

<b>1 ARTICLE 10 .....</b>	<b>1</b>
1.1 Text of Article 10.....	1
1.2 Article 10.1.....	2
1.3 Article 10.2.....	2
1.3.1 "Substantial interest" .....	2
1.3.2 "having notified its interest to the DSB": timing of request to participate as a third party .....	3
1.3.3 Whether a Member that has not notified its interest pursuant to Article 10.2 may submit a brief.....	6
1.4 Article 10.3.....	6
1.5 Article 10.4.....	6
1.6 Enhanced third-party rights .....	7
1.6.1 General .....	7
1.6.2 Table showing decisions on enhanced third-party rights requests and factors considered .....	7
1.7 Extent to which panels may draw upon third-party submissions .....	7
1.8 Third-party rights in different stages of WTO dispute settlement proceedings.....	9
1.8.1 Third-party rights in preliminary ruling proceedings .....	9
1.8.2 Third-party rights in Article 21.5 proceedings .....	10
1.8.3 Third-party rights in Article 22.6 arbitrations.....	12
1.8.4 Appellate proceedings .....	14
1.9 Other issues .....	15
1.9.1 Absence of authority for panel to direct a Member to be a third party.....	15
1.9.2 The concept of "essential parties" .....	15
1.9.3 Third-party rights for co-complainants where a single panel is established pursuant to Article 9.1 of the DSU.....	15
1.9.4 Distinction between third parties and amicus curiae .....	16
1.9.5 Confidentiality obligations .....	16

## **1 ARTICLE 10**

### **1.1 Text of Article 10**

#### **Article 10**

##### *Third Parties*

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

## 1.2 Article 10.1

1. In *US – FSC (Article 21.5 – EC)*, Appellate Body found that Article 10.3 requires that third parties are provided with all of the submissions made by the parties up to the time of the first panel meeting, regardless of whether that meeting is the first of two panel meetings, or the first and only panel meeting. In the course of its analysis, the Appellate Body discussed Article 10.1:

"Our interpretation of Article 10.3 is also consistent with the context of that provision. Article 10.1 directs panels 'fully' to take into account the interests of Members other than the parties to the dispute, and Article 10.2 requires panels to grant to third parties 'an opportunity to be heard'. Article 10.3 ensures that, up to a defined stage in the panel proceedings, third parties can participate fully in the proceedings, on the basis of the same written submissions as the parties themselves. Article 10.3 thereby seeks to guarantee that the third parties can participate at a session of the first meeting with the panel in a full and meaningful fashion that would not be possible if the third parties were denied written submissions made to the panel before that meeting. Moreover, panels themselves will thereby benefit more from the contributions made by third parties and will, therefore, be better able 'fully' to take into account the interests of Members, as directed by Article 10.1 of the DSU."<sup>1</sup>

2. In *US – Upland Cotton*, the Panel concluded that, in the context of examining Brazil's claim of "serious prejudice to the interests of another Member" under Article 5(c) of the SCM Agreement, the serious prejudice under examination by a WTO panel is the serious prejudice allegedly suffered by the complaining Member only; the Panel indicated that it would take into account the serious prejudice allegations of other Members only to the extent these constitute evidence of the serious prejudice suffered by Brazil. In the course of its reasoning, the Panel stated that:

"As we have already observed, by the terms of Article 10.1 of the *DSU*, we are already bound to take the interest of *all* WTO Members – naturally including least-developed country Members – *fully* into account in our substantive examination under Part III of the *SCM Agreement*. In taking such full account of all Members' interests, we do not view it as conceptually or practically possible to take certain Members' interests *more fully* into account than those of other Members."<sup>2</sup>

3. In *Indonesia – Iron or Steel Products*, the Appellate Body found problematic that the panel had not given the third parties ample opportunity to express their views on whether the challenged measure was subject to the disciplines of the Agreement on Safeguards, but did not consider that the Panel had exceeded the boundaries of its discretion in doing so.<sup>3</sup>

## 1.3 Article 10.2

### 1.3.1 "Substantial interest"

4. In *EC – Bananas III*, the European Communities argued that a complaining party must normally have a legal right or interest in the claim it is pursuing. The Appellate Body stated that no provision of the DSU contains any such explicit requirement:

"We agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel'. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to

<sup>1</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 249.

<sup>2</sup> Panel Report, *US – Upland Cotton*, para. 7.1411.

<sup>3</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.37.

join in multiple consultations must have 'a substantial trade interest', and that under Article 10.2 of the DSU, a third party must have 'a substantial interest' in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the *WTO Agreement*, provides a basis for asserting that parties to the dispute have to meet any similar standard."<sup>4</sup>

5. In *US - Shrimp*, the Appellate Body recalled that "only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel".<sup>5</sup>

### **1.3.2 "having notified its interest to the DSB": timing of request to participate as a third party**

6. At the June 1994 GATT General Council meeting, the Chairman of the GATT General Council made the following statement:

"At the February 1994 Council meeting, the United States raised the question of third-party participation in panels. The late notification by a contracting party of its intention to participate in a panel may create difficulties, for example in relation to the determination of the panel's composition. Another problem that has occurred relates to the reception by third parties, in good time, of the submissions of the parties to the dispute to the first meeting of a panel.

After consultations, and in order to avoid such difficulties, I propose that the Council agree to the following practices in future, without prejudice to the rights of contracting parties under established dispute settlement procedures:

1. Delegations in a position to do so, should indicate their intention to participate as a third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third party interest should do so within the next ten days.

