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## Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency

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# KEY PROCEDURAL ISSUES: TRANSPARENCY

## Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency

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### I. Introduction

The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>1</sup> calls for the Ministerial Conference to complete a review of the dispute settlement rules by the end of 1998. The Dispute Settlement Body (DSB) will assume responsibility for preparations for the review.

There may be a consensus that significant changes should not be considered during the 1998 review because only a few cases have run the full course from consultations to implementation of a panel or Appellate Body ruling. If there is little pressure for a review of the fundamentals of the dispute settlement process, there could nevertheless be considerable focus on some key procedural issues. Doubtless, one such issue will be the transparency of World Trade Organization (WTO) dispute settlement proceedings and the question whether transparency should be increased.<sup>2</sup>

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1. Understanding on Rules & Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1226 (1994) [hereinafter DSU].

2. See Uruguay Round Agreements Act § 126, 19 U.S.C.A. § 3536 (West Supp. 1998) [hereinafter URAA]; URAA Statement of Administrative Action 23 in Message from The President of the United States Transmitting the Uruguay Round Trade Agreements, Text of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-316, 103d Cong., 2d Sess., vol. 1, at 656, 679 (1994) [hereinafter Statement of Administrative Action].

This article reviews the current status of transparency in WTO dispute settlement proceedings, including the following issues: (1) access to documents and meetings (both during the dispute and afterward), and (2) participation in the process by groups seeking additional access (e.g., third parties, non-governmental organizations, private parties, and counsel). Finally, this article suggests that while transparency has increased under the WTO compared to the General Agreement on Tariffs and Trade (GATT), more can and should be done. Many of the recommendations herein would increase transparency without upsetting the fundamental nature of WTO dispute settlement as reflected in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

## II. Access to Documents

### A. DURING THE DISPUTE

#### 1. *Request for Consultations*

The dispute settlement process begins with a request for consultations under article 4(4) of the DSU. All requests for consultations must be notified to the DSB and the relevant councils and committees of the WTO. Requests for consultations must be submitted in writing.

Although it was not the case under GATT 1947, the existence of the request for consultations becomes public knowledge relatively soon after it is lodged with the DSB. This occurs because the WTO has established an internet website<sup>3</sup> on which it posts reports on recent developments, including requests for consultations. A summary of pending consultations contains a brief statement of the measure at issue and the articles of the relevant WTO agreement(s) alleged to have been violated by such measure.<sup>4</sup> In this regard, the WTO is much more transparent than its predecessor.

Under the former GATT practice, a request for consultations probably would have been permanently restricted unless the parties to the dispute chose to make the document public. Under current WTO practice, the request, even if originally distributed as a restricted document, may not remain restricted forever. At its July 18, 1996 meeting, the General Council adopted procedures for the circulation and derestriction of WTO documents.<sup>5</sup> The decision provides that documents circulated after entry into force of the WTO Agreement, in any WTO document series, shall be circulated as unrestricted with the exception of certain categories of documents that are to be circulated as restricted and subject to derestriction,

3. The address for this website is <<http://www.wto.org>>.

4. These summaries may be located on the internet at <<http://www.wto.org/wto/dispute/bulletin.htm>>.

5. *Procedures for the Circulation and Derestriction of WTO Documents—Decision Adopted by the General Council on 18 July 1996*, WT/L/160 (July 22, 1996) [hereinafter 1996 Derestriction Decision] (visited June 21, 1998) <<http://www.wto.org/wto/online/ddf.htm>> [hereinafter WTO Website].

or consideration thereof. As such, working documents shall be either derestricted upon the adoption of the report pertaining to their subject matter or considered for derestriction six months after their circulation, whichever is earlier.<sup>6</sup>

The 1996 procedures for the circulation and derestriction of WTO documents represent a significant advance over the practice under GATT 1947. Nevertheless, there are those who argue that the procedures, particularly the procedures for derestriction, do not go far enough. The procedures themselves provide that “in the light of the experience gained from the operation of these procedures and changes in any other relevant procedures under the WTO, the General Council will review, and if necessary modify, the procedures two years after their adoption.” This review could commence as early as July of 1998.

## 2. *Consultations*

Article 4(6) of the DSU provides that consultations shall be confidential. This means that documents employed during the consultation process such as questions and answers exchanged among parties to consultations, are not included in the formal WTO document system and also are not generally available to WTO Members.

This approach would seem appropriate, as the consultation process is intended for use by Members to clarify issues and to attempt to resolve them without recourse to the panel process. Publication of documents used in consultations could undermine the goal of achieving settlements.

## 3. *Terms of Settlements*

The DSU requires Members that reach mutually agreed solutions to matters formally raised under the consultation provisions to notify the DSB and the relevant councils and committees, “where any Member may raise any points relating thereto.”<sup>7</sup> Such points include the question of whether the solution is consistent with the covered agreements and whether it nullifies or impairs benefits accruing to any Member under those agreements.<sup>8</sup>

Notification of a settlement agreement to the DSB would generate an official WTO document subject to the 1996 derestriction rules. Unless a Member raises a question with respect to a settlement, there would generally be no occasion for the DSB or a council to consider that settlement. Thus, the six-month rule would likely apply in most instances. The existence of a notified settlement would likely become public prior to derestriction, however, because it would be noted on the weekly dispute settlement bulletin on the WTO website.

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6. The six-month rule applies from the date of circulation of the document, i.e., the date printed on the front page of a document indicating when it has been made available to Members' delegations.

7. DSU, *supra* note 1, art. 3(6).

8. *See id.* art. 3(5).

#### 4. *Requests for the Establishment of a Panel*

If consultations do not succeed in resolving a dispute, the complaining party may request that the DSB establish a panel. Requests for the establishment of a panel are circulated to Members and included on the agenda of the DSB. A request for a panel and DSB agendas are working documents, and as such, they are eligible for derestriction six months later.

It might be argued that such documents should be derestricted immediately following each DSB meeting at which a decision is taken to establish a panel. In any event, the weekly WTO dispute settlement bulletin on the internet reports the establishment of a panel and outlines the issues in a particular case. As a practical matter, most DSB decisions establishing panels are reported in the trade press, and the requesting WTO Member frequently announces publicly that it has been granted the right to have a matter heard by a panel.

In a dispute in which the United States is a party, there is an additional channel for learning about the establishment of a panel. Under the Uruguay Round Agreements Act (URAA), the United States Trade Representative (USTR) is required to publish in the Federal Register a notice of the establishment of a panel and to solicit comments from the public on the subject matter of the dispute.<sup>9</sup>

#### 5. *Terms of Reference*

The DSU provides standard terms of reference for panels.<sup>10</sup> Although it is possible to deviate from the standard terms of reference, this has been rare both in GATT and WTO experience. "If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB."<sup>11</sup> While an airing in the DSB provides a protection for Members, the general public is unlikely to become aware of non-standard terms of reference until publication of a panel decision. The prompt release of requests for consultation would improve transparency on this subject, since a request for non-standard terms of reference must be set forth therein.<sup>12</sup>

#### 6. *Selection of Panelists*

One criticism that has been leveled at WTO dispute settlement panels is that they are composed of faceless bureaucrats, government officials, or former GATT officials specialized in trade. Article 8(1) of the DSU supports this perception.<sup>13</sup> On the other hand, the DSU does not formally restrict the universe for the selection

9. URAA § 127(b), 19 U.S.C.A. § 3537(b) (West Supp. 1998).

10. See DSU, *supra* note 1, art. 7(1).

11. *Id.* art. 7(3).

12. See *id.* art. 6(2).

13. Article 8(1) of the DSU provides:

[p]anels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or

of panelists. Indeed, article 8(2) of the DSU provides that "[p]anel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."<sup>14</sup> Nevertheless, there has been substantial criticism of the composition of GATT/WTO panels, and this has led to the argument that a better way to improve the WTO dispute settlement process is to change the profile of panel members and not to focus on access to documents and meetings.<sup>15</sup>

When the selection of panelists is complete, the chairman of the DSB must inform the Members of the composition of the panel.<sup>16</sup> Until then, no information about potential panelists is available to either Members or the general public. Advocates of greater transparency argue that without access to information concerning the candidates under consideration or the identity of the panelists actually selected, it is difficult to have a timely external policing of article 8(2)'s requirement for independent panel members. In this regard, however, the WTO panel selection process is not much different from the selection of arbitrators, or the assignment of a judge in a domestic judicial proceeding. Moreover, the WTO does have rules of conduct that include disclosure requirements for panelists, arbitrators, and experts.<sup>17</sup> With the assistance of the parties, questions of independence can be raised and resolved. In fact, these rules have been used to good effect.

## 7. Written Submissions

Written submissions are deposited with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. Submissions are confidential<sup>18</sup> and are not circulated to Members as they were not under GATT 1947 procedures. The DSU, however, contains a significant change from GATT 1947 with regard to written submissions to the panel. Article 18(2) of the DSU provides that nothing in the 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 . . . which that Member has designated as confidential."<sup>19</sup> Thus, a Member may make public a statement about a dispute, including its entire submission to the panel. Such

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as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

14. DSU, *supra* note 1, art. 8(2).

15. Philip Nichols, *Extension of Standing in World Trade Organization Disputes to Non-Governmental Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996).

