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## **1 ARTICLE 18**

### **1.1 Text of Article 18**

#### **Article 18**

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

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.
2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

### **1.2 Article 18.1**

1. In *EC – Bananas III (US) (Article 22.6 – EC)*, the European Communities indicated that it could not accept the BCI procedures adopted by the Arbitrators, and that the Arbitrator should not consider any BCI as to do so would violate Article 18.1 of the DSU, which prohibits *ex parte* contacts between parties and panelists. The Arbitrator responded that:

"Since we are of the view that the procedures are reasonable in the circumstances, we do not accept the EC argument that its decision not to receive information under the rules we have established means that the United States may not submit the information. Acceptance of the EC argument would mean that a party's refusal to participate in a proceeding would effectively prevent the proceeding from going forward."<sup>1</sup>

2. In *US – Wheat Gluten*, the United States indicated that domestic producers would grant permission for the release of certain business confidential information provided that the information was not divulged to representatives of the European Communities. The Panel considered that "in light of Article 18.1 of the DSU and the position expressed by the European Community in this case, it should not view the requested information under the conditions outlined by the United States".<sup>2</sup>

3. In *Canada – Aircraft Credits and Guarantees*, Canada provided certain information to the Panel without providing a copy to Brazil. The Panel explained that:

"Having reviewed the parties' first written submissions, on 20 June 2001 the Panel asked Brazil 'to provide full details of the terms and conditions of Embraer's offer of financing to Air Wisconsin', and Canada 'to provide full details of the terms and conditions of its Air Wisconsin transaction'. Both parties responded to this request on 25 June 2001. Canada failed to provide a copy of the information to Brazil on that date. Instead, Canada 'ask[ed] the Panel to require that when this information is provided to Brazil, its disclosure be restricted to officials of the Government of Brazil and private legal counsel retained and paid for by the Government of Brazil who are directly involved in this dispute settlement proceeding'. In a letter to Canada dated 26 June 2001, the Panel noted that Canada's letter of 25 June 2001 'was not copied to Brazil, contrary to paragraph 10 of the Panel's Working Procedures'. The Panel further 'note[d] that, with the limited exception of paragraph 16, its Working Procedures do not provide for any special procedures regarding the treatment of business confidential information. The Panel does not consider it appropriate to introduce such procedures under the present circumstances, i.e., on the basis of an *ex parte* request, and without an opportunity to consult with Brazil'. For those reasons, the Panel returned Canada's submission of 25 June 2001. At the first substantive meeting, Canada informed the Panel that it had not intended to make an *ex parte* communication, and that it was not seeking to introduce any special procedures for the treatment of business confidential information. On that basis, its letter of 25 June 2001 was entered in the record."<sup>3</sup>

4. In *Korea – Certain Paper*, in its second written submission Korea stated that it would continue to serve its confidential submissions on Indonesia subject to the understanding that these submissions would not be disclosed by Indonesia to anyone other than the relevant Indonesian government officials and to legal advisors of Indonesia who had agreed to maintain the confidentiality of information provided to them". Indonesia responded that Korea could not unilaterally subject to conditions Indonesia's use of Korea's submissions in the preparation of its case. Korea then requested the Panel to direct Indonesia to return to Korea all confidential submissions made by the latter. Korea also indicated that it would serve non-confidential versions of its confidential submissions on Indonesia. The Panel understood this proposition to mean that Korea would submit full confidential versions of its submissions to the Panel, but that only non-confidential versions would be served on Indonesia. The Panel considered that:

"In respect of Korea's proposal to withdraw its existing submissions and submit non-confidential versions of those submissions to Indonesia, considering the fact that Article 18.1 of the DSU precludes *ex parte* communications between the Panel and a party, we stated that while we would entertain any request by Korea to withdraw its submissions or to redact from them certain information, in such a case the submissions withdrawn or information redacted would no longer be before the Panel. We further stated that we were fully conscious of the obligations placed on Members

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<sup>1</sup> Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.6.

<sup>2</sup> Panel Report, *US – Wheat Gluten*, para. 8.10.