2. Further to paragraph F(e) (3) of the Decision of 12 April 1989 (BISD 36S/61) and to the Decision of 22 February 1994 (L/7416), it is the understanding of the Council that third parties shall receive the submissions of the parties to the dispute to the first meeting of a panel established by the Council."<sup>6</sup>

7. In *EC – Export Subsidies on Sugar*, Kenya and Côte d'Ivoire made requests to participate as third parties 28 days and 68 days (respectively) after the establishment of the Panel, but before the Director-General was asked by the parties to compose the Panel. The complaining parties raised objections to the participation of Côte d'Ivoire. The Panel, in a preliminary ruling, authorized the two Members to take part to the panel proceedings as third parties, noting its discretion to deal with situations not specifically regulated and the fact that the Panel's selection and composition had not been adversely affected and that the Panel process had not been hampered:

"Article 10 of the *DSU* is silent on when Members need to notify to the DSB their interest in participating in any specific dispute as third parties. ...

The Panel recalled, *inter alia*, the Appellate Body's decision in *EC – Hormones*, which stated that 'the DSU leaves panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.' In addition, with regard to the two requests at issue, the Panel noted that in this particular dispute:

- (a) the selection and composition of the Panel did not appear to have been adversely affected; and

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<sup>4</sup> Appellate Body Report, *EC – Bananas III*, para. 132.

<sup>5</sup> Appellate Body Report, *US - Shrimp*, para. 101.

<sup>6</sup> Third Party Participation in Panels, Statement by the Chairman of the Council, C/COM/3 of 27 June 1994, page 1.

(b) the Panel process had not been hampered.

On the basis of these considerations, the Panel therefore decided ... to accept as third parties all Members that had expressed a third-party interest and saw no reason to treat them differently".<sup>7</sup>

8. In *Turkey - Rice*, Pakistan notified its interest to participate as a third party to the dispute 151 days after the establishment of the Panel, and after the Panel had been composed. When the Panel raised the issue of this third-party request with the parties at the organizational meeting, the complainant was in favour of Pakistan's request to be included, while the respondent opposed it.<sup>8</sup> The Panel decided to accept Pakistan's third-party request. Referring to the text of the DSU, the Panel noted that Members are not specifically required to notify to the DSB their interest in participating in any specific dispute as third parties:

"Article 10 of the DSU is silent on when Members need to notify to the DSB their interest in participating in any specific dispute as third parties. The Panel is aware, however, of the GATT Council Chairman's Statement of June 1994, which provided for a ten-day notification period:

'Delegations in a position to do so, should indicate their intention to participate as a third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third party interest should do so within the next ten days.'

As noted by the Panel in *EC – Export Subsidies on Sugar (Australia)*:

'[T]he status of that Chairman's Statement [has] been discussed on several occasions at the DSB and the timing of third-party notifications [has been] the subject of proposals in the context of the DSU negotiations.'

In the same case, the Panel further noted that:

'[T]he Appellate Body's decision in *EC – Hormones*... stated that 'the DSU leaves panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.'"<sup>9</sup>

9. The Panel in *Turkey – Rice* then referred to the panel report in *EC – Export Subsidies on Sugar (Australia)*, and decided, for similar reasons, to accept Pakistan's request in this case:

"The Panel in *EC – Export Subsidies on Sugar (Australia)* additionally noted, with regard to the requests to participate as third parties in that particular dispute, that:

'(a) the selection and composition of the Panel did not appear to have been adversely affected; and

(b) the Panel process had not been hampered.'

The relevant third party requests in *EC – Export Subsidies on Sugar* were submitted 'before the Director-General was asked by the parties to compose the Panel pursuant to Article 8.7 of the DSU.' In the present case, Pakistan's third party request was made after this Panel had been composed. Nevertheless, similarly to the relevant third party requests in *EC – Export Subsidies on Sugar*, as a result of Pakistan's request, the Panel process has not been hampered. In addition, although the Panel had already been composed when Pakistan formulated its third party request, we see no reason to believe that accepting Pakistan's request would affect the 'independence of the

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<sup>7</sup> Panel Report, *EC – Export Subsidies on Sugar (Australia)*, paras. 2.2-2.4.

<sup>8</sup> Panel Report, *Turkey – Rice*, paras. 6.1-6.2.

<sup>9</sup> Panel Report, *Turkey – Rice*, paras. 6.4-6.6.

members' of this Panel, as stipulated by Article 8.2 of the DSU, nor does it seem to prejudice in any way the manner in which this Panel fulfil its functions specified in Article 11 of the DSU:

'[T]o assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements ...'

In the light of the above, as communicated on 30 August 2006 to the parties and third parties in these proceedings, we decided to accept as third parties all Members that had expressed a third-party interest and saw no reason to treat them differently. Similar to the Panel in *EC – Export Subsidies on Sugar (Australia)*, we emphasize that this decision is specific to this dispute and is not intended to offer a legal interpretation of the ten-day notification period referred to in the GATT Council Chairman's Statement of June 1994."<sup>10</sup>

10. In *EC – IT Products*, the United States, Japan and Chinese Taipei notified their interest to participate as third parties in each other's complaints. The notifications were made 122 days after the establishment of the Panel, and one day after the composition of the Panel. The Panel allowed these main parties to also participate as third parties. After noting that Article 10 is silent on the period of time Members have to notify their interest to participate as third parties in a given dispute, the GATT Council Chairman's Statement of June 1994, and the prior panel reports in *EC – Export Subsidies on Sugar* and *Turkey – Rice*, the Panel decided that:

"Despite the length of delay and the fact that this Panel had already been composed, we see no reason why accepting the complainants' requests would affect the 'independence of the members' of this Panel or otherwise hamper the Panel process. The members of this Panel had been selected taking into consideration the participation of the complainants as main parties. We do not see how the additional participation of the complainants as third parties would have compromised the initial selection of these panellists; nor has the European Communities made any such allegation. Given the foregoing, we confirm our acceptance of the complainants' request to participate as third parties to this dispute."<sup>11</sup>

11. In *Indonesia – Chicken*, Oman and Qatar requested to join the proceedings as third parties more than three months after the establishment of the Panel, without providing any justification. Taking into account the practice of the 10-day notification period and the cases in which the panels accepted the requests that were made beyond that period, as well as the fact that Oman and Qatar are developing countries with very little experience in WTO dispute settlement system, the Panel accepted the request and granted them third-party status.<sup>12</sup>

12. In *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, the Panel granted third party rights to Canada, although Canada's request was made more than three months following the Panel's establishment, allegedly due to internal coordination problems. In reaching its decision, the Panel considered the relevant provisions of the DSU and the relevant practice concerning third-party notifications made after panel composition. The Panel also considered that Canada's participation as a third party would not disturb the development of the proceeding, nor impair the due process rights of the parties, who, in fact, had not objected to Canada's request.<sup>13</sup>

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<sup>10</sup> Panel Report, *Turkey – Rice*, paras. 6.7-6.9.

<sup>11</sup> Panel Report, *EC – IT Products*, para. 7.75.

<sup>12</sup> Panel Report, *Indonesia – Chicken*, paras. 7.2-7.3.

<sup>13</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 - EU)*, paras. 1.20-1.22.

### 1.3.3 Whether a Member that has not notified its interest pursuant to Article 10.2 may submit a brief

13. In *EC – Sardines*, Morocco did not notify its interest pursuant to Article 10.2. However, during the appeal proceedings, Morocco submitted an amicus curiae brief. Peru objected to the Appellate Body accepting Morocco's brief, arguing that such acceptance would circumvent the rules in the DSU setting out the conditions under which WTO Members can participate as third parties in dispute settlement proceedings. The Appellate Body disagreed:

"None of the participants in this appeal has pointed to any provision of the DSU that can be understood as prohibiting WTO Members from participating in panel or appellate proceedings as an *amicus curiae*. Nor has any participant in this appeal demonstrated how such participation would contravene the DSU. Peru states only that the DSU provides that participation as a third party is governed by Articles 10.2 and 17.4, and appears to draw from this a negative inference such that Members may participate pursuant to those rules, or not at all. We have examined Articles 10.2 and 17.4, and we do not share Peru's view. Just because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an *amicus curiae* is prohibited."<sup>14</sup>

### 1.4 Article 10.3

14. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, the Panel explained that the "requests for information pursuant to Article 13 of the DSU, the communications concerning these requests and the parties' responses to the requests, were not 'submissions' which the third parties were entitled to receive pursuant to Article 10.3 of the DSU".<sup>15</sup>

### 1.5 Article 10.4

15. In *India – Patents (EC)*, India claimed that since the European Communities was a third party in the previous *India – Patents (US)* dispute, and since it was "possible" to do so, it was required by Article 10.4 to submit its complaint to the Panel which examined the United States' claims on this matter. India's claim that the European Communities did not meet the requirement of Article 10.4 was based on the premise that the term "original panel" in Article 10.4 is limited to a panel which has not yet issued its final report. The Panel disagreed:

"We do not see that this limitation flows from the ordinary meaning of the text. We also note that, the phrase 'original panel' is used elsewhere in the DSU (Article 21.5 and Article 22.6), where it is clear that the reference is to a panel the final report of which has already been issued and adopted. The text of Article 10.4, read in this context, does not support the Indian view.

Thus, in our view, the terms of Article 10.4 have been complied with in the present case. The EC, which was a third party in the proceeding initiated by the United States in respect of the same Indian measures, decided to have recourse to a panel under the DSU. This is precisely what Article 10.4 permits. The two members of the Panel in WT/DS50 were reappointed, while the Panel chairman, who was no longer available, was replaced. We therefore find that India's claim regarding a violation of Article 10.4 lacks both factual and legal basis."<sup>16</sup>

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<sup>14</sup> Panel Report, *EC – Sardines*, para. 165.

<sup>15</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 1.28.

<sup>16</sup> Panel Report, *India – Patents (EC)*, paras. 7.20-7.21.

## **1.6 Enhanced third-party rights**

### **1.6.1 General**

16. In *US – 1916 Act*, the Appellate Body confirmed that "[u]nder the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3".<sup>17</sup>

17. In *US – FSC (Article 21.5 – EC)*, the Appellate Body confirmed the above statement and summarized its prior Reports as follows:

"In respect of the provisions of the DSU governing third party rights, we have already observed that, as the DSU currently stands, the rights of third parties in panel proceedings are limited to the rights granted under Article 10 and Appendix 3 to the DSU. Beyond those minimum guarantees, panels enjoy a discretion to grant additional participatory rights to third parties in particular cases, as long as such "enhanced" rights are consistent with the provisions of the DSU and the principles of due process. However, panels have no discretion to circumscribe the rights guaranteed to third parties by the provisions of the DSU."<sup>18</sup>

18. The Panel in *Russia – Traffic in Transit* recalled that prior panels had denied third parties enhanced rights where they simply alleged to have a "systemic interest" in the dispute. However, considering that this was the first WTO panel to interpret Article XXI(b)(iii) of the GATT 1994 concerning Members' essential security interests, and Russia's argument that the determination of a Member's national security is within the sole discretion of that Member, the Panel nevertheless decided to grant enhanced third-party rights on the basis of the far-reaching effect that its interpretation could have on the scope of the covered agreements:

"The Panel considers, however, that this proceeding presents something of an exceptional situation. In its first written submission, the Russian Federation invokes Article XXI(b)(iii) of the GATT 1994 as a defence to Ukraine's claims. This proceeding will, therefore, be the first occasion on which a WTO dispute settlement panel will interpret Article XXI(b)(iii) of the GATT 1994. Moreover, the Russian Federation advances an interpretation of Article XXI(b)(iii) which posits that the determination of an action that is necessary for the protection of a Member's essential security interests, and the determination of such Member's essential security interests, is within the sole discretion of that Member. It is clear that the Panel's conclusions regarding the interpretive issues raised by the Russian Federation could have far-reaching effects on the determination of the ambit of the covered agreements and on the WTO as a whole. In our view, these effects are radically different from those of the interpretation of one or another of the substantive provisions of the covered agreements. In the circumstances of this case, the Panel has concluded that it is in the interests of the WTO system as a whole that all of the third parties be granted such enhanced third-party rights as would enable them to engage fully on interpretive issues of such vital systemic importance."<sup>19</sup>

### **1.6.2 Table showing decisions on enhanced third-party rights requests and factors considered**

19. For a table providing information on all WTO proceedings where enhanced third-party rights have been requested, see the chapter of the Analytical Index on "DS Information Tables".

## **1.7 Extent to which panels may draw upon third-party submissions**

20. In *Chile – Price Band System*, the Appellate Body found that the Panel erred in finding a violation of a provision in respect of which the complainant, Argentina, had made no claim. In the course of its reasoning, the Appellate Body stated that:

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<sup>17</sup> Appellate Body Report, *US – 1916 Act*, para. 145.

<sup>18</sup> Appellate Body Report, *US – FSC (Article 21.5 – European Communities)*, para. 243.

<sup>19</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-1, para. 1.13.

"Argentina contends also that two third parties—the United States and the European Communities—'provided argumentation regarding the second sentence of Article II:1(b).' In support of this contention, Argentina cites those third parties' responses to Question 3 posed by the Panel. However, even if these responses could be interpreted in the way Argentina would have us do—an issue which we need not decide in this appeal—these responses could not, in any event, assist Argentina in making a claim under the second sentence of Article II:1(b). These are the statements of third parties to this dispute. Third parties to a dispute cannot make claims. It was for Argentina, as the claimant, to make its claim; Argentina cannot rely on third parties to do so on its behalf. Moreover, we note that Argentina did not adopt these arguments of the third parties in subsequent proceedings."<sup>20</sup>

21. In *Argentina – Poultry Anti-Dumping Duties*, Argentina asserted that Brazil failed to act in good faith by first challenging Argentina's anti-dumping measure before a MERCOSUR *Ad Hoc* Tribunal and then, having lost that case, initiating WTO dispute settlement proceedings against the same measure. The Panel noted that:

"Argentina has made it clear that it is not invoking the principle of *res judicata*. Even though Paraguay considers this principle relevant to these proceedings, Paraguay, as a third party, does not have the right to determine the scope of any preliminary issues to be examined by us."<sup>21</sup>

22. In *EC – Trademarks and Geographical Indications*, Mexico requested that the Panel make a suggestion pursuant to Article 19.1, and argued that there is no requirement that a request for such a suggestion must be forwarded by one of the parties. The Panel stated:

"The Panel takes note of Mexico's request. The issue of the product coverage of the Regulation is not challenged by the claims in this dispute and is therefore outside the Panel's terms of reference. However, Mexico's attention is drawn to Article 10.4 of the DSU."<sup>22</sup>

23. In *US – Upland Cotton*, the Panel considered that information provided by a third party cannot alleviate a complainant's evidentiary burden:

"Neither party suggests that evidence provided by a third party may alleviate the complainant's burden to establish a prima facie case. We agree entirely. Information supplied by third parties in support of their allegations may constitute evidence, in terms of additional context and support, that we may take into account in conducting an objective assessment of the matter before us."<sup>23</sup>

24. In *US – Upland Cotton (Article 21.5 – Brazil)*, the European Communities submitted that the Panel had not been properly composed. The Panel responded that "it is not within [the Panel's] authority under the DSU to make a 'finding or ruling' on an issue that has not been raised by any of the parties to the dispute and which concerns the application by the WTO Director-General of the DSU provisions regarding panel composition."<sup>24</sup>

25. In *Australia – Apples*, Australia objected to the fact that a number of the Panel's proposed questions to scientific experts addressed issues raised solely in the United States' third-party submission. Australia argued that as third parties are not parties to the dispute, their submissions cannot constitute evidence and argument that can be used by either party to make the case for it. The Panel considered that it was proper to draw on third-party submissions in posing questions to the scientific experts, and stated that:

"[O]nce a claim is properly put before a panel and the complaining party has submitted its arguments and articulated its complaint, the panel has broad powers of

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<sup>20</sup> Appellate Body Report, *Chile – Price Band System*, para. 163.

<sup>21</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, fn 53.

<sup>22</sup> Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.86, and *EC – Trademarks and Geographical Indications (US)*, para. 7.35.

<sup>23</sup> Panel Report, *US – Upland Cotton*, para. 6.54.