16. See DSU, *supra* note 1, arts. 8(5) & 8(7).

17. *Appellate Body—Working Procedures for Appellate Review*, WT/AB/WP/1 (Feb. 15, 1996), at WTO Website, *supra* note 5. See also URAA §§ 123(c) & 124, 19 U.S.C.A. §§ 3533(c) & 3534 (West Supp. 1998).

18. DSU, *supra* note 1, art. 18(2) & App. 3, para. 3.

19. *Id.* art. 18(2).

a release is subject only to the obligation not to reveal information submitted by another Member and designated as confidential.<sup>20</sup>

Article 18(2) also requires a party to a dispute to provide a non-confidential summary of the information contained in its written submission upon the request of a Member. This provision constitutes an important, if somewhat tentative, advance toward greater transparency in WTO dispute settlement procedures.

The United States requests Members (both parties to disputes and third parties) to release their full written submissions, or alternatively, a non-confidential summary.<sup>21</sup> In the first, fully litigated WTO case involving U.S. standards for reformulated and conventional gasoline, the requests were acceded to and non-confidential summaries were delivered contemporaneously with the written submissions or shortly thereafter and placed on file at the public reading room at the USTR. This practice has not been followed consistently since that case. Some requests for summaries are ignored, and in other cases, summaries are provided long after the original written submission.

One can only speculate as to the reasons for the mixed practice. Some WTO Members may still feel that submissions to a panel should remain confidential in the interest of using the panel as an instrument to achieve a negotiated settlement. Others may fear that disclosure will limit their ability to take inconsistent positions in future cases or negotiations. Whatever the reason, article 18(2) does not regulate in detail the requirement to provide a non-confidential summary.

Moreover, there are other limitations. There is no deadline for submission. The provision refers only to a "summary of the information contained in" a written submission and not to a redacted version of the submission or any particular type of summary.<sup>22</sup> Accordingly, those interested in increasing transparency may want to consider tightening the language of article 18(2) in order to achieve a more uniform practice with respect to non-confidential summaries. In addition to time limits, consideration could be given to requiring that all legal arguments be fully disclosed and that the withholding of information on the basis that it is confidential be limited to the withholding of technical or commercial information that would be harmful to the competitive position of individual firms.<sup>23</sup>

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20. In fact, the United States routinely releases its submissions to panels, subject only to the confidentiality provision described. URAA § 127(c)(1) requires the USTR to do so. This provision of the URAA codifies a USTR practice that developed after a Freedom of Information Act suit that held that the USTR must release U.S. submissions to the public. *See Public Citizen v. Office of the United States Trade Representative*, 804 F. Supp. 385 (D.D.C. 1992).

21. URAA § 127(d), 19 U.S.C.A. § 3537(d) (West Supp. 1998).

22. As a practical matter, redacted versions of written submissions may be easier to prepare than summaries. The utility of a redacted version over a summary is not clear, particularly when there are extensive redactions.

23. The article 18(2) requirement applies "upon request of a Member." There is no qualification that the Member must be a party to the dispute in question. Any Member may lodge a request for a non-confidential summary. Members interested in greater transparency, as well as Members interested in maintaining popular support for the WTO, should consider joining the United States in

The evolution of practice under article 18(2) may depend, in part, on the use that is made of public versions of written submissions. Following the decision in the *Japanese Film* case,<sup>24</sup> the United States announced a “new market opening initiative” consisting of the establishment of an interagency monitoring and enforcement committee to review implementation of “formal representations” made by Japan’s government to the WTO panel.<sup>25</sup> Significantly, these “formal representations” are all taken from the public version of Japan’s submissions to the WTO panel. The U.S. position is that “[b]y making these statements to a WTO panel, Japan . . . committed itself before an international tribunal to implement its wholesale and retail distribution measures and enforce its competition laws in a manner consistent with its own representations and findings.”<sup>26</sup> There may be considerable discussion concerning the legal nature of Japan’s “commitments,” both as a matter of WTO law and under U.S. law. The outcome of that discussion may not depend on whether Japan made its “commitments” in the confidential or the public version of its submissions to the WTO panel. Nevertheless, one has to wonder how WTO Members will react to this use of public versions of panel submissions by the United States.

#### 8. “Oral” Statements

Panels normally meet with the parties at least twice during the panel process. At such meetings, each party to the dispute makes an oral statement. In addition, paragraph nine of Appendix three to the DSU has formalized the prior GATT practice of preparing a written version of the oral statement for delivery to the panel at the time the statement is delivered or shortly thereafter. Written versions of oral statements are not entered into any WTO document series and are treated as confidential and not made public. Furthermore, such statements are not subject to the article 18(2) requirement. An argument might be made that oral statements committed to writing have become written submissions within the contemplation of the DSU, but such an argument would involve a new interpretation of established GATT practice and the language of the Working Procedures, which use distinct terminology for written submissions (i.e., those delivered prior to a panel meeting), and oral statements (i.e., those delivered at a panel meeting).<sup>27</sup>

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exercising this prerogative. Perhaps if more Members requested summaries, more would be provided. If more were provided, procedures could be developed to disseminate them through internet links, rather than relying exclusively on the public reading room of the USTR.

24. *Japan—Measures Affecting Consumer Photographic Film and Paper—Panel Report—Action by the Dispute Settlement Body—Trilingual Document*, WT/DS44/5 (Apr. 23, 1998), at WTO Web-site, *supra* note 5 [hereinafter *Japanese Film Case*].

25. *USTR Statement* (Feb. 3, 1998) (visited July 30, 1998) <<http://www.ustr.gov/releases/1998>>.

26. *Id.*

27. Typically, an “oral” statement repeats in summary form a party’s written submission. The release of “oral” statements might therefore contribute little to improving the understanding of the positions and arguments of the parties. On the other hand, if “oral” statements are largely similar to written submissions, the argument for keeping them confidential may not be very persuasive. In



At meetings with the parties, the panelists are free to question the parties either orally or in writing. In addition, parties to the dispute may put written questions to each other. Some parties will respond to questions at the oral hearing, while others may prefer to consult with their capitals and respond later, usually in writing. Questions and answers are not entered in any WTO document series and are treated as confidential. Although it seems more difficult to argue that written questions and answers should be subject to the non-confidential summary provisions of article 18(2) than written submissions themselves, written questions sometimes focus on important factual or legal matters. On the other hand, the release of questions and answers, or summaries thereof, without access to the full written submissions might confuse more than it clarifies.

### 9. *Evidence and Expert Review Groups*

One interesting feature of the DSU is that it contains few rules concerning the fact-finding process. Article 11 provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case."<sup>28</sup> Article 13 provides that "[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."<sup>29</sup> Panels also may "seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."<sup>30</sup> Interestingly, there are no rules of evidence for testing the credibility of information. It is merely assumed that information submitted by a Member will be truthful and complete. The only way to test factual submissions is to submit additional information or opinions.

The absence of rules of evidence may be used to argue both for and against certain proposals for greater transparency in WTO dispute settlement proceedings. On the one hand, some may argue that the absence of rules of evidence makes it imperative that individuals or organizations with special knowledge be permitted to review submissions to panels, particularly submissions dealing with scientific or technical matters. On the other hand, others may argue that the absence of any method for testing the veracity or validity of factual submissions means that the WTO should only accept submissions from governments. Otherwise, interest groups could submit misleading or even completely false information without challenge. This problem could be addressed, in part, by the use of expert review groups.<sup>31</sup> However, the timing of expert reports would need to be

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fact, providing for the release of "oral" statements might be a means for beginning to discipline the article 18(2) non-confidential summary requirement. Release could be timely, because most "oral" statements are delivered within a few weeks of a written submission, and confidential information could be removed from the "oral" statement and addressed separately before the panel.

28. DSU, *supra* note 1, art. 11.

29. *Id.* art. 13(1).

30. *Id.* art. 13(2).

31. Procedures for the establishment and functioning of expert review groups are set forth in Appendix 4 to the DSU.

carefully coordinated in order to keep the panel process on schedule. Interestingly, expert review groups may themselves consult and seek information and technical advice from any source they deem appropriate.<sup>32</sup> This could include affected industries, consumer groups or non-governmental organizations (NGOs).

As a general rule, the parties to a dispute shall have access to all relevant information provided to an expert review group.<sup>33</sup> However, with respect to information of a confidential nature, such access is conditioned upon formal authorization from the government, organization, or person providing the information.<sup>34</sup> If the expert review group is not authorized to release certain information, a non-confidential summary of the information must be provided by the government, organization, or person supplying the information.<sup>35</sup>

Expert review groups submit a draft report to the parties to the dispute to obtain their comments and take them into account, as appropriate, in the final report to the panel.<sup>36</sup> The final report is issued to the parties to the dispute when it is submitted to the panel. The final report of an expert review group is advisory only.<sup>37</sup>

Reports of expert review groups are considered confidential and are not made public. Groups that are concerned about the role of WTO dispute settlement panels considering health and safety measures or environmental measures have expressed concerns about the confidentiality of the expert reports. As mentioned, the absence of procedures for public review of technical and scientific evidence submitted to a panel makes outside observers of the process suspicious. The same concern applies to the direct consultation of experts undertaken in the *EU—Beef Hormones* case.<sup>38</sup> Although procedurally more complicated than the direct consultation of experts, the use of expert review groups may grow to be perceived as the fairer and more balanced procedure. However, confidence may not be generated in the process until expert review group reports are made public.