<sup>3</sup> Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.135.

by Article 6.5 of the Anti-dumping Agreement, and remain prepared to work with the parties to design ways to protect any information treated as confidential by the investigating authorities in the underlying investigation. Korea, however, failed to request such procedures."<sup>4</sup>

5. In *Turkey – Rice*, the Panel requested certain information from Türkiye. In response, Türkiye indicated that it could only provide the requested information to the Secretariat and the Panel, but not the United States. The Panel explained that:

"The Panel was explicit in the documents it requested from Turkey, both after the first and after the second substantive meeting with the parties. As noted above, in response to the Panel's requests, Turkey expressed that its 'officials involved in this Panel proceeding [did] not feel comfortable in risking information leaks and possible criminal accusations of violation of Turkish law on confidentiality'. Turkey offered to provide "'blacked-out" copies of [some] Certificates of Control only to the Panel and after a clear understanding... that these documents would not be made available to the United States nor to any other entity beside the Panel and the WTO Secretariat'. However, the Panel cannot accept such an offer from Turkey, which is one of the parties to this dispute. Indeed, the evidence requested by the Panel, as well as all submissions under the proceedings at issue, fall under the provision contained in Article 18.1 of the DSU."<sup>5</sup>

### 1.3 Article 18.2

#### 1.3.1 General

6. The Panel in *Russia – Railway Equipment* stated that "the parties are required to treat as confidential information provided by a panel to parties or third parties, all the more so where such information is marked as confidential."<sup>6</sup>

#### 1.3.2 Disclosure of "written submissions"

##### 1.3.2.1 Difference between "submissions" and "statements"

7. In *Argentina – Poultry Anti-Dumping Duties*, Brazil informed the Panel of its intention to make its first written submission (except the exhibits) available to the public, after providing Argentina with an opportunity to indicate whether the submission should be revised to exclude any information deemed confidential. Argentina objected and submitted that a Member is only entitled to disclose written statements of its position. According to Argentina, Article 18.2 of the DSU draws a clear distinction between "written submissions" and position "statements". The Panel rejected Argentina's interpretation as being formalistic:

"On substance, we agree with Canada that Argentina's interpretation of Article 18.2 of the DSU results in a formalistic distinction between the terms 'written submission' and 'statement'. In doing so, Argentina negates that a party's written submissions to a panel necessarily contain statements of that party's positions. In our view, the first two sentences of Article 18.2 of the DSU should not be read in formalistic isolation of one another. Read together, and in context of one another, the first two sentences of Article 18.2 of the DSU mean that while one party shall not disclose the submissions of another party, each party is entitled to disclose statements of its own positions, subject to the confidentiality requirement set forth in the third sentence of Article 18.2 of the DSU. We recall that a party's written submissions to a panel necessarily contain statements of that party's positions. In our view, therefore, disclosing submissions to a panel is one way for a party to disclose statements of its positions. If a party chooses to make public the totality of the statements of its own position contained in its written submission, it is entitled to do so, provided the confidentiality requirement of the third sentence of Article 18.2 of the DSU is respected. Since Argentina has not argued that Brazil violated its confidentiality obligation, we do not consider that

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<sup>4</sup> Panel Report, *Korea – Certain Paper*, para. 7.17.

<sup>5</sup> Panel Report, *Turkey – Rice*, para. 7.100.

<sup>6</sup> Panel Report, *Russia – Railway Equipment*, para. 7.182. See also *ibid.* para. 7.181.

Brazil's decision to disclose the entirety of the statements of position contained in its first written submission to the Panel (excluding exhibits) was inconsistent with Article 18.2 of the *DSU*."<sup>7</sup>

### **1.3.2.2 Timing of the disclosure**

8. Subsequently, in the proceedings in *Argentina – Poultry Anti-Dumping Duties*, Argentina withdrew its objection to the disclosure of Brazil's written submission. However, it did not agree with the timing of that disclosure. According to Argentina, Brazil should not have revealed its submissions until after publication of the Panel report. The Panel again disagreed with Argentina on this point since, in its view, Article 18.2 of the *DSU* does not impose any time-limits for the disclosure:

"Furthermore, we note that, by the time of our first substantive meeting with the parties, Argentina was no longer arguing that Brazil was not entitled to make the entirety of its written submissions to the Panel available to the public during the Panel proceedings. Implicitly, therefore, Argentina ultimately agreed that Brazil was entitled to make its written submission available to the public pursuant to Article 18.2 of the *DSU*. Although Argentina argued that Brazil should not have done so until after publication of the Panel's report, we find no basis for this argument in Article 18.2 of the *DSU*. Article 18.2 sets no temporal limits on Members' rights and obligations under that provision. Nor do we find any basis for this argument in paragraph 11 of the Panel's Working Procedures, which concerns the preparation of the descriptive part of the Panel's report. We see nothing in this provision which would impose any limits on rights accruing to Members under Article 18.2 of the *DSU*."<sup>8</sup>

### **1.3.3 Non-confidential versions of written submissions**

9. In *US – Steel Safeguards*, the Panel sent a letter to all parties including a series of preliminary rulings on organizational matters. Among the issues, the Panel dealt with the United States' request to require production of non-confidential versions of written submissions within 14 days following the filing of the written submissions. The Panel responded as follows:

"The Panel recalls that, although the production of a non-confidential summary is mandatory upon request by any WTO Member, it is also WTO practice for panels to leave parties to agree on the date for production of such summaries, if any deadline is to apply. Accordingly, the Panel urges the parties to agree as early as possible on deadlines for production of such non-confidential summaries so as to ensure that appropriate information relating to the present dispute is disclosed to the public."<sup>9</sup>

10. In *US – Washing Machines*, the working procedures adopted by the Panel required the parties to submit non-confidential summaries of the confidential version of their written submissions to the Panel, "no later than ten days after the date of a request from a Member, or the date the written submission in question is submitted to the Panel, whichever is later, unless a different deadline is established by the panel upon written request of a party showing good cause."<sup>10</sup>

### **1.3.4 Alleged breaches of confidentiality**

11. Regarding breaches of confidentiality in the form of leaking the interim report, see the Section on Article 15 of the *DSU*.

12. In *Thailand – H-Beams*, an industry association submitted an *amicus* brief which cited Thailand's confidential submission. Thailand then claimed that Poland's private counsel may have violated WTO rules of confidentiality by providing Thailand's submission to the said association. Although Poland and the lawyer concerned denied the alleged breach of confidentiality, the Appellate Body rejected the *amicus brief* in a preliminary ruling:

<sup>7</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.14.

<sup>8</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.15.

<sup>9</sup> Panel Reports, *US – Steel Safeguards*, para. 5.3.

<sup>10</sup> Panel Report, *US – Washing Machines*, Annex A-1, para. 2.

"The terms of Article 17.10 of the DSU are clear and unequivocal: '[t]he proceedings of the Appellate Body shall be confidential'. Like all obligations under the DSU, this is an obligation that all Members of the WTO, as well as the Appellate Body and its staff, must respect. WTO Members who are participants and third participants in an appeal are fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants. We emphasized this in *Canada – Measures Affecting the Export of Civilian Aircraft*, DS70/AB/R, para. 145, where we stated that:

'... the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, *those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.*' (emphasis added)

We note that Poland has made substantial efforts to investigate this matter, and to gather information from its legal counsel, Hogan & Hartson L.L.P. We note as well the responses from the third participants, the European Communities, Japan and the United States. Furthermore, Poland has accepted the proposal made by Hogan & Hartson L.L.P. to withdraw as Poland's legal counsel in this appeal. On the basis of the responses we have received from Poland and from the third participants, and on the basis of our own examination of the facts on the record in this appeal, we believe that there is *prima facie* evidence that CITAC received, or had access to, Thailand's appellant's submission in this appeal.

We see no reason to accept the written brief submitted by CITAC in this appeal. Accordingly, we have returned this brief to CITAC."<sup>11</sup>

13. The Panel in *Brazil – Aircraft (Article 21.5 – Canada II)* rejected Brazil's arguments that Canada had acted inconsistently with the requirements of the DSU or the Panel's working procedures by providing advisers who were not designated as members of its delegation with access to information submitted to the Panel by Brazil. A member of the Canadian delegation at a meeting of the Panel with the parties had provided a copy of Brazil's written version of its oral statement to persons who were not members of its delegation. Further, Canada had "shared [Brazil's submissions and statements] with members of a private law firm retained by a Canadian aircraft manufacturer". The Panel advised as follows:

"In our view, it emerges from [Article 18.2 of the DSU] that Canada must keep confidential all information submitted to this Panel by Brazil.<sup>12</sup> However, as the Appellate Body has noted, 'a Member's obligation to maintain the confidentiality of [...] proceedings extends *also* to the individuals whom that Member selects to act as its representatives, counsel and consultants.' Thus, the Appellate Body clearly assumed that Members may provide confidential information also to *non*-government advisors.