<sup>24</sup> Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 8.28.

investigation in order to make an objective assessment of the matter. At that point, a panel is not limited by the arguments made by the parties to a dispute; it may develop its own arguments, and it can certainly consider the arguments made by third parties. Australia's proposition that a panel is precluded from considering information put forward by a third party is contrary to the panel's duty to make an objective assessment of the matter. It would also constitute a breach of the rights granted under the DSU to third parties in WTO dispute settlement. Article 10.2 of the DSU provides that third parties 'shall have an opportunity to be heard by the panel and to make written submissions to the panel'. The Appellate Body has noted in this respect that, not only have third parties the right to make submissions in a dispute, but panels have the legal obligation to consider them. ...

In other words, the rights of a third party to make submissions to a panel and the duty of a panel to take into account relevant information provided by a third party in its submission are two sides of the same coin. If panels were prevented from considering information provided by a third party, including arguments and evidence, then third party rights under the DSU would be illusory.

As noted above, under the Panel's Working Procedures, the Panel was ultimately responsible for deciding on the questions that it would pose to the experts. Nothing prevented the Panel from using information, including arguments and evidence, provided in the submission of a Third Party. Nothing would subsequently prevent the Panel from using such information for the purpose of performing its objective assessment of the matter. Nor would the Panel be prevented from using information provided by the experts in response to the Panel's questions, or in response to questions posed by the Parties themselves during the meeting with the experts, as long as this information is relevant to the matter that is within the Panel's terms of reference."<sup>25</sup>

## **1.8 Third-party rights in different stages of WTO dispute settlement proceedings**

### **1.8.1 Third-party rights in preliminary ruling proceedings**

26. In *Canada – Wheat Exports and Grain Imports*, the Panel, after consulting the parties to the dispute in accordance with Article 12.1 of the DSU, decided, in a preliminary ruling, that the third parties to this dispute were to be invited to participate in the proceedings up to the time the Panel issued its preliminary rulings on the requests made by Canada concerning the consistency with Article 6.2 of the DSU of the United States' request for the establishment and certain additional procedures proposed by Canada for the protection of proprietary or commercially sensitive information. As regards the extent of this participation, the Panel decided as follows:

- "(a) third parties shall receive the preliminary written submissions of the parties to the dispute;
- (b) third parties shall have an opportunity to make preliminary written submissions to the Panel for purposes of commenting on the parties' preliminary written submissions; and
- (c) third parties shall have an opportunity to be heard by the Panel on the issues raised in the parties' preliminary written submissions."<sup>26</sup>

27. The Panel in *US – Upland Cotton* also decided that third parties should play a role in the "initial stage" of that proceeding, which concerned the preliminary question of whether Brazil's claims were precluded by virtue of the "peace clause" in Article 13 of the Agreement on Agriculture:

"With respect to the participation of third parties in these Panel proceedings, we have carefully considered the parties' comments at this morning's organizational meeting.

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<sup>25</sup> Panel Report, *Australia – Apples*, paras. 7.76-7.78.

<sup>26</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.6.

In exercise of our discretion to manage these Panel proceedings, we continue to believe that it would be appropriate in this case for the third parties to have access to the parties' initial written comments (and any written comments the parties may make on each others' comments) as well as to have the ability to submit any written comments they themselves may have on the issue that we have identified above. The Panel considers that such third party participation in this initial stage of the Panel proceedings is appropriate for the following reasons.

The Panel is aware of the provisions of Article 10.3 of the *DSU*, which states that third parties shall receive the submissions of the parties to the dispute to the first meeting of the Panel. We would also observe that the factual circumstance that presents itself here is not itself specifically addressed by the *DSU*. In our view, the legal issue that the Panel has asked the parties to address in their initial briefs will necessarily have ramifications for the remainder of the Panel proceedings, including the scope of the first substantive meeting, at which third parties will participate.

We therefore invite the parties to serve also on the third parties their initial briefs and any responding comments. The Panel will also invite third parties to submit any written comments they might have concerning the initial phase of these proceedings."<sup>27</sup>

### 1.8.2 Third-party rights in Article 21.5 proceedings

28. In *Australia – Automotive Leather II (Article 21.5 – US)*, the working procedures adopted by the Panel provided, *inter alia*, for only one meeting with the parties, to be held in conjunction with the third party session. The procedures also provided for third parties to receive only the first submissions, and not the rebuttal submissions, of the parties. The European Communities objected and argued that since in this case there was to be only one meeting of the Panel, at which the Panel would be considering both submissions of each party, the third parties, in accordance with Article 10.3 of the *DSU*, should receive all of the parties' submissions. The Panel, in a preliminary ruling, rejected the European Communities' request as follows:

"[T]he Panel indicated that it had decided not to change the existing working procedures which provide for third parties to receive the first written submissions of the parties, but not the rebuttals. The Panel stated that if it had decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the *DSU*, third parties would have received only the written submissions made prior to the first meeting, but not rebuttals or other submissions made subsequently. Thus, in the more usual case, third parties would be in the same position as they were in this case with respect to their ability to present views to the panel. In the view of the Panel, the procedure it had established conformed more closely with the usual practice than would be the case if third parties received the rebuttals, and was in keeping with Article 10.3 of the *DSU* in a case where the Panel holds only one meeting."<sup>28</sup>

29. In *Australia – Salmon (Article 21.5 – Canada)*, the Panel also followed the approach above and denied the European Communities' request to allow the third parties access to second written submissions.<sup>29</sup>

30. In *Canada – Dairy (Article 21.5 – New Zealand and US)*, however, the Panel decided, in a preliminary ruling, to allow third parties access to the second written submissions of the parties on the following grounds:

"In the Panel's view, the object and purpose of Article 10.3 of the *DSU* is to allow third parties to participate in an informed and, hence, meaningful, manner in a session of the meeting with the parties specifically set aside for that purpose. Third parties can only do so if they have received all the information exchanged between the parties before that session. Otherwise, third parties might find themselves in a situation where their oral statements at the meeting become partially or totally irrelevant or

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<sup>27</sup> Panel Report, *US – Upland Cotton*, para. 3.