#### 10. *Draft Descriptive Section and Interim Report*

Following consideration of rebuttal submissions and oral arguments, the panel issues to the parties the descriptive sections of its draft report.<sup>39</sup> This document sets forth the panel's proposed summary of the factual and legal arguments put forward by the parties during the proceeding. This document is confidential and delivered only to the parties to the dispute. The parties have the opportunity to

32. See DSU, *supra* note 1, app. 4, para. 4.

33. *Id.* para. 5.

34. *Id.*

35. *Id.*

36. *Id.* para. 6.

37. *Id.*

38. See *European Communities—Measures Affecting Meat and Meat Products (Hormones)—Appellate Body Report and Panel Report—Action by the Dispute Settlement Body—Trilingual Document*, WT/DS26/13, WT/DS48/11 (Feb. 19, 1998), at WTO Website, *supra* note 5.

39. See DSU, *supra* note 1, art. 15(1).

comment on the draft, and any comments made are also treated as confidential and distributed only to the panel and the disputants. This procedure provides a means of confirming that the panel understood and fairly characterized the parties' arguments. It seems that there is little to be gained by greater transparency for this aspect of the panel process.<sup>40</sup> The parties will surely respond if the panel has omitted or mischaracterized a material fact or argument.

After consideration of comments from the parties on the draft descriptive statement, the panel issues an interim report to the parties including the descriptive section and the panel's findings and conclusions.<sup>41</sup> The parties are then given a brief period to comment on the interim report, and at the request of a party, the panel holds another meeting with the parties on the issues identified in written comments. Again, neither these written comments nor any "oral" statements made to the panel at this meeting are made public. However, the parties' arguments at the interim review stage are outlined in the final panel report and thus become public upon publication of the final panel report.

### 11. *Panel Reports*

The parties to the dispute receive the final panel reports first; approximately ten days later they are delivered to WTO Members. The theory behind this delay is that knowledge of the panel decision will motivate the parties to reach a settlement in advance of its public announcement. Although this theory may apply in some cases, the tendency of many parties in litigation is to harden their position after learning of a result in their favor. Nonetheless, since the advent of the WTO, there has been at least one settlement reached at this stage of the process.<sup>42</sup>

Panel reports are distributed to Members and may be considered by the DSB for adoption twenty days thereafter.<sup>43</sup> Members having objections to a panel report must circulate them in writing at least ten days prior to the DSB meeting at which the panel report will be considered.<sup>44</sup> Circulated objections constitute formal WTO documents and are restricted.

One major change from GATT 1947 is that panel reports are derestricted no later than the tenth day after their circulation to all Members as restricted documents.<sup>45</sup> Moreover, panel reports are only circulated to Members as restricted

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40. Interests convinced that WTO Members conspire to lose cases will disagree, but little short of disbanding the WTO will assuage such critics.

41. *Id.* art. 15(2).

42. See *Overview of the State-of-play of WTO Disputes, European Communities—Trade Description of Scallops* (visited Feb. 13, 1998) <<http://www.wto.org/dispute/bulletin.htm>>.

43. DSU, *supra* note 1, art. 16(1).

44. *Id.* art. 16(2).

45. This means that panel reports are available to the public prior to formal DSB adoption.

documents if prior to the date of circulation a party to the dispute submits a written request for delayed derestriction.<sup>46</sup>

In furtherance of the derestriction policy, the WTO Secretariat now publishes derestricted panel reports on the WTO internet site, thereby assuring broad circulation. This practice represents a considerable change from GATT 1947 procedures under which panel reports were published only following their adoption by the GATT Council. The prompt publication of panel decisions has helped demystify the WTO and its dispute settlement process. Panel reports contain a reasonably complete statement of the factual and legal arguments put forward by each party, including third parties, and reasoned decisions of WTO law. There does not appear to be support for changing the policy of prompt release of panel reports, unless, for example, the recent action by the United States in the *Japanese Film* case prompts Japan to reconsider the entire subject of transparency.

## 12. *Appeal*

Prompt publication of GATT panel reports enables the public to review a decision while the time to appeal is still pending. Under article 16(4) of the DSU, that period is sixty days after the date of circulation of a panel report to the Members. Individuals or groups interested in inducing a government to appeal will have a minimum of fifty days from publication in which to make the case to the government in question.

In this regard, there was no comparable practice under GATT 1947. A panel report was placed on the agenda for adoption at a subsequent meeting of the GATT Council, where it sometimes lingered for months or even years, because the losing party had an effective veto over adoption. This provision has changed under the WTO—panel reports are adopted unless there is a consensus against their adoption.

The public availability of panel reports may prove to have an important impact on the process. Decisions by a government not to appeal a panel report may be subject to less criticism if concerned parties have had an opportunity to review the panel report prior to the lapse of the time for appeal. Of course, the opposite could be true as well. The public availability of a panel decision could generate considerable pressure on a government to appeal a ruling.

## 13. *Appellate Body Decision Making*

As is the case with panel proceedings, the proceedings of the Appellate Body are confidential and the reports of the Appellate Body are drafted without the

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46. 1996 Derestriction Decision, *supra* note 5. A report circulated as a restricted document indicates the date upon which it will be derestricted. *Id.* Furthermore, the 1996 Derestriction Decision provides that the procedure for the derestriction of panel reports will be subject to review at the time of review of the DSU. Significantly, the same document provides that the derestriction procedure "will be discontinued if there is no consensus on the matter." *Id.* at n.9.

presence of the parties to the dispute.<sup>47</sup> Interestingly, although article 17(1) of the DSU provides that an appeal shall be heard by a division of three of the seven Appellate Body members, Rule 4(2) of the Working Procedures for Appellate Review provides that each member of the Appellate Body shall receive all documents filed in an appeal.<sup>48</sup> In addition, the Working Procedures provide that the division responsible for deciding each appeal shall exchange views with the other members of the Appellate Body before the division finalizes its report for circulation to WTO Members.<sup>49</sup> Only members who are recused from a particular case or who have announced their intention to resign from the Appellate Body do not participate in this process.<sup>50</sup> Thus, although formal decisions are taken by a majority of the division assigned to a specific case,<sup>51</sup> other Appellate Body members could in fact exercise some influence on the legal reasoning and perhaps the outcome of a particular dispute. Although this possibility may be remote given the tight deadlines of the appellate process and the workload of Appellate Body members, it would seem desirable to remove any ambiguity about who is deciding cases.<sup>52</sup> If there is a concern about consistency of decisions, there may be ways to address the matter other than circulating submissions to all Appellate Body members.

#### 14. *Submissions to the Appellate Body*

Appellate Body procedures with respect to access to documents are similar to panel procedures. Submissions of parties are confidential and available only to the parties to the dispute including third parties. Article 18(2) of the DSU applies to written submissions to the Appellate Body and any Member may request a non-confidential summary of the information contained in a written submission.

Appellate proceedings are "limited to issues of law covered in the panel report and legal interpretations developed by the panel."<sup>53</sup> Some might argue that if

47. See DSU, *supra* note 1, arts. 14(1), 14(2), & 17(10).

48. The Appellate Body consists of seven "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the [WTO] agreements generally." *Id.* art. 17(3). They may not be affiliated with any government, and are supposed to be broadly representative of the WTO membership. *Id.* Information about these individuals is generally known and available. For each appeal, three members of the Appellate Body are selected to serve as a "division" to decide the case. The procedure for formation of Appellate Body divisions is not entirely clear, but Rule 6(2) states that "[t]he Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all members to serve regardless of their national origin." World Trade Organization Appellate Body: Working Procedures for Appellate Review, 35 I.L.M. 495, 505 (1996) [hereinafter Working Procedures]. As this provision implies, however, the assignment process may be intentionally obscure in order to preserve the principle of "unpredictability" and thereby avoid "judge shopping."

49. See *id.* Rule 4, para. 3.

50. *Id.*

51. See *id.* Rule 3, para. 2.

52. Rule 4, para. 4 of the Working Procedures for Appellate Review states the formal situation but is not totally convincing. *Id.* Rule 4, para. 4.

53. DSU, *supra* note 1, art. 17(6).

factual determinations are not open for reexamination, there is little reason to restrict the dissemination of written submissions to the Appellate Body. Others will argue that the submissions of the parties may contain references to commercially sensitive or other types of confidential information. Although this might be the situation in certain types of anti-dumping and countervailing duty reviews and some intellectual property disputes, few cases under the WTO agreements will require disclosure of truly confidential information for proper resolution. Accordingly, in addition to consideration of tightening the non-confidential summary provisions of Article 18(2), WTO Members may want to consider whether Appellate Body submissions should be derestricted generally, subject only to appropriate exceptions for business confidential information.

### 15. *Appellate Body Reports*

The procedures for the circulation and derestriction of WTO documents do not refer expressly to Appellate Body reports. As a general rule, Appellate Body reports are circulated to Members and are published on the WTO internet site ten days thereafter.