We see nothing in Article 18.2 of the *DSU*, or any other provision of the *DSU*, to suggest that Members may share such confidential information with non-government advisors only if those advisors are members of an official delegation at a panel meeting. Indeed, paragraph 13 of this Panel's Working Procedures expressly provides that:

'The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations, *as well as any other advisors consulted by a party* or third

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<sup>11</sup> Appellate Body Report, *Thailand – H-Beams*, para. 74.

<sup>12</sup> (*footnote original*) This is subject, of course, to the provisions of the last sentence of Article 18.2 of the *DSU*, which allow a party to panel proceedings to disclose to the public non-confidential summaries of the information contained in the written submissions of the other party, if such summaries are requested.

party, act in accordance with the rules of the DSU and the working procedures of this Panel, particularly in regard to confidentiality of the proceedings. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel.' (emphasis added)

It is apparent from the second and third sentences of paragraph 13 of the Working Procedures that the 'other advisors' referred to are advisors who are *not* part of a Member's delegation at a panel meeting. It is equally clear to us that paragraph 13 is based on the premise that parties to panel proceedings *may* give their 'other advisors' access to confidential information submitted by the other party. Were it otherwise, there would be no point in requiring parties to safeguard the confidentiality of panel proceedings in respect of such 'other advisors'.<sup>13</sup>

14. On this basis, the Panel in *Brazil – Aircraft (Article 21.5 – Canada II)* concluded:

"On the basis of the foregoing, we are unable to accept Brazil's argument that Canada acted inconsistently with the requirements of the *DSU* or this Panel's Working Procedures by giving advisors not designated as members of its delegation access to information submitted to this Panel by Brazil.

In reaching this conclusion, we note, however, that, pursuant to paragraph 13 of the Working Procedures, Canada must ensure that any advisors who were not members of its official delegation respect the confidentiality of the present proceedings."<sup>14</sup>

15. In relation to the involvement of private lawyers, the Panel in *Brazil – Aircraft (Article 21.5 – Canada II)* indicated that it had no basis for questioning a confidentiality agreement between the relevant private lawyers and the Canadian Government. For the Panel, confidentiality rules are not to be used by a panel to "stifle" necessary communication between Member governments and their advisers, provided adequate safeguards are in place.

"We note Canada's statement that the members of the law firm which have had access to Brazil's submissions have been part of its litigation team and have served as 'advisors' to the Government of Canada. Since no members of a private law firm were part of Canada's delegation to the meeting of the Panel with the parties, the private lawyers Canada says were advising it fall within the 'other advisors' category within the meaning of paragraph 13 of the Panel's Working Procedures. It was (and is), therefore, the responsibility of Canada to ensure that those private lawyers maintain the confidentiality of the documents submitted by Brazil.

Based on Canada's representations, we also understand that the law firm in question has an attorney-client relationship with a Canadian regional aircraft manufacturer. We think that the dual role performed by the law firm -- as advisor to the Government of Canada and attorney for a Canadian regional aircraft manufacturer -- places the law firm in a particularly delicate position as far as the protection of Brazil's submissions, statements and exhibits is concerned. In our view, it is crucial, in such circumstances, that Canada put in place appropriate safeguards to ensure non-disclosure of confidential information.

...

We agree that maintaining confidentiality in accordance with the obligations of the *DSU* is important. On the other hand, in applying the rules on confidentiality we must be careful not to stifle necessary communication between Member governments and their advisers, as long as appropriate safeguards are in place. In the absence of arguments and evidence to the contrary, we have no basis for questioning Canada's

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<sup>13</sup> Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.6-3.8.