<sup>28</sup> Panel Report, *Australia – Automotive leather II (Article 21.5 – United States)*, para. 3.9.

<sup>29</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.5-7.6.

moot in the light of second submissions by the parties to which third parties did not have access. Without access to all the submissions by the parties to the dispute to the first meeting of the panel, uninformed third party submissions could unduly delay panel proceedings and, as rightly emphasised by the EC and supported by Mexico, could prevent the Panel from receiving 'the benefit of a useful contribution by third parties which could help the Panel to make the objective assessment that it is required to make under Article 11 of the DSU'."<sup>30</sup>

31. In *US – FSC (Article 21.5 – EC)*, the Panel, in a preliminary ruling, did not follow the position of the Panel in *Canada – Dairy (Article 21.5 – New Zealand and US)* and denied access to second written submissions to third parties on the grounds that it was not permitted by Article 10.3 of the DSU. However, the Appellate Body disagreed with the Panel on the grounds that Article 10.3 requires that third parties are provided with all of the submissions made by the parties up to the time of the first panel meeting "whether that meeting is the first of two panel meetings, or the first and only panel meeting":

"Article 10.3 of the DSU is couched in mandatory language. By its terms, third parties 'shall' receive 'the submissions of the parties to the *first* meeting of the panels'. (emphasis added) Article 10.3 does *not* say that third parties shall receive 'the *first* submissions' of the parties, but rather that they shall receive '*the* submissions' of the parties. (emphasis added) The number of submissions that third parties are entitled to receive is *not* stated. Rather, Article 10.3 defines the submissions that third parties are entitled to receive by reference to a specific step in the proceedings – the first meeting of the panel. It follows, in our view, that, under this provision, third parties must be given all of the submissions that have been made by the parties to the panel up to the first meeting of the panel, irrespective of the number of such submissions which are made, including any rebuttal submissions filed in advance of the first meeting."<sup>31</sup>

32. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* agreed to give third parties access to the final report issued to the parties in the first compliance proceedings, before its translation and circulation to all Members, in order to allow such third parties to participate in the second round of compliance proceedings in a meaningful manner. The Panel summarized the rationale behind this decision as follows:

"[T]he Panel recalls that it is well established that 'the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated'. The Panel is required to deal with a situation that is not explicitly regulated by the DSU or any other applicable rules, and it falls within the authority of the Panel to adopt appropriate arrangements to deal with this situation in accordance with due process and following consultation with the parties pursuant to Article 12.1 of the DSU. The Panel is mindful that 'due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations'. The Panel has given careful consideration to the particular circumstances of the case and the parties' views, while engaging in a balancing exercise taking into account how each of the alternative options before the Panel would impact on the rights and interests of the third parties, the Panel, the parties, and the WTO membership at large. In the particular circumstances of this case, the Panel considers that due process is best served by granting the third parties access to the contents of the confidential Final Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, subject to the conditions set forth in the enclosed additional procedures adopted by the Panel.

...

The Panel considers that meaningful third-party participation in this proceeding is instrumental to the Panel's own function of making an objective assessment of the matter before it, and in particular to ensuring that the Panel arrives at the correct

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<sup>30</sup> Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 2.34.

<sup>31</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 245.

legal interpretation of the provisions of the WTO agreements. This again favours granting third parties access to non-redacted versions of the parties' submissions, as a means of ensuring that the third parties can provide meaningful views on the parties' legal arguments.

...

This procedural ruling is not meant to suggest otherwise, or to open the door to panels, parties or third parties receiving advance copies of panel reports in translation whenever two different proceedings have overlapping subject-matter. In the circumstances of this case, the disputing parties and the Panel already have the Final Report, and will refer to it in their submissions to the Panel. The decision to grant third-party access to the Final Report has not been taken because of the degree of overlapping subject-matter as an autonomous consideration, but rather because the Panel expects that by virtue of the overlapping subject-matter between the two compliance proceedings, the parties' submissions in the second compliance proceeding will refer to the Final Report from the first compliance proceeding in a manner that will necessitate third-party access to the contents of the Final Report if they are to participate in the second compliance panel proceeding in a full and meaningful fashion. In other words, the principal reason for granting third-party access to the Final Report is simply to enable the third parties to have access to, understand, and meaningfully comment on the submissions of the parties."<sup>32</sup>

### 1.8.3 Third-party rights in Article 22.6 arbitrations

33. In *EC – Bananas III (US) (Article 22.6 – EC)*, Ecuador requested the Arbitrators to accord it third-party status in light of its special interest in the proceedings. The Arbitrators, however, in light of the absence of provisions for third-party status under Article 22 of the DSU and given that they did not believe that Ecuador's rights would be affected by this proceeding, declined Ecuador's request.<sup>33</sup>

34. In *EC – Hormones (US) (Article 22.6 – EC)* and in *EC – Hormones (Canada) (Article 22.6 – EC)*, the United States and Canada respectively had requested the Arbitrators to accord them third-party rights in each other's arbitration procedures. On this occasion, the Arbitrators recalling their discretion to decide on procedural matters under Article 12.1 of the DSU and the absence of a reference to third-party participation in Article 22, did grant the authorization on the grounds that the rights of the United States and Canada may be affected in both arbitration proceedings:

"The US and Canada are allowed to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.