Appellate Body reports are considered by the DSB for adoption and are unconditionally accepted unless the DSB decides by consensus not to adopt them within thirty days following their circulation to Members.<sup>54</sup> Members have the right to express their views on the Appellate Body reports, but these views, even if delivered in writing, are not publicly available unless they are circulated to the Members and subsequently derestricted.

## B. POST-ADOPTION PROCEEDINGS

### 1. *Implementation*

Much of the discussion concerning transparency in WTO dispute settlement has focused on the panel process and, to a lesser extent, the Appellate Body review process. An equally vital aspect of WTO dispute settlement, however, is the implementation of panel and Appellate Body decisions adopted by the DSB. As Article 21(1) of the DSU states, "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."<sup>55</sup> The WTO rules, however, do not guarantee that decisions will be implemented or respected. To date, few disputes have entered the implementation phase, so it is too early to assess whether the system encourages compliance with panel rulings and how well it handles cases in which Members refuse to comply.

Article 3(7) of the DSU provides that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned

54. *Id.* art. 17(14).

55. *Id.* art. 21(1).

if these are found to be inconsistent with the provisions of any of the covered agreements."<sup>56</sup> The other options for implementation include the provision of compensation and the authorized suspension of the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the Member in violation. Importantly, article 3(7) implicitly recognizes that trading powerhouses could buy their way out of violations.<sup>57</sup>

While little attention has been paid to the question of transparency at the implementation stage, it is at this stage where laws are changed, regulations are rewritten, or countries decide to buy their way out of a violation. This phase, therefore, is critically important for the dispute resolution process and transparency advocates should pay greater attention to it.

## 2. DSB Surveillance

Following the adoption of a panel or Appellate Body report, the DSB is responsible for surveillance of implementation. At a DSB meeting held within thirty days after the date of adoption, the Member concerned must inform the DSB of its intentions with respect to implementation.<sup>58</sup> If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a "reasonable" period of time in which to do so.<sup>59</sup> This reasonable period of time may be established in one of several ways, none of which is particularly transparent.<sup>60</sup>

The issue of implementation may be raised before the DSB by any Member at any time following adoption.<sup>61</sup> The DSU provides that the Member concerned shall provide the DSB with a written status report of its progress on implementation at least ten days prior to each DSB meeting.<sup>62</sup> These written status reports are WTO documents circulated to the Members and subject to the 1996 derestriction policy. Although advocates of transparency might argue for circulation prior to the DSB meeting at which they are discussed, such status reports may not be terribly revealing. A losing party tends to adopt a standard formulation on implementation and to repeat it with regularity. The first such report, and any subsequent amended reporting language could be useful, however, to members of the public trying to follow the status of implementation of a ruling.

56. *Id.* art. 3(7).

57. For example, the DSU states that "[t]he provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement." *Id.* art. 3(7).

58. *Id.* art. 21(3).

59. *Id.*

60. Significantly, for those interested in transparency, arbitral decisions concerning the reasonable time for implementation have been published on the WTO website in several cases. The positions of the parties on the issue tend also to be widely disclosed through the trade press, prior to an arbitrator's decision.

61. *Id.* art. 21(6).

62. *Id.*

If the reasonable time for implementation passes without implementation, the parties to the dispute may enter into negotiations "with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, . . . [any party prevailing before the panel] may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."<sup>63</sup> Such requests would presumably be made in writing and circulated to all Members. Such a request would not become publicly available until the DSB had acted or the document was derestricted following a request for derestriction six months after the date of the document.<sup>64</sup>

### 3. *Transparency in Domestic Implementation*

During the implementation phase, the losing party will need to decide how to react. Here, the concerns of transparency focus on to the domestic environment. In this regard, it may be of interest to examine the procedures put in place by the U.S. Congress in the URAA. The URAA contains comprehensive requirements for the Executive Branch to inform and consult with Congress and private sector representatives.<sup>65</sup> These requirements apply whenever the United States is a party before a dispute settlement panel. At each stage of the proceeding, the Executive Branch must consult with the appropriate congressional committees and relevant private sector advisory committees as well as consider the views of representatives from appropriate interested private sector and non-governmental organizations.<sup>66</sup> The URAA defines "appropriate Congressional committees" as the Senate Finance Committee, the House Ways and Means Committee, and any other congressional committee having jurisdiction over the matter in dispute.<sup>67</sup>

Promptly after a panel or Appellate Body report is circulated to WTO Members, the USTR must notify the appropriate congressional committees of the report, consult with the committees regarding any possible appeal of the report, and if the report is adverse to the United States, consult with the committees regarding whether and how to implement the report.<sup>68</sup>

If the WTO decision affects a federal regulation, as opposed to a federal or state law, the URAA prohibits the agency in question from making any changes

63. *Id.* art. 22(2).

64. Procedures also are established in the DSU for the determination of the proper level of suspension. These procedures contemplate arbitration by the original panel, if its members are available, or by an arbitrator appointed by the Director General. *Id.* art. 22(6). Although such a case has yet to arise, presumably submissions to the arbitrators would be treated as confidential. They would not be considered WTO documents, and only the arbitrator's award, as reported to the DSB, would be circulated to Members.

65. URAA §§ 123(d) & 127(a), 19 U.S.C.A. §§ 3533(d) & 3537(a) (West Supp. 1998).

66. URAA § 127(a), 19 U.S.C.A. § 3537(a) (West Supp. 1998).

67. URAA § 121(3), 19 U.S.C.A. § 3531(3) (West Supp. 1998).

68. URAA § 123(f), 19 U.S.C.A. § 3533(f) (West Supp. 1998).



in its regulations unless and until the appropriate congressional committees have been consulted, the USTR has sought advice from the relevant private sector advisory committees, the agency has published a notice of the proposed changes in the Federal Register and invited public comment, and the USTR has provided the appropriate congressional committees with a report on the proposed changes, the reasons for them, and a summary of the advice regarding them that it has received from the relevant private sector advisory committees.<sup>69</sup> USTR and the head of the agency proposing the changes must also consult with the appropriate congressional committees regarding a final plan for implementing the changes, and the agency must publish in the Federal Register a notice of its final decision on the changes.<sup>70</sup> Furthermore, within sixty days after the commencement of the consultations with the USTR and the head of the relevant agency, the Senate Finance Committee and the House Ways and Means Committee may vote on their agreement or disagreement with the agency's planned changes.<sup>71</sup> The committees may decide not to vote, and even if they do vote, their decision is not binding on the agency. The agency's changes may not take effect until the sixty-day period afforded for the vote has expired unless the President decides that earlier implementation of the changes is in the national interest.<sup>72</sup>

The URAA provisions described above are clearly designed to ensure an adequate and full public discussion of any changes in U.S. law induced by a WTO panel or Appellate Body decision. Changes in agency rules are subject to full notice and comment rulemaking.<sup>73</sup> They are also subject to review by the relevant committees of Congress, thereby ensuring a full political discussion of such changes. Although some may quibble that these procedures in themselves are not as transparent as the public might like, they afford an opportunity for the normal political process to function. All documents in a notice and comment rulemaking proceeding are available to the public, and the public has ample opportunity to make suggestions on implementation and/or advocate defiance of a WTO decision.

Advocates of greater transparency may want to suggest that procedures similar to those of the URAA be adopted by other WTO Members. In those countries with a reasonably open political process, such procedures may well enhance the political acceptance and sustainability of unpopular measures taken to comply with WTO rulings. On the other hand, such procedures may only serve to increase

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69. URAA § 123(g), 19 U.S.C.A. § 3533(g) (West Supp. 1998).

70. *Id.*

71. *Id.*

72. *Id.* The URAA also requires that USTR to submit to Congress on March 1 of each year a report describing WTO decisions concerning a U.S. federal or state law, and any efforts by the USTR to implement any such ruling that was adverse to the United States, the subject and status of each new WTO dispute settlement proceeding involving a U.S. federal or state law initiated during the preceding year, and any progress made during the year in increasing the transparency of WTO dispute settlement proceedings. URAA § 124, 19 U.S.C.A. § 3534 (West Supp. 1998).

73. Administrative Procedures Act, 5 U.S.C.A. § 551 (West Supp. 1998).

the political dimension (and the related effort and expense for the parties and private trading interests) of otherwise routine cases.

### III. Access to Meetings

In addition to greater access to WTO documents, certain advocates of increased transparency in WTO dispute settlement seek access to meetings.<sup>74</sup> Although these requests relate primarily to panel and Appellate Body hearings, they also cover meetings of the DSB, article XXII and article XXIII consultations, and panel and Appellate Body deliberations. Each type of meeting should be examined to determine which, if any, might usefully be opened to the public generally or to groups or individuals with an interest in the proceeding.

#### A. CONSULTATIONS

As explained above, formal dispute settlement proceedings commence with a request for consultations. Although some advocates of a popular democracy model of dispute settlement would grant standing to NGOs and other non-Members of the WTO for the purpose of initiating cases, no government or major NGO espouses that position.<sup>75</sup> Accordingly, the discussion here is restricted to the question of access to meetings once a request for consultations has been lodged.

