

CONTRIBUTION OF THE UNITED STATES TO THE IMPROVEMENT OF THE
DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO RELATED TO TRANSPARENCY

INTRODUCTION

The Uruguay Round of multilateral trade negotiations was able to achieve agreement on a wide range of new disciplines designed to reduce barriers to trade while recognizing the legitimate needs of Members to pursue policy objectives. Those new disciplines reached areas of government action additional to those areas that had traditionally been the subject of trade disciplines. Members also agreed on a new dispute settlement system in order to help resolve problems arising from the application of these World Trade Organization (“WTO”) disciplines.

Experience under the WTO dispute settlement system since 1995 has demonstrated that the recommendations and rulings of the Dispute Settlement Body can affect large sectors of civil society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in those recommendations and rulings. Yet civil society and Members not party to a dispute have been unable even to observe the arguments or proceedings that result in these recommendations and rulings.

Other international dispute settlement fora and tribunals are open to the public, such as the International Court of Justice,¹ the International Tribunal for the Law of the Sea,² the International Criminal Tribunal for the former Yugoslavia,³ the International Criminal Tribunal for Rwanda,⁴ the European Court of Human Rights,⁵ and the African Court on Human and Peoples’ Rights.⁶ Those fora deal with issues that are intergovernmental in nature and are at least as sensitive as those involved in WTO disputes. For example, these fora have addressed boundary disputes, use of force, nuclear weapons, human rights violations, and genocide.

There is no reason why the WTO should be different in this respect. The public has a legitimate interest in the proceedings. WTO trade disputes, like other intergovernmental disputes, could benefit from being more transparent to the public. Indeed, implementation of the

¹Article 59, Rules of Court.

²Article 74, Rules of the Tribunal.

³Rule 78, Rules of Procedure and Evidence.

⁴Rule 78, Rules of Procedure and Evidence.

⁵Rule 33, Chapter 1, Title II, Rules of Court.

⁶Article 10, On the Establishment of an African Court of Human and Peoples’ Rights, Protocol to the African Charter on Human and Peoples’ Rights.

DSB recommendations and rulings may be facilitated if those being asked to assist in the task of implementation, such as the constituencies of legislators, have confidence that the recommendations and rulings are the result of a fair and adequate process.

At the same time, non-party WTO Members would benefit from being able to observe the arguments and proceedings of WTO disputes.⁷ This would assist Members, including developing countries, in understanding the issues involved as well as gaining greater familiarity and experience with dispute settlement. Being better informed about disputes generally could aid Members in deciding whether to assert third party rights in a particular dispute.

A more open and transparent process would be a significant improvement to the DSU, in keeping with the commitment by Ministers “to promote a better public understanding of the WTO,” and “to making the WTO’s operations more transparent, including through more effective and prompt dissemination of information.”⁸ Such a more open and transparent process could be achieved by providing an opportunity to observe the arguments and evidence submitted in proceedings as well as observing those proceedings, subject to appropriate safeguards such as for confidential information and security. In addition, the final results of those proceedings should be made available to the public as soon as possible. The following proposals are intended to help achieve such a more open and transparent process. In no case are these proposals designed to afford Members fewer or more limited rights than those available to civil society.

1) OPEN MEETINGS

The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration⁹ meetings with the parties except those portions dealing with confidential information (such as business confidential information or law enforcement methods). The DSU could provide a basic set of procedures for this purpose with some flexibility for the relevant body to refine these in light of the particular circumstances of a specific proceeding. For example, the procedures could provide a number of options for allowing the public to observe the meetings, such as broadcasting meetings to special viewing facilities.

2) TIMELY ACCESS TO SUBMISSIONS

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

⁷ We note that other Members have expressed an interest in this.

⁸ Paragraph 10 of the Doha Ministerial Declaration.

⁹ This would include arbitration under Articles 21.3(c), 22.6, and 25 of the DSU.

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

3) TIMELY ACCESS TO FINAL REPORTS

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

4) AMICUS CURIAE SUBMISSIONS

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

The United States would welcome discussing these proposals with any Member that is interested, including discussion of the particular details involved in putting any of these proposals into effect. In addition, the United States looks forward to working with Members on other means to improve the DSU.