The above ruling was made on the following grounds.

- DSU provisions on panel proceedings, referred to by analogy in the arbitrators' working procedures, give the arbitrators discretion to decide on procedural matters not regulated in the DSU (Article 12.1 of the DSU) in accordance with due process. The DSU does not address the issue of third-party participation in Article 22 arbitration proceedings.

- US and Canadian rights may be affected in both arbitration proceedings:

First, the estimates for high quality beef ('HQB') exports, foregone because of the hormone ban, are to be based on a tariff quota that allegedly needs to be shared between Canada and the US. A determination in one proceeding may thus be decisive for the determination in the other.

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<sup>32</sup> WT/DS371/24, paras. 4.5, 4.7, and 4.11.

<sup>33</sup> Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.8.

Second, several methodologies are proposed to calculate lost export opportunities. Given the fact that the product scope (HQB and edible bovine offal ('EBO')) and relevant trade barriers (hormone ban and HQB tariff quota) are the same in both proceedings, both arbitration panels (composed of the same three individuals) may consider it necessary to adopt the same or very similar methodologies. This is all the more necessary because the arbitrators are called upon to arrive at a specific determination on the amount of nullification and impairment caused by the ban. They are therefore not limited, as in most panel proceedings, to ruling only on the consistency of the amounts proposed by the US and Canada with DSU provisions. Due process thus requires that all three parties receive the opportunity to comment on the methodologies proposed by each of the parties.

- In contrast, the EC has not shown how third-party participation would prejudice its rights. No specific arguments were made demonstrating that third party participation would substantially impair the EC's interests or due process rights."<sup>34</sup>

35. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Australia requested that it be granted the authorization to participate as a third party in the Article 22.6 arbitration in light of its participation in that capacity in the Article 21.5 Panel. The Arbitrators declined this request and noted the absence of a specific provision, in Article 22, on third-party rights:

"[W]e informed Australia that we declined its request. Our decision took into account the views expressed by the parties, the fact that there is no provision in the DSU as regards third party status under Article 22, and the fact that we do not believe that Australia's rights would be affected by this proceeding.

We note in this respect that third party rights were granted in the Article 22.6 arbitrations concerning *European Communities – Measures Concerning Meat and Meat Products (Hormones)* and rejected in the *EC – Bananas (1999)* Article 22.6 arbitration. We do not consider that Australia in this case is in the same situation as Canada and the United States in the *EC – Hormones* arbitrations, nor even in the same situation as Ecuador in the *EC – Bananas (1999)* arbitration. Indeed, Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue. Moreover, Australia did not draw the attention of the Arbitrators to any benefits accruing to it or any rights under the WTO Agreement which might be affected by their decision."<sup>35</sup>

36. In *US – Gambling (Article 22.6 – US)*, the Arbitrator declined a request by the European Communities to participate as a third party:

"The Arbitrator first notes the absence of a specific provision in the DSU on third-party rights in Article 22.6 arbitral proceedings. Like panels, arbitrators acting under Article 22.6 have, under the DSU, 'a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not expressly regulated'. At the same time, the Arbitrator considers that, in such situations, it should pay particular attention to the views of the parties. In this instance, there is no agreement among the parties as to whether the EC request should be accepted, and this consideration should be given appropriate weight.

The Arbitrator also notes that in arbitral proceedings under Article 22.6 of the DSU to date, third party rights have only been granted once. This involved very specific circumstances, where the two Members being granted third-party status were both complainants and parties to arbitral proceedings under Article 22.6 in disputes concerning the same matter, and where the Arbitrator found, in the circumstances of

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<sup>34</sup> Decisions by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC) / EC – Hormones (Canada) (Article 22.6 – EC)*, para. 7.

<sup>35</sup> Decision by the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.5-2.6.

that case, that the determination in one arbitral proceeding may be decisive for the determination in the other. ...

The Arbitrator sees no basis for assuming that its determination under Article 22.7 of the DSU in respect of Antigua and Barbuda's request to suspend concessions and other obligations would be such as to adversely affect the EC's rights in the context of the separate proceeding it is engaged in with other Members concerned under Article XXI:1(b) of the GATS for the modification of US concessions, which has both a distinct legal basis and a distinct object."<sup>36</sup>

37. In *US – COOL (Article 22.6 – United States)*, involving two parallel proceedings, one dispute initiated by Mexico and the other one by Canada, the Arbitrator granted these two Members' requests to participate in each other's proceedings. Specifically, the Arbitrator gave the two parties the right to have access to all written submissions and to be present during the entirety of the joint hearings:

"As noted in previous arbitrations under Article 22.6 of the DSU, arbitrators, like panels, have 'a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not expressly regulated.' The DSU does not contain a specific provision on third-party rights in Article 22.6 arbitration proceedings, nor does it deny any such rights. Noting the absence of any such provision, previous arbitrators have denied requests for third-party status on the grounds that the party making the request could not show that its rights would be adversely affected through their inability to participate in the proceedings. However, arbitrators have authorized participation by Members not directly involved in the arbitration in certain situations. We note that in the two parallel arbitration proceedings in the *EC – Hormones* dispute, participation rights were granted because it was considered that the rights of the requesting Members 'may be affected in both arbitration proceedings'. In particular, it was noted that the product scope and relevant trade barriers were the same in both proceedings and that both arbitrators (composed of the same three individuals) might adopt the same or very similar methodologies. On these grounds, combined with the absence of any prejudice to the interests or due process rights of the respondent, the Members requesting suspension of concessions in the parallel cases were allowed 'to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.

...