Under both GATT 1947 and GATT 1994 consultations involve only government delegations,<sup>76</sup> and there is no public access to consultations. Instead, the issue of access to consultations focuses primarily on the access of other Members. The DSU provides that whenever a Member other than the consulting Members believes that it has a substantial trade interest in consultations being held pursuant to article XXII:1 (or the corresponding provisions in other covered agreements), such Member may notify the consulting Members and the DSB of its desire to be joined in the consultations.<sup>77</sup> The "Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well founded."<sup>78</sup> If the request to be joined is not accepted, the applicant Member is free to request consultations of its own, under either article XXII:1 or article XXIII:1.<sup>79</sup>

The Member complained against, however, controls this process. If it is willing to have joint consultations, they may take place. If the Member complained

74. See e.g., Statement of Administrative Action, *supra* note 2, at 23.

75. See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INTL. ECON. L. 331 (1996).

76. As discussed below, the composition of government delegations may raise questions for some Members, particularly if a delegation includes industry representatives or counsel not in the employ of a Member.

77. DSU, *supra* note 1, art. 4(11).

78. *Id.*

79. *Id.*

against is unwilling, consultations must take place separately notwithstanding the existence of common issues of fact and law surrounding a particular trade measure.<sup>80</sup>

As consultations may be used to ask questions of another Member and to clarify issues, it is understandable that organizations and institutions with an interest in the issue may also desire to attend. The posing of questions and the delivery of answers, however, is frequently undertaken in writing and attendance at the consultation itself might not prove essential if some mechanism could be developed for disseminating the questions and answers exchanged in consultations. On the other hand, the purpose of a consultation is for a Member to give sympathetic consideration to the representations or proposals made to it. In other words, consultations are about settlement. As with most dispute settlement mechanisms, some value must be attached to the desirability of reaching settlements rather than allowing disputes to run their full course. Parties are generally more forthcoming in closed settlement discussions than public discussions, and a desire for transparency should not overcome the values associated with providing an environment conducive to settlement. Any settlement reached can be policed by other means, since all settlements must be reported to the DSB where they are subject to review.

## B. PANEL MEETINGS

Some advocates of transparency argue that panel meetings should be conducted in public, much like a court hearing.<sup>81</sup> Others merely desire the opportunity to appear before the panel to make oral submissions or to submit an amicus brief.<sup>82</sup> Before dealing with the proposals of non-Members, however, it is important to consider the existing procedures as they apply to third-party Members.

### 1. *Third Party Members*

Article 10 of the DSU provides that the interests of the parties to a dispute and those of other Members shall be fully taken into account during the panel process.<sup>83</sup> This objective is met by permitting any Member having a substantial interest in a matter before a panel an opportunity to be heard by and to make a written submission to the panel.<sup>84</sup> These submissions are given to the parties to

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80. Article 4(11) of the DSU applies to article XXII:1 consultations and not to article XXIII:1 consultations. Thus, if a Member initiates article XXIII:1 consultations with another Member, there is no formal mechanism in the DSU for joining other Members to those consultations. Such consultations could conceivably be expanded with the consent of all parties to the original article XXIII:1 request, but in such situations both the aggrieved party and the author of the particular measure have a veto.

81. See URAA Statement of Administrative Action, *supra* note 2, at 23.

82. See Charnovitz, *supra* note 75, at 348.

83. DSU, *supra* note 1, art. 10(1).

84. *Id.* art. 10(2).

the dispute and are subsequently reflected in the panel report.<sup>85</sup> Finally, third parties receive the written submissions of the parties to the dispute prior to the first substantive meeting of the panel.<sup>86</sup>

Significantly, article 10 does not accord third party access to the panel meetings at which the principal disputants present their respective cases.<sup>87</sup> In addition, article 10 does not accord third party access to the second substantive meeting of the panel. Article 10 also does not provide third party access to the interim decision in the case nor to the meeting with the panel at which comments are made on the interim decision. Finally, article 10 does not provide third party access to the second and subsequent submissions of the parties to the dispute, although, as a practical matter, such submissions may be shared by the disputant that believes a particular third party supports its position.

Clearly, the question of access to meetings has a dimension touching WTO Members themselves, before one even considers the question of access for the public. Those who defend the current system on the ground that all interests are adequately protected through the submissions of Members might legitimately be asked how this can be when third parties have such limited access to dispute settlement proceedings.<sup>88</sup>

## 2. *Public Access*

Support for greater public access to WTO dispute settlement proceedings comes from private parties and industries, labor interests, and NGOs, including consumer groups and organizations with sector-specific, issue-specific, or regional concerns. Some NGOs are organized internationally with local chapters in more than one WTO Member while others focus exclusively on a specific industry, problem, and/or geographic region. What they share, however, is a desire for more access.

Steve Charnovitz has argued that there are two main justifications for non-Member participation in dispute resolution. First, "NGO participation will increase the information available to the panel, thereby leading to better informed—and hopefully better quality—panel decisions. . . . Second, a closed dispute resolution system will undermine popular support."<sup>89</sup>

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85. *Id.*

86. *Id.* art. 10(3).

87. The provisions of article 10 are implemented in the following fashion: each panel sets aside a day for presentations by third parties at the time of the first substantive meeting of the panel. At that session, representatives of the principal parties to the dispute attend, but there is little, if any, exchange between the delegations of the disputants and delegations of the third parties. The third parties merely make a statement and retire.

88. Greater third party access would also create more opportunity for private interests and NGOs to provide input through a Member.

89. Charnovitz, *supra* note 75, at 351.

## a. Better Information

i. *Access Through Governments.* The response to requests for direct access by NGOs to WTO panels has generally been that NGOs should filter their comments through sovereign governments. The same response has been given to private interests in the industry or sector concerned and to labor and consumer organizations. Lately, NGOs, private interests, and labor and consumer groups have become more sophisticated about doing precisely that. Following the widely perceived debacle of *Tuna 1*,<sup>90</sup> NGOs organized to make their inputs to governments. In fact, by the time of *Tuna 2*,<sup>91</sup> NGOs, industry interests, and consumer organizations had become quite sophisticated at submitting their views through WTO Members. Indeed, both NGOs and trade associations were quite active in the *Venezuelan Gasoline* case. One can hardly conceive of the *Japanese Film* case without its private party protagonists on both sides.<sup>92</sup> Furthermore, environmental NGOs have been very active on the *Shrimp* cases.<sup>93</sup>

If a goal of NGO and private party participation is to provide information to a panel, such information can be effectively channeled through governments. Since no limitations exist on the types of materials that a Member may submit to a panel, it may use materials provided by NGOs or industry in many ways. In the *Shrimp* case, for example, the United States has submitted certain academic studies and written statements of individuals that have the appearance of affidavits, but which are not sworn before a notary or stated to be declarations under penalty of perjury. For the purpose of transmitting information to the panel, these documents may be as effective as an amicus brief or an oral statement. In a way, they may be more persuasive to a panel as part of the submission of a Member.

ii. *Impediments to Access Through Governments.* Advocates of direct access counter that there may be substantial impediments to access through governments. For example, many international NGOs do not fit the traditional citizen-government model.<sup>94</sup> Still other NGOs may be organized in countries that are not Members of the WTO. Finally, a government may not want to present a point urged by one of its NGOs, either because the point is incorrect or for fear

90. United States—Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1991) (unadopted); 30 I.L.M. 1594 (1991).

91. United States—Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994).

92. See *Japanese Film Case*, *supra* note 24. For many, this case was a proxy for a dispute between Kodak and Fuji.

93. *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58, at WTO Website, *supra* note 5.

94. The fact that international NGOs do not fit the traditional citizen-government model, however, may actually enhance their ability to influence WTO dispute settlement proceedings. By definition, they are not limited to attempting to influence a single government. Their worldwide resources may well provide access to several governments.

of undermining the government's position in another pending case.<sup>95</sup> Finally, it is argued that a defendant government might prefer to lose a WTO case if the executive dislikes the law being contested.<sup>96</sup>

As a preliminary matter, to argue that NGOs should be allowed to present their point of view directly to WTO panels because WTO Members may have latent conflicts of interest is to eliminate what remains of the political or diplomatic aspect of WTO dispute settlement. When WTO Members agreed to lower the tariff on product X and not on product Y, there was a latent conflict of interest. When a WTO Member makes or seeks concessions on financial services but not on steel, there is a conflict of interest. These conflicts reflect the entire dynamic of the bargaining process. Espousal of a principle in one case may weaken the intellectual position of a Member in another case. This, however, does not mean that the Member should not be permitted to continue to make societal judgments about the industries in which it may have a comparative advantage and the industries in which it may not. The fact that a government might prefer to lose a WTO case is merely another reflection of the so-called conflict of interest issue. Here, the domestic political process of the Member may be brought to bear to discipline the executive if it has made a decision not aligned with the national interest.