<sup>14</sup> Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.9-3.10.

representation that the relevant private lawyers are subject to a confidentiality agreement with the Government of Canada."<sup>15</sup>

16. In *EC – Export Subsidies on Sugar*, an association representing German sugar producers submitted an *amicus* brief that disclosed Brazil's confidential information. Australia, Brazil and Thailand requested the Panel to reject the association's brief. The European Communities did not wish to comment.<sup>16</sup> The Panel requested that the industry association identify the source of its information, which it refused to do.<sup>17</sup> The Panel, in a preliminary ruling, determined that there had been a breach of confidentiality and refused to further consider the brief. It further stated:

"The Panel has come to the conclusion that a breach of confidentiality did occur in the framework of these proceedings. The Panel is therefore concerned and deeply deplores this breach of confidentiality and the disregard of a requirement imposed by the *DSU* and the Panel's Working Procedures. ...

The Panel hereby reports the incident to the Dispute Settlement Body."<sup>18</sup>

17. In *US – Upland Cotton*, the United States requested that the Panel would note in its final report that Brazil had breached the obligation of confidentiality of the Panel's interim report. Brazil replied that certain press reports could not have obtained information from any Brazilian source but could just as easily have been United States officials or other persons not connected to Brazil. The Panel stated:

"Indeed, pursuant to Article 18.2 of the *DSU*, all panel proceedings remain confidential until the Panel Report is circulated to WTO Members. Over and above the binding treaty obligation of confidentiality in the *DSU*, the confidentiality of our Panel proceedings was reflected in our working procedures adopted pursuant to Article 12.1 of the *DSU*. Therefore, we are profoundly concerned to observe that the confidentiality has not been respected and that aspects of the Panel's interim report were disclosed, as evidenced in various press reports brought to our attention by the parties. We consider this lack of respect for confidentiality unacceptable."<sup>19</sup>

18. In *Russia – Railway Equipment*, it was found that the head of the delegation of Ukraine, the complainant, had disclosed the position of Russia, the respondent, on one of the issues raised in the dispute. The Panel found this to be inconsistent with Ukraine's obligation under Article 18.2:

"Ukraine disclosed Russia's assertion regarding the quality of Ukrainian rolling stock in quite general terms. It did not disclose the time-period or any other specific information contained in paragraphs 97 and 29. In the Panel's view, the general information that Ukraine disclosed does not meet the definition of BCI as set out in paragraph 2 of the BCI Working Procedures. However, this does not detract from Ukraine's obligation to maintain the confidentiality of Russia's position as expressed in its written submission and oral statement, as required under Article 18.2, and paragraphs 2 and 4 of the Panel's Working Procedures.

For these reasons, by disclosing aspects of Russia's position, specifically with respect to the quality of Ukrainian rolling stock, through the Facebook and Twitter accounts of the head of Ukraine's delegation and the website of Ukraine's Ministry of Economic Development and Trade, Ukraine has breached its confidentiality obligations under Article 18.2, and paragraphs 2 and 4 of the Panel's Working Procedures."<sup>20</sup>

19. In a communication sent to the parties during the course of the proceedings, the Panel addressed Ukraine's statement as to whether Ukraine was in a position to have private entities remove the information at issue from their websites:

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<sup>15</sup> Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.11-3.12, and 3.15.

<sup>16</sup> Panel Reports, *EC – Export Subsidies on Sugar*, para. 2.20.

<sup>17</sup> Panel Reports, *EC – Export Subsidies on Sugar*, para. 7.82.

<sup>18</sup> Panel Reports, *EC – Export Subsidies on Sugar*, para. 7.98-7.99.

<sup>19</sup> Panel Report, *US – Upland Cotton*, para. 6.5.

<sup>20</sup> Panel Report, *Russia – Railway Equipment*, paras. 7.197-7.198.

"24. The Panel is concerned, however, about Ukraine's statement in the same communication that 'to the extent that such information has also been published by private media outlets falling outside the control of the Government of Ukraine, as Exhibit RUS-18 suggests, Ukraine is precluded from compelling such private entities to remove published information from their websites'. It may well be true that a government cannot compel private media outlets to remove published information. However, this does not mean that Ukraine cannot take measures directed at safeguarding the confidentiality of the disclosed information. Such measures could, for instance, include (i) advising the relevant media outlets that the published information was improperly released by the government and (ii) requesting them to follow the government's lead and assist it in safeguarding the confidentiality of the information by refraining from continued publication of the relevant information."<sup>21</sup>