We have granted the above rights on the basis of our margin of discretion as described above. We note that these rights are not the same as those accorded to third parties in panel proceedings pursuant to Article 10 of the DSU. In particular, third parties in panel proceedings may make submissions in another party's case, including on issues not pertaining to its own case. Further, Canada and Mexico have been granted full access to all submissions and communications in each other's arbitration, including those made after the meeting with the Arbitrator."<sup>37</sup>

#### 1.8.4 Appellate proceedings

38. See the Section on Rule 24 ("Third Participants") of the Working Procedures for Appellate Review.

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<sup>36</sup> Decision by the Arbitrator, *US – Gambling (Article 22.6 - US)*, para. 2.31.

<sup>37</sup> Decisions by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 2.20 and 2.23.

## 1.9 Other issues

### 1.9.1 Absence of authority for panel to direct a Member to be a third party

39. In *Turkey – Textiles*, Türkiye argued that the European Communities should be a party to the dispute because the measure taken by Türkiye was done so pursuant to a regional trade agreement between Türkiye and the European Communities. The Panel ruled:

"In the absence of any relevant provision in the DSU, in light of international practice, and noting the position of the EC to this point, we consider that we do not have the authority to direct that a WTO Member be made third-party or that it otherwise participate throughout the panel process."<sup>38</sup>

### 1.9.2 The concept of "essential parties"

40. In *Turkey – Textiles*, Türkiye claimed that the Panel should dismiss India's claims because the measures were taken pursuant to a regional trade agreement between Türkiye and the European Communities and the latter therefore should have been a party to the dispute. The Panel addressed the concept of "essential parties" first by referring to the case of law of the International Court of Justice (ICJ), more specifically to the *Military and Paramilitary Activities in and Against Nicaragua* and the *Phosphate Lands in Nauru* cases.<sup>39</sup> The Panel went on to observe:

"The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (i.e. in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement."<sup>40</sup>

41. After analysing the practice of the ICJ with respect to the "essential parties" concept, the Panel in *Turkey – Textiles* noted:

"[T]here is no WTO concept of 'essential parties'. Based on our terms of reference and the fact that we have decided (as further discussed hereafter) not to examine the GATT/WTO compatibility of the Turkey-EC customs union, we consider that the European Communities was not an essential party to this dispute; the European Communities, had it so wished, could have availed itself of the provisions of the DSU, which we note have been interpreted with a degree of flexibility by previous panels, in order to represent its interests. We recall in this context that Panel and Appellate Body reports are binding on the parties only.

Under WTO rules, the European Communities and Turkey are Members with equal and independent rights and obligations. For Turkey, it is not at all inconceivable that it adopted the measures in question in order to have its own policy coincide with that of the European Communities. However, in doing so, it should have been aware, in respect of the measures it has chosen, that its circumstances were different from those of the European Communities in relation to the Agreement on Textiles and Clothing ('ATC') and thus could reasonably have been anticipated to give rise to responses which focussed on that distinction."<sup>41</sup>

### 1.9.3 Third-party rights for co-complainants where a single panel is established pursuant to Article 9.1 of the DSU

42. In *EC – IT Products*, a joint panel request was submitted and a single panel was established to examine the complaints of the United States (DS375), Japan (DS376), and Chinese Taipei (DS377). These complainants subsequently notified their interest to participate as third

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<sup>38</sup> Panel Report, *Turkey – Textiles*, para. 9.5.

<sup>39</sup> Panel Report, *Turkey – Textiles*, paras. 9.8-9.9.

<sup>40</sup> Panel Report, *Turkey – Textiles*, para. 9.10.

<sup>41</sup> Panel Report, *Turkey – Textiles*, paras. 9.11-9.12.

parties in each other's complaint. After recalling the terms of Articles 9.1 and 9.2 of the DSU, the Panel stated that:

"In the present dispute, we do not consider the fact that multiple complainants have presented a *joint* panel request should *per se* prevent parties from seeking to participate as third parties, or that the complainants' participation as third parties would not serve a 'legitimate purpose'. Nothing in the language of Articles 9 or 10 of the DSU limits or regulates the participation of complainants as third parties in disputes where multiple complainants present a panel request jointly. In fact, such participation may prove desirable for a complainant. For instance, a co-complainant that presented a joint panel request may decide to pursue, in subsequent phases of the panel proceedings, only certain claims that it had jointly included in the panel request. It is possible that a co-complainant under these circumstances would have a legitimate interest in commenting, as a third party, on the claim(s) it had decided *not* to pursue as a joint complainant. We consider; however, that in cases where multiple complainants present a joint panel request, and simultaneously request to participate as third parties, care should be taken to ensure protection of the due process rights of the parties. In this dispute, we have reminded the complainants of the European Communities' due process concerns, and received no specific complaint from the European Communities."<sup>42</sup>

#### 1.9.4 Distinction between third parties and *amicus curiae*

43. In *US – Shrimp*, the Appellate Body emphasized that Members participating as third parties under Article 10 enjoy "legal rights" that others do not:

"[A]ccess to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members 'having a substantial interest in a matter before a panel' may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding."<sup>43</sup>

#### 1.9.5 Confidentiality obligations

44. In *Mexico – Corn Syrup*, the Panel observed that:

"Third parties are subject to the same requirement to maintain the confidentiality of panel proceedings as are parties. We therefore conclude that the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations."<sup>44</sup>

Current as of: December 2024

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<sup>42</sup> Panel Report, *EC – IT Products*, para. 7.78.

<sup>43</sup> Appellate Body Report, *US – Shrimp*, para. 101.

<sup>44</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.41.