Some will argue that in non-democratic countries there can be no effective discipline of the executive. Others will argue that non-democratic regimes may perpetuate inefficient economic judgments about comparative advantage. These arguments may well be correct. Nevertheless, it is not the objective of the WTO to bring democracy to every corner of the world. The full benefits of the WTO will probably be achieved only when membership is universal and all Members are democracies, but direct participation in WTO dispute settlement proceedings is not the only way to promote those objectives. In fact, a narrow focus on dispute settlement is probably an inefficient method for promoting many objectives.

iii. *Access Through Amicus Briefs.* Some NGOs have started to prepare amicus briefs for particular cases, notwithstanding the fact that no procedure exists for submitting such briefs to panels. It is an interesting exercise to compare such briefs with the public versions of the parties' submissions made available under article 18(2) of the DSU. In the *Shrimp* case, for example, one amicus brief contains an extensive discussion of international treaties and the international environmental law regime for the protection of shrimp.<sup>97</sup> Although the parties' submissions did not include a reference to all the material contained in the amicus

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95. This issue, however, raises the question of the scope of the WTO's subject matter. As its name suggests, the WTO is an organization designed to deal with trade issues. It cannot be all things to all people. Moreover, it is not the only organization or international treaty regime, and NGOs will not be without opportunities to attempt to influence their own government or others to deal with pressing issues outside the scope of the WTO.

96. See Charnovitz *supra* note 75, at 353.

97. See WWF Amicus Brief to WTO Shrimp-Turtle Dispute (Sept. 1997).

brief, it can hardly be argued that the submissions of the parties overlooked the international environmental law background in the case. Clearly, whether by the intervention of NGOs or through their own diligence, the Members involved have informed the panel with respect to this aspect of the case.

The international environmental law background is not, however, the only important aspect of the case on which the panel could benefit from good information. Considerable debate is underway before the panel concerning the incidence of turtle mortality in specific fishing grounds and its causes. Additional issues concern the relative economic burden of turtle excluder devices and their efficacy. On these issues, the WWF amicus brief is essentially silent.

Finally, with respect to the application of the relevant GATT articles, the amicus brief speaks only in a conclusory and cursory way. This is not to say that in a particular case, an amicus brief cannot make a contribution, but the ability of non-Members to submit amicus briefs is not a panacea for improving the quality of WTO panel reports. Perhaps the best way to improve the quality of information available to panels is to focus on opening the domestic procedures within each WTO Member and making those procedures more transparent.

#### b. Maintenance of Popular Support

i. *Who Speaks?* In the end, Charnovitz clearly argues that the real problem is the failure of the WTO Agreement to recognize the global environment and that this failure risks a loss of popular support for the WTO.<sup>98</sup> He calls for fundamental reform of the WTO so that it can pay attention to ecological interdependence and suggests that in the meantime it would be useful to let NGOs make written presentations to WTO panels to fill this gap. He suggests that submissions would be most useful at the stage when interim factual and positional drafts are circulated to the disputants.<sup>99</sup> To overcome practical objections about hearing from many groups, Charnovitz proposes that NGOs could act collectively to select their spokespersons. Finally, Charnovitz suggests an alternative to direct participation, such as asking an intergovernmental environmental organization like the United States Environment Programme or the World Conservation Union to name an environmental advocate in WTO environmental disputes.<sup>100</sup>

If the complaint about lack of access to meetings is based on a popular democratic notion that all different points of view should be heard, it is hard to discern what principles the chair of a panel would apply when determining who would be allowed to speak. Collective action by NGOs to select their own spokespersons also provides no particular guarantee of democracy. What is the evidence that such a process would prove any better than allowing national governments to sort out the

98. See Charnovitz, *supra* note 75, at 354.

99. Such submissions would come very late in the process and could prolong the panel process beyond the applicable deadlines. It would seem that if amicus submissions were allowed, they should be submitted simultaneously with the submissions of third parties.

100. See Charnovitz, *supra* note 75, at 356.

positions that should be presented?<sup>101</sup> It should also be pointed out that while many NGOs have broad membership and democratic internal processes, others do not. Some NGOs respond primarily to the directives of their chief source of funds. If WTO panel proceedings are to move toward a popular democratic model will this require the establishment of a disclosure and lobbying reporting regime?

ii. *Consultations with Intergovernmental Organizations.* Perhaps the solution lies in Charnovitz's final suggestion which calls for participation by intergovernmental environmental organizations. In this regard, both GATT 1947 and GATT 1994 contain an important provision. Article XXIII:2 provides that the WTO may consult with Members, as well as "with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where [it] considers such consultations necessary."<sup>102</sup> Thus, if a particular dispute involves matters that are beyond the normal scope of the WTO, the organization has a ready-made mechanism for obtaining information and relevant input on the international political consensus with respect to such matters.

This mechanism might have been used with positive effects in the tuna/dolphin cases. As that case now reaches its denouement, it becomes clear that the solution<sup>103</sup> implemented was actually hatched in the InterAmerican Tropical Tuna Commission (IATTC), an intergovernmental organization with fifty years of experience in the relevant fishery.<sup>104</sup> Although those who advocate a total ban on setting on dolphin have always questioned the efficacy of the IATTC, major environmental NGOs have now recognized that a complete ban on setting on dolphin produces undesirable environmental consequences for other species and for management of the entire ecosystem. If the IATTC had been consulted when the case first arose, nearly a decade of hysteria and hand-wringing about the inadequacies of the GATT might have been avoided, because the multilateral agreement sponsored by the IATTC that led to the solution of the problem had already been negotiated at the time of *Tuna 2*.<sup>105</sup>

Perhaps the DSU needs to be more specific about offering parties an opportunity to invoke consultations with intergovernmental organizations. This might be done by broadening article 13 of the DSU concerning the right to seek information.

101. Arguably, it was precisely the NGO community's inability to form a unified position that contributed, in part, to the prolongation of the tuna/dolphin controversy.

102. General Agreement on Tariffs and Trade, art. XXIII:2, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

103. See International Dolphin Conservation Program Act, Pub. Law No. 105-42, 111 Stat. 1122 (1997).

104. See The Convention for the Establishment of an Inter-American Tropical Tuna Commission, 1 U.S.T. 230, T.I.A.S. 2044.

105. See The Agreement of June 1992 for the Reduction of Dolphin Mortality in the Eastern Tropical Pacific Ocean, 33 I.L.M. 936 (1994); Declaration on Strengthening the Objectives and Operation of the Convention Establishing the Inter-American Tropical Tuna Commission, reprinted in *International Dolphin Conservation Program Act: Hearing Before the Subcommittee on Oceans and Fisheries of the Senate Committee on Commerce, Science, and Transportation*, 104th Cong. 22-32 (1996).



Both in cases where the subject matter goes beyond the normal reach of the WTO and in other cases where it does not, the ability of the panel to request the views of intergovernmental organizations might help maintain popular support for the WTO. Furthermore, as pointed out above, a panel may seek information from any relevant source, including from any individual or body it deems appropriate. Perhaps a panel could experiment with this provision to see whether it has any impact on public support for the WTO.

iii. *Public Access to Meetings.* Some who are concerned about increasing the credibility and legitimacy of WTO dispute settlement procedures argue that panel and Appellate Body meetings should be open to the public in order to overcome their "star chamber" image.<sup>106</sup> Panel meetings, however, are not star chamber proceedings,<sup>107</sup> and could benefit from some demystification. There have been some significant improvements in transparency since GATT 1947, and this article makes some suggestions for further changes in WTO procedures.

The question of public access, whether through written submissions or a presence in the hearing room, really centers on a question of sustaining popular support for the WTO. People have a fear of being controlled by other people and institutions located far away that they think they do not control or cannot influence. They will accept a court ruling, but only if, *inter alia*, they have confidence in the system for selecting the judges. In this regard, the advent of the Appellate Body may be helpful. Appellate Body members are identifiable. Their names are public information and anyone may look up their biographies or read their decisions. Information about panelists, on the other hand, may not be so readily available to the general public until after a case is decided.

Perhaps there is room for experimentation. The Appellate Body currently considers only questions of law and legal interpretations developed by the panel. Maybe the WTO could open Appellate Body arguments to the public, or at least permit the submission of amicus briefs.<sup>108</sup> In this way the public might feel that

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106. See *INSIDE U.S. TRADE*, Mar. 4, 1994, at 3-4 (quoting U.S. Trade Representative Mickey Kantor).

107. With respect to Mr. Kantor, this characterization is not entirely fair. The term "star chamber" does not apply to a system in which the defendant is fully apprised of the charges against him, has the right and the ability to confront his accuser in consultations and at least three times during the panel process, can present any information he desires to the panel, has an opportunity to rebut the accuser's proof and legal arguments, may review the statement of facts and the findings and conclusions before they are final and disseminated to the world, and then has the right to appeal. One does not detect the rack and screw at work here before hooded judges. In fact, the identity of the judges is known to the parties and to the public when a decision is announced.

108. If certain steps are taken, such as making more frequent use of consultations with intergovernmental organizations or the development of procedures for submitting amicus briefs to the Appellate Body, the need for public hearings may be reduced. This may be particularly true when one considers that most panel meetings are highly ritualized affairs, with each party largely reading the written version of its "oral" statement and the panelists posing important questions in writing. These characteristics of panel meetings could change, but until they do, the argument for public access to hearings seems less than convincing.

they have a better understanding of, and a way of participating in, the development of WTO law. Of course, in the case of the WTO, far more law is made in broad negotiations. However, if the opening of Appellate Body proceedings will serve to maintain public faith in the WTO as an institution, an experiment like the one described may be worthwhile. It is premature to experiment with panels, however. If the goal is to make the WTO a truly universal institution, imagine the complications that might arise in the China accession negotiations if it were perceived that every future panel session in a case involving China would become an opportunity for a human rights organization to attack China. More transparency is possible, but it should be remembered that the WTO is a *trade* organization.

