

Dispute Settlement Body
Special Session

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CONTRIBUTION OF THE UNITED STATES ON SOME PRACTICAL CONSIDERATIONS IN IMPROVING THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO RELATED TO TRANSPARENCY AND OPEN MEETINGS

Communication from the United States

The following communication, dated 13 July 2005, is being circulated at the request of the delegation of the United States.

INTRODUCTION

As the United States has previously observed, over 10 years of experience under the WTO dispute settlement system has demonstrated that the recommendations and rulings of the Dispute Settlement Body can affect large sectors of civil society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in those recommendations and rulings.

The United States continues to believe that it is important to improve the transparency of the dispute settlement system. In this regard, in TN/DS/W/13 and TN/DS/W/46 the United States proposes: (1) open meetings, (2) timely access to submissions, and (3) timely access to final reports. The United States has also suggested in TN/DS/W/13 that Members may wish to consider whether it would be helpful to propose guideline procedures for handling amicus curiae submissions to address those procedural concerns that have been raised by Members, panels and the Appellate Body.

In this contribution, the United States elaborates on the various benefits that could flow from opening panel, Appellate Body and arbitrator meetings to WTO Members in general and the public, and shares with Members some further thoughts on how open meetings could be achieved in practice.¹

The United States notes first that civil society and Members not party to a dispute have been unable to observe the proceedings that result in these recommendations and rulings. The result has been that the WTO has missed the opportunity to demonstrate that dispute settlement proceedings are fair, professional, and permit parties a full opportunity to present their positions before neutral, engaged, impartial and objective arbiters. The WTO approach also stands in contrast to other international dispute settlement fora and tribunals, which are also intergovernmental in nature and whose hearings are open to the public.

¹ The proposal to open meetings to the public and WTO Members in general is intended to work with the other components of improved transparency included in the U.S. proposals.

Allowing WTO Members in general and the public to observe WTO disputes, as they can other intergovernmental disputes, would benefit the dispute settlement system and the WTO more broadly. Indeed, implementation of the DSB recommendations and rulings may be facilitated if those being asked to assist in the task of implementation have confidence that the recommendations and rulings are the result of a fair and adequate process. It would also help strengthen the dispute settlement system if all WTO Members could observe the arguments and proceedings of WTO disputes to become better informed about disputes and the dispute settlement process in general.

THE UNDERLYING U.S. PROPOSAL

It may be useful to first recall the underlying U.S. proposal:

U.S. proposal in concept (from TN/DS/W/13):

"The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration² meetings with the parties except those portions dealing with confidential information (such as business confidential information or law enforcement methods). The DSU could provide a basic set of procedures for this purpose with some flexibility for the relevant body to refine these in light of the particular circumstances of a specific proceeding. For example, the procedures could provide a number of options for allowing the public to observe the meetings, such as broadcasting meetings to special viewing facilities."

U.S. proposal to reflect this in the text of the DSU (from TN/DS/W/46):

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

"3. All substantive meetings with the parties of a panel, the Appellate Body, or an arbitrator³ shall be open for the public to observe,⁴ except for those portions dealing with confidential information.⁵"

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

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

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

"d) Paragraph 1 of Article 18 is amended by inserting ", arbitrator," after "panel" both places that it occurs."

² This would include arbitration under Articles 21.3(c), 22.6, and 25 of the DSU.

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

⁴ The expression "observe" does not require physical presence in the meeting.

⁵ For purposes of this Article, the term "confidential information" shall mean certain factual information designated as such by the party or third party to the dispute at the time that party or third party submitted the information.

SOME PRACTICAL CONSIDERATIONS

In light of this underlying proposal, the United States in this contribution offers the following observations on some of the practical considerations involved in panel, Appellate Body, and arbitrator meetings that are open to all WTO Members and the public.

Physical presence?

As noted in the U.S. proposal in TN/DS/W/46, allowing civil society and WTO Members to observe a meeting does not require their physical presence in the meeting. In fact, there are a number of considerations that would indicate that physical presence may not necessarily be the preferred approach. For example, physical presence could impose certain constraints on who would be in a position to observe. It would also raise issues of space, particularly where there is a need to accommodate the presence of a large number of delegates who will be attending the meeting as parties or third parties. In some cases, physical presence might lead to issues of maintaining order or security as well.

Alternatives to physical presence?

Some alternatives to physical presence could be electronic broadcast, either through a closed-circuit or intranet facility or through webcasting. These alternatives would offer greater flexibility in terms of location for observing meetings which in turn could permit more interested persons to observe, including those in the territories of the parties, third parties, or other WTO Members. In this way, these alternatives would respond to concerns about any restrictions entailed in interested persons having to travel to Geneva.

Any electronic broadcast should be done under the control of the Secretariat and arranged to be as discreet and unobtrusive as possible. Options to explore would include a voice-activated camera to focus on and track only those who are speaking.

An additional issue to explore would be whether to permit re-broadcast of the meeting. Re-broadcast could permit greater flexibility concerning viewing times, but may also raise questions about who would have rights to re-broadcast, for what purpose, and under what conditions.

Confidential information?

As the United States confirmed in TN/DS/W/46, those portions of meetings dealing with confidential information would not be open. An additional safeguard could be provided against the disclosure of confidential information. If meetings were broadcast electronically, it may be possible to include a delay in the broadcast to ensure that there would be no inadvertent disclosure of confidential information.

Modalities?

As in general with working procedures, the exact modalities in individual disputes would be left up to the panel, Appellate Body, or arbitrator to refine as part of the appropriate working procedures. Members may want to consider providing some guidance for the working procedures. Any guidance should be flexible to take into account experience gained in holding open meetings.
