures in most WTO Member States
<b>Consultations Stage</b>	How is the public notified when consultations are initiated?	Dispute Settlement Gateway (website)
	When is the public notified?	Within 3-4 days
	How are mutually agreed solutions notified?	Insufficient (internal and external) notification
<b>Panel Establishment</b>	How is the public notified about a request for panel establishment?	Dispute Settlement Gateway (website)
	When is the public notified?	Within 3-4 days
	Which information is available about the dispute?	Requirements of Art. 6.2 DSU
<b>Panel Proceedings</b>	Are written submissions by the parties public?	Publication only on a voluntary basis, at the discretion of the party
	Can the public directly participate in the proceedings?	Direct participation only as <i>amicus curiae</i>
	Are oral hearings public?	Public hearings dependent on consent of the parties
	How are panel reports published?	Dispute Settlement Gateway (website)
	When are panel reports published?	Within 3-4 days (depending on translation)
<b>Appellate Proceedings</b>	How is the public notified when appellate proceedings are initiated?	Dispute Settlement Gateway (website)
	When is the public notified?	Within 3-4 days
	Which information is available about the dispute?	Requirements of the Appellate Body's Working Procedures (WT/AB/WP/5)
	Are written submissions by the parties available?	Publication only on a voluntary basis, at the discretion of the party
	Can the public directly participate in the proceedings?	Direct participation only as <i>amicus curiae</i>
	Are oral hearings public?	Public hearings dependent on consent of the parties
	How are Appellate Body reports published?	Dispute Settlement Gateway (website)
	When are Appellate Body reports published?	Within 3-4 days (depending on translation)

## ANNEX II:

### TEXTUAL PROPOSALS FOR DSU REVIEW

#### I. Current State of the Negotiations

This text is based on the contributions of Members, and also incorporates some proposals by the current Chairman of the DSU negotiations, Ambassador Ronald Saborio Soto.<sup>129</sup> It was presented under the responsibility of the Chairman, as a basis for further work.

Proposed deletions to the current DSU text are indicated in ~~strikeout~~ text. Proposed new text is shown in **bold**. For clarity, proposed footnotes are identified with letters rather than numbers, and would be renumbered as appropriate if agreed to.

Single square brackets reflect text requiring further work, decision or confirmation. In some cases, square brackets are used to reflect alternative texts for consideration. Text in *italics* and double square brackets indicates text on which no convergence is apparent at this stage.

Proposed textual changes by the Chairman are shaded in grey. Where proposed text by the Chairman involves deletions to text proposed by Members, this is not expressly reflected in this text.

#### A. Public Submissions

##### Article 18

##### *Communications with the Panel or Appellate Body*

1. There shall be no *ex parte* communications with the panel, ~~or~~ Appellate Body, **or arbitrator<sup>c</sup>**, concerning matters under consideration by the panel, ~~or~~ Appellate Body, **or arbitrator**.

<sup>c</sup> **For the purposes of this Article, the expression "arbitrator" means any arbitrator under paragraph 3(c) of Article 21, Article 22, or Article 25.**

2. [ [Any document<sup>d</sup>] [The written submissions] that a Member provides to a panel, the Appellate Body, or an arbitrator [(other than any submission made subsequent to the issuance of the interim report to the parties)] shall be public except for information designated as strictly confidential information [in accordance with the procedures referred to in paragraph 3]. ~~Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute.]~~

[<sup>d</sup> **For the purposes of this paragraph, the term "document" does not include a document concerning an interim report or that is purely administrative in nature.]**

~~Nothing in this Understanding shall preclude a Member party to a dispute from~~

<sup>129</sup> Report by the Chairman, *Special Session of the Dispute Settlement Body*, 18 July 2008, JOB(08)/81. See also Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee, *Special Session of the Dispute Settlement Body*, 5 December 2008, TN/DS/23.

disclosing statements of its own positions to the public. ~~[Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. [A Member shall not disclose information designated by another Member as strictly confidential information in accordance with the procedures referred to in paragraph 3.]~~

A party [or third party] to a dispute shall also, upon request of a Member, provide a non-confidential summary of ~~the information contained in~~ its written submissions that could be disclosed to the public. [A Member submitting strictly confidential information in accordance with the procedures referred to in paragraph 3 shall provide a non-confidential summary of the information within 15 days of the request of another Member].

3. [Where a party designates any information submitted to the panel or the Appellate Body as "strictly confidential information", such information shall be treated in accordance with the procedures set out in Appendix 5, unless the panel or the Appellate Body decides otherwise after consulting the parties to the dispute. These procedures also apply *mutatis mutandis* to strictly confidential information submitted in the course of arbitrations pursuant to this Understanding or in the course of procedures under Annex V of the Agreement on Subsidies and Countervailing Measures.]

## B. Public Hearings

To be added to Art. 18 as paragraph 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>g</sup>, except for any portion dealing with strictly confidential information [submitted in accordance with the procedures referred to in paragraph 3.] ]

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

## C. Publication of Final Reports

To be included in the proposed Annex 5 of the DSU "Procedures Governing Strictly Confidential Information":

### II. PROPOSED DSB DECISIONS

#### [PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

##### Decision by the Dispute Settlement Body

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 [strictly] confidential information [designated as such by a Member in accordance with the procedures referred to in paragraph 3 of Article 18].

A final report issued by a panel to the parties is an unrestricted document, except for any [strictly] confidential information, as defined in [paragraph 3 of] 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>9]</sup>

<sup>9</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).

## D. *Amicus Curiae* Participation

### 1. Panel Proceedings

#### *Article 13*

#### *Right to Seek Information*

3. [In exercising the right to seek information and technical advice, the panel shall not accept or consider information or technical advice provided by any individual or body from whom the panel has not sought it.]

### 2. Appellate Body Proceedings

#### *Article 17*

#### *Appellate Review*

#### *Standing Appellate Body*

(e) [The Appellate Body shall consider only the submissions of parties and third [participants], and shall not accept or consider any submission beyond those submitted by the parties and the third [participants].]

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