### C. PANEL DELIBERATIONS

Article 14 of the DSU provides that panel deliberations shall be confidential and that the reports of panels shall be drafted without the presence of the parties to the dispute. No government, NGO, industry interest, or consumer organization advocates any change. Panel deliberations must benefit from privacy so that each panelist may present his views to his colleagues in a full and frank manner.

### D. DSB CONSIDERATION OF PANEL DECISIONS AND IMPLEMENTATION

Very little attention has been paid in the transparency debate to the deliberations of the DSB itself. Following the issuance of a panel or Appellate Body decision, it is presented to the DSB for adoption. As previously mentioned, the DSB continues to consider the matter until it has been satisfactorily resolved. Information about DSB consideration of final reports and the implementation thereof tends to filter into the press, but it is not reported on the WTO internet dispute settlement overview. Addition of a new section to the dispute settlement bulletin to report on implementation of adopted reports might be useful. As the DSB meets regularly, the availability of this type of information could be used by interested parties to make their input through sovereign governments for presentation at a future DSB meeting.

## IV. Right to Counsel for WTO Members

Another important participation issue is the question of WTO Members' ability to select counsel of their own choosing and the extent of the participation of such counsel in dispute settlement proceedings. This question should be distinguished from the question of whether counsel to private interests, industry groups, NGOs, or labor or consumer organizations should be permitted to attend panel and Appellate Body hearings. That question is properly characterizable as a transparency issue and has already been discussed. From the due process perspective, however, whether a WTO Member may be represented by counsel of its choice during the several steps of the WTO dispute settlement process is a very different issue.

Private counsel<sup>109</sup> have in fact advised GATT contracting parties and WTO Members on dispute settlement proceedings for many years, particularly with respect to the preparation of written submissions and oral statements to panels. No WTO Member seems to question the right of Members to seek and receive this type of legal assistance. In fact, the DSU itself recognizes that not all Members will have access to necessary legal expertise from among the ranks of the Member's own government service.<sup>110</sup> The question therefore focuses narrowly on the composition of Member delegations in consultations as well as panel and Appellate Body sessions and the role of private counsel once accredited to a Member delegation.

At its February 1998 meeting, the House of Delegates of the American Bar Association (ABA) adopted a resolution and report endorsing procedures, and urging the U.S. Government in the context of the scheduled 1998 review of the DSU, to support procedures enabling any party in a dispute subject to the DSU to seek, employ, and use counsel of such party's selection at all phases of the proceedings.<sup>111</sup> The following material borrows heavily from that report.

#### A. BACKGROUND

As the WTO dispute settlement process becomes more legally oriented than at any time in GATT history, the role of legal advice becomes more important. As indicated, the DSU recognizes the need for legal expertise for developing countries.<sup>112</sup> Some countries, such as the United States, maintain large contingents of government lawyers familiar with the WTO agreements and dispute settlement. In fact, because the United States is using the dispute mechanism so frequently, the USTR recently announced its intention to hire more lawyers.<sup>113</sup> At the same time, it has been the U.S. government that has most often voiced the view that private counsel should be excluded from hearings.

#### B. RECENT HISTORY

Under the WTO, some countries, particularly the United States, continue to argue that attendance at panel and Appellate Body proceedings should be limited to individuals, including counsel, who are regular employees of the Member's

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109. The term "private counsel" is used here to refer to a legal adviser that is not a regular employee of a WTO Member.

110. See DSU, *supra* note 1, art. 27(2).

111. See ABA Recommendation and Report No. 118A, adopted by ABA House of Delegates (Feb. 1, 1998).

112. The DSU provides that the expert provided by the Secretariat shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat. See DSU, *supra* note 1, art. 27(2). Thus, developing countries are entitled to assistance from the Secretariat but not too much and certainly not at substantive meetings with the panel.

113. INSIDE U.S. TRADE, Nov. 21, 1997, at 3-4.

government. The United States has even suggested to other Members that the inclusion of outside counsel on a Member's delegation would open the door to demands by NGOs that they be similarly included. With respect, it is not so difficult to distinguish outside counsel retained by a government for purposes of a specific proceeding from an NGO.

In the panel proceeding addressing the European Community (EC) regulations concerning banana imports, an objection was raised to the presence of private counsel used by a small country that did not have access to governmental expertise on WTO dispute settlement proceedings. The panel ruled that the counsel should be excluded and stated as follows in its report:

[i]t has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any party objected to their presence and in this case the complainants did so object. In the working procedures of the panel, which were adopted at the panel's organizational meeting, we had expressed our expectation that only members of governments would be present at panel meetings. The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the panel at its organizational meeting. Given that private lawyers may not be subject to disciplinary rules such as those that apply to members of governments, their presence at panel meetings could give rise to concerns about breaches of confidentiality. There was a question in our minds whether the admission of private lawyers to panel meetings, if it became common practice, would be in the interest of smaller members as it could entail disproportionately large financial burdens for them.

Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of the WTO dispute settlement proceedings. We noted that our request would not in any respect adversely affect the right of parties or third parties to meet and consult with their private lawyers in the course of panel proceedings, nor to receive legal or other advice in the preparation of written submissions from non-governmental experts.<sup>114</sup>

The decision of the *Banana* panel refers to a special agreement on the procedures for the conduct of that case. In this regard, it may stand for the unremarkable principle that when parties represented by counsel decide that they desire to have a meeting without counsel present, one party should not subsequently appear at the meeting with counsel. Of course, this reading of the panel decision begs the question whether the United States had insisted on the adoption of the procedural rule by invoking a general principle against the presence of counsel before panels. The principle should be clarified so that parties faced with a suggestion that counsel be excluded can address that question on its merits on a case-by-case basis.

114. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27 (May 22, 1997), para. VII, 11-12, at WTO Website, *supra* note 5.

The *Banana* decision was appealed to the Appellate Body, which did not review the issue concerning the presence of counsel in panel proceedings because that issue was not appealed. At the appeal itself, however, the complaining parties, including the United States, objected to the presence of private counsel for other parties before the Appellate Body. The Appellate Body rejected the objection, noting that it found nothing in the WTO Agreement, the DSU, or the Appellate Body Working Procedures, nor in customary international law or the prevailing practice of international tribunals, that would prevent a WTO Member from determining the composition of its delegation in Appellate Body proceedings. The Appellate Body considered the full panoply of concerns with private counsel participation in WTO dispute resolution proceedings, as articulated by the United States and other Members. The Appellate Body then ruled that, "[i]t is for a WTO Member [to determine] who should represent it as Members of its delegation in an oral hearing of the Appellate Body."<sup>115</sup>

Since the adoption of the Appellate Body decision in the *Banana* case, no rules or guidelines have been adopted by the WTO concerning the ways in which countries may work with or retain outside counsel. The WTO Secretariat merely determines whether an individual has been named to a Member's delegation, allowing any delegation to decide for itself who may serve that Member.

There appears to be no solid basis for a rule to limit a sovereign nation's right to elect to be represented by counsel in WTO dispute settlement proceedings. In the absence of a treaty provision prohibiting the use of outside counsel, the question whether to employ such counsel should be left to the individual Member. This position is supported by fundamental concepts of due process. The right may be particularly important for governments without the internal resources required to defend their interests and for countries with small economies. Such a country may not desire to expend the resources required to train and maintain on staff counsel fully familiar with all the details of the more than 2000-page WTO Agreements. On the other hand, if a particular case arises that threatens a major trading interest of that country, what justification can there be for a blanket rule that the country may not engage private counsel of its own choosing?

### C. GENERAL PRINCIPLES OF INTERNATIONAL LAW

The argument in favor of free choice of counsel is soundly grounded in general principles of international law. One such principle is that sovereign states are free to choose who represents them before international organizations absent specific rules to the contrary in the charter of the organization. Professor Rosenne, a leading commentator on the International Court of Justice (ICJ), has written that:

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115. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB (Sept. 9, 1997), para. 10, at WTO Website, *supra* note 5.

[n]o attempt is made in the Statute [of the ICJ] to regulate the manner by which the parties shall be represented before the Court and this is a matter which is largely the outcome of the practice of states in international arbitration . . . The texts governing the working of the Court are silent concerning the qualifications of counsel and advocates. This is a domestic matter for the litigating state to settle for itself, with due regard for the status of the Court.<sup>116</sup>

In fact, the Statute of the International Court of Justice expressly permits parties to engage counsel to represent them. Article 42 provides that (1) the parties shall be represented by agents, and (2) they may have the assistance of counsel or advocates before the Court.

The rules of the International Centre for the Settlement of Investment Disputes and of the Iran-United States Claims Tribunal also provide that parties may be represented by persons of their choice. Further, no limitations on representation appear in the statutes of the European Court of Human Rights, the InterAmerican Court of Human Rights, the Permanent Court of Arbitration, and the United Nations Compensation Commission (adjudicating claims against Iraq).

Other international organizations also adhere to the customary international law principle that sovereign states are free to choose who represents them. This is true in the International Telecommunication Union, the International Labour Organization, the Organization of American States, the United Nations Conference on Trade and Development, and the World Intellectual Property Organization. In fact, no organ of the United Nations imposes any restriction on the composition of delegations which may be comprised of technical experts, including lawyers, drawn from the private sector.

#### D. OPPOSING ARGUMENTS

##### 1. *Tactical Advantage*

It is possible that the U.S. objection to the appearance of private counsel at hearings stems from a desire either to maintain a tactical advantage in the individual case or a more generalized desire to keep the issue as a bargaining chip to be traded for concessions in the transparency area. Yet, the right to counsel seems so fundamental, both to the interests of WTO Members (including potentially the United States) and also to the healthy development of the dispute settlement process itself (something that the United States actively promotes), that it should not be held hostage to the particular short-term concerns of any one nation.

##### 2. *Aggressive Style*

Some countries, particularly European countries, seem to fear that private lawyers may introduce an adversarial, excessively litigious style of representation that is alien to WTO dispute settlement and would undermine its effectiveness

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116. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 214-16 (1965).

to assist in the settlement of disputes. It also has been argued that private lawyers, retained on a case-by-case basis, may not be sufficiently imbued with the instinct of Members to preserve the institution and systems of the WTO. Lawyers, however, are subject to the ultimate control of their clients.<sup>117</sup> Lawyers can and should be brought to heel when they exceed the scope of their client's instructions or engage in overzealous representation. Further, to the extent that lawyers are permitted to participate in dispute settlement proceedings, a WTO bar will doubtless develop that will have an institutional interest in the preservation and maintenance of the WTO dispute settlement system.

### 3. *Economic Arguments*

The economic arguments against the use of private counsel seem to be either paternalistic or self-serving. How can it be that a poor country that cannot afford an internal government legal expert would be disadvantaged by the opportunity to engage counsel in a particular case? To the contrary, a country with limited resources may have a case that is so significant to it that it is prepared to assemble very considerable resources. The economic argument also ignores the realities of the marketplace. To the extent that a market develops for WTO counsel, the geographic scope of the bar will expand. There is no reason to believe that just because today some U.S. and EU firms or individuals are experts in WTO matters that firms or individuals from other countries or regions will not be attracted to the market.

It may be that rich countries may fear that even they may not have the internal resources to match the efforts of private counsel in a particular case. This, however, is not a principled basis on which to oppose the right to counsel for WTO Members. In fact, this possibility may be good for the system, because it may force countries to think carefully about the strength of each case before initiating it.

### 4. *Lawyer Misconduct*

There are two remaining arguments against the use of private lawyers by WTO Members that reflect traditional concerns in the area of regulation of lawyers. These have to do with systems for disciplining misconduct, including breaches of obligations of confidentiality and conflicts of interest. At present, there is no WTO bar and the home bars of lawyers aspiring to practice before the WTO may not have focused on the disciplinary aspects.

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117. This discussion assumes that the client is the WTO Member, and that the WTO Member has ultimate authority to dismiss private counsel from its delegation. The argument with respect to aggressive style may carry greater weight when applied to counsel whose client is an affected industry. Even in such a case, however, if the WTO Member assumes responsibility for and retains control over the composition and conduct of its own delegation, the concern about aggressive style should not be determinative. The prudent practice for Members, however, will be to include on their delegations only counsel to the Member and not counsel to private interests.

#### a. Confidentiality

The issue of confidentiality relates to two types of information: (i) negotiating positions (including diplomatic information) developed in the panel proceeding itself, and (ii) confidential information (primarily business data) that may have been generated in the underlying matter or dispute which is the subject of the dispute settlement proceeding. Concerns about disclosure of confidential information are legitimate concerns, but they do not rise to a level that would justify the exclusion of private counsel from WTO dispute settlement proceedings.

The history of past proceedings involving private counsel suggests that the unauthorized disclosure of confidential information has not been a problem. Private counsel have been involved in many prior GATT and WTO proceedings without instances of unauthorized disclosure of confidential information. Most of these representations involved preparation and review of written submissions rather than participation in oral proceedings before panels. However, counsel debrief delegations following panel proceedings in order to be able to respond to written questions from the other party to the dispute or from the panel itself.<sup>118</sup> It cannot be argued, therefore, that the presence of counsel at a panel session will materially increase the risk of disclosure of confidential information.

To date, the amount of business confidential information submitted to GATT panels has been minimal. As more proceedings unfold under the antidumping and the subsidy codes, and the Agreement on Trade-Related Aspects of Intellectual Property, however, there exists some potential for more information of this type to reach individuals involved in WTO dispute settlement proceedings. However, in many cases, counsel before the WTO would have already had access to such information in the domestic proceedings giving rise to the WTO proceeding. Disclosure of such information to any person, whether an employee of another government or private counsel, who is not subject to regulation by the government agency collecting the information, would be a matter of concern both for that government agency and for the private parties submitting the information. In fact, sovereign governments may be unwilling to submit business confidential information in WTO disputes and Appellate Body proceedings, whether or not private counsel represent Members in such proceedings. Submitting governments may view unauthorized disclosure by government officials of other parties to be just as, if not more, likely than disclosure by private counsel. In any case, the involvement of private counsel does not generate a concern that would not otherwise arise without their participation in such proceedings.<sup>119</sup>

118. Permitting counsel to attend panel sessions would eliminate this needless inefficiency in the rendering of legal advice.

119. Moreover, it is quite likely that most WTO dispute settlement proceedings could be conducted without the need to disclose business confidential information to private counsel. The majority of disputes subject to WTO panel review involve questions of law, and the facts necessary to apply that law will involve otherwise public information. When review of business confidential information is involved, public summaries of such information can be provided in most cases without disclosing



## b. Discipline

It should be possible to supplement existing obligations of private counsel to the bar association of their home jurisdiction by either (1) establishing a WTO bar with its own rules of conduct and disbarment procedures and/or (2) requiring all lawyers representing WTO Members in dispute settlement proceedings to adhere in writing to a code of conduct developed by the WTO through the DSB and Appellate Body Secretariats. Sanctions for violation of the code of conduct would include removal from the pending dispute proceeding, disbarment from future WTO proceedings, and referral of the violation to the appropriate bar or other professional association in the counsel's home jurisdiction for appropriate sanctions.

The ABA developed such a draft code of conduct, and it is appended to its 1998 Report.<sup>120</sup> The code provides that the counsel will expressly represent that he is familiar with the organization, history, and operation of the WTO and is professionally qualified to provide advice regarding the proceeding. Finally, counsel also would be required to represent that he understands that only Members are the parties before the WTO dispute settlement bodies, that his conduct will be consistent with the representation of a Member in a proceeding in which all other parties are also Members, and that he will accept instructions solely from the Member who retained him.

## V. Conclusion

The issue of transparency in WTO dispute settlement proceedings will certainly command attention during the forthcoming review of the DSU. The U.S. delegation, in particular, will be under clear instructions in this regard. The starting place for movement on this subject will be the provisions with respect to the participation of third parties in the proceedings. Before the general public can claim access, third parties who are full-fledged Members of the WTO would seem to have first claim on greater transparency.

The second area for further development of the DSU would be refining the provisions of article 18(2) with respect to the disclosure of summaries of written submissions to panels. Very little of what goes into a submission to a panel is

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confidential information in a manner harmful to the private parties originally submitting such information. Finally, procedures for maintaining the confidentiality of business confidential information could be developed along the lines of the existing U.S. procedures for administrative protective orders.

120. The code contemplates that counsel representing Members in WTO proceedings will be members in good standing of a bar or other professional organization in a Member state that conditions admission and continued good standing on (1) sufficient education, (2) a review of qualifications by a government operated or sanctioned agency, and (3) adherence to ethical obligations generally recognized as appropriate throughout the world. Further, counsel would be required to provide the name and address of the disciplinary body of the bar or other professional organization to which any violation of the code of conduct may be reported by the WTO Secretariat.

truly confidential. It would seem appropriate to develop categories of information properly subject to a confidentiality designation and to require that all submissions be made public, at the time of their submission, subject only to redaction for removal of truly confidential information. In this way, copies of complete, or nearly complete, written submissions would be available.

Third, more attention should be paid in the transparency debate to the post-panel DSB proceedings concerning the implementation of decisions. In this regard, the Secretariat might consider the preparation of appropriate summaries of DSB proceedings concerning implementation. In addition, WTO Members could be urged to adopt procedures like those followed in the United States governing public participation in administrative and executive decision making concerning changes in domestic laws and procedures following a WTO panel or Appellate Body decision. Fourth, in the interest of sustaining public support, the WTO might consider opening Appellate Body proceedings for the submission of amicus briefs on an experimental basis.

Finally, steps could be taken to clarify Members' right to employ counsel of their own choice in dispute settlement proceedings. At a minimum, this would include the right to attend all panel proceedings and Appellate Body hearings. Under appropriate conditions, it might also include the right to advocate in such proceedings. The Secretariats of the WTO and the Appellate Body should collaborate in this endeavor to develop appropriate procedures for credentials and disciplinary referrals.