20. In *Russia – Traffic in Transit*, the European Union, a third party in the proceedings, published its third-party submission and third-party statement at the first meeting of the Panel, on the European Commission's website. Russia argued that by doing so the European Union disregarded "the confidential nature of: aspects of the positions of Russia and certain third parties; contents of procedural documents; contents of the Panel's questions to the parties and third parties during the first substantive meeting; information regarding the Panel's timetable; and certain details relating to another ongoing dispute, *Russia – Pigs*."<sup>22</sup> The European Union disagreed, arguing that it regularly posts on the Commission's website the European Union's written submissions and the written version of its oral statements and that, as required under the third sentence of Article 18.2, it omits from those documents the information designated as confidential by other parties.<sup>23</sup> While acknowledging that its written submission and oral statement posted on the Commission's website contained Russia's arguments, the European Union pointed out that these were not redacted because Russia had not designated any of that information as confidential.<sup>24</sup>

21. The Panel ruled, first, that Russia's complaint under Article 18.2 "falls squarely" within its jurisdiction inherent in its adjudicative function.<sup>25</sup> In rejecting Russia's claim of violation of Article 18.2, the Panel made several observations about the nature of obligations embodied in this provision. The Panel pointed to the integrated nature of the four sentences comprised in Article 18.2 and reasoned that, therefore, "it is necessary to read each sentence of Article 18.2 in the context of the other sentences of that provision, as well as in the context of the other provisions of the DSU."<sup>26</sup> The Panel clarified the relationship between the first and second sentences of Article 18.2, as follows:

"The scope of the right in the second sentence of Article 18.2 of the DSU informs the nature of the confidentiality protection attaching to written submissions set forth in the first sentence of Article 18.2. The first sentence of Article 18.2, in stating that written submissions to the panel or the Appellate Body shall be treated as confidential, requires that parties and other persons authorized to have access to the written submissions to a panel or the Appellate Body, ensure that access to those submissions is restricted to authorized persons who are similarly bound to treat the submissions as confidential."<sup>27</sup>

22. The Panel in *Russia – Traffic in Transit* cautioned against an expansive reading of the scope of the obligation in the first sentence of Article 18.2, noting that such a reading would render the third sentence of this provision redundant:

"We consider that an expansive reading of the first sentence of Article 18.2, in which the confidentiality protections attaching to the written submissions encompass also all of the information that is contained in or derived from those documents (i.e. defences, legal arguments, positions, opinions, facts and any other evidence), would render

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<sup>21</sup> Panel Report, *Russia – Railway Equipment*, para. 7.199.

<sup>22</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 1.2.

<sup>23</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 3.1.

<sup>24</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 3.2.

<sup>25</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 5.4.

<sup>26</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 5.10.

<sup>27</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 5.12.

redundant the third sentence of Article 18.2. It is also difficult to envisage how, as a matter of logic, it would be possible to provide a 'non-confidential summary' of such information contained in the written submissions (understood in the expansive sense above), as required by the fourth sentence. We note that the Appellate Body in *US – Continued Suspension* reached a similar conclusion regarding the relationship between Article 17.10 of the DSU, which provides that the proceedings of the Appellate Body shall be confidential, and Article 18.2. The Appellate Body explained that Article 17.10 must be read in light of Article 18.2, and that the third sentence of Article 18.2 would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. In our view, the same considerations apply with respect to the interpretation of the first sentence of Article 18.2 in relation to the third sentence of that provision."<sup>28</sup>

23. The Panel in *Russia – Traffic in Transit* distinguished "information" from legal arguments, positions and opinions, and did not consider that the latter could be designated as confidential under the third sentence of Article 18.2:

"In addition, we note that the term 'information' as used in the covered agreements refers to facts or other evidence, as distinct from legal arguments, positions, or opinions of a party to a dispute. Moreover, the Appellate Body has previously observed that questions of legal interpretation are not inherently confidential. We similarly do not consider that the legal arguments, positions and opinions of parties in WTO dispute settlement proceedings are inherently confidential, or capable of designation as confidential information under the third sentence of Article 18.2 of the DSU."<sup>29</sup>

24. The Panel in *Russia – Traffic in Transit* concluded that Article 18.2 does not preclude a party from referring to the positions of another party, in disclosing its own statement to the public:

"For the foregoing reasons, we do not consider that Article 18.2 of the DSU precludes a party, in exercising its right to disclose a statement of its own positions to the public in accordance with the second sentence of that provision, from making reference to the corresponding positions of the other parties to the dispute. While a party disclosing a statement of its own positions to the public may not refer to information designated as confidential by a Member in accordance with the third sentence of Article 18.2, the information eligible for such designation is limited to facts and other evidence submitted to a panel or the Appellate Body and additionally excludes any information that is already publicly available."<sup>30</sup>

25. However, the Panel in *Russia – Traffic in Transit* underlined that this right does not extend to disclosing the entirety of another party's written submission:

"Our interpretation of Article 18.2 would not permit a party to disclose a statement of its own positions to the public by simply appending the written submissions of another party with the introductory words, 'We do not agree with the following'. This would amount to a publication of the actual written submission of the other party, contrary to the first sentence of Article 18.2 of the DSU."<sup>31</sup>

26. On this basis, the Panel in *Russia – Traffic in Transit* concluded that the European Union had not violated Article 18.2, and declined to take action against the European Union:

"We therefore conclude that the disclosures in the published version of the European Union's third-party submission and statement of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994, as well as aspects of the positions of other third parties, for the purpose of setting forth the European Union's positions on those issues, are not inconsistent with the confidentiality obligations contained in Article 18.2 of the DSU.

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<sup>28</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 5.13.

<sup>29</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 5.14.

<sup>30</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, para. 5.15.

<sup>31</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, fn 34.

...

In the light of the above, we find it unnecessary to take any action regarding the European Union's published third-party submission and statement based on the disclosure of aspects of Russia's positions concerning the measures at issue and defence under Article XXI of the GATT 1994."<sup>32</sup>

### **1.3.5 Additional procedures to protect Business Confidential Information (BCI)**

#### **1.3.5.1 General**

27. In *Brazil – Aircraft* and *Canada – Aircraft*, the Panels, at the request of the parties, adopted special BCI procedures that went beyond the protection afforded by Article 18.2 of the DSU. However, the Appellate Body declined to adopt additional procedures to protect business confidential information during the appeal process. The Appellate Body stated:

"[T]he provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.

...

For these reasons, we do not consider that it is necessary, under all the circumstances of this case, to adopt *additional* procedures for the protection of business confidential information in these appellate proceedings."<sup>33</sup>

28. However, the Appellate Body did adopt additional procedures to protect business confidential information in *EC and certain member States – Large Civil Aircraft*.<sup>34</sup> In that proceeding, the Appellate Body clarified that:

"[W]e recognize that, in *Brazil – Aircraft* and *Canada – Aircraft*, the Appellate Body did not consider it necessary, in the circumstances of those appeals, to adopt additional procedures to protect information deemed sensitive by the participants. In doing so, however, the Appellate Body did not suggest that the DSU, the other covered agreements, or the *Working Procedures* precluded the adoption of procedures providing additional protection; rather, the Appellate Body did not consider that such additional protection was necessary in the particular circumstances of those appeals."<sup>35</sup>

29. In *US – Anti-Dumping Methodologies (China)*, the Appellate Body highlighted the difference between the general confidentiality rules envisaged by Articles 18.2 and 13.1 of the DSU and "the additional layer of protection of sensitive business information that a panel may choose to adopt". The Appellate Body clarified that, in the absence of a request for the additional protection procedures, the general confidentiality rules apply:

"On 16 February 2015, having been requested by the parties to do so, the Panel decided to adopt additional working procedures for the protection of business confidential information (BCI) (Additional Working Procedures on BCI). No such request was received by the Appellate Body. At the beginning of the oral hearing in these appellate proceedings, the Presiding Member noted that, while the Panel record contains BCI, under the circumstances, the Division would assume that all information in this appeal shall be treated as confidential in accordance with Article 18.2 of the DSU. The Appellate Body has in the past highlighted the need to distinguish between

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<sup>32</sup> Panel Report, *Russia – Traffic in Transit*, Annex B-2, paras. 5.16 and 5.18.

<sup>33</sup> Appellate Body Reports, *Canada – Aircraft*, paras. 145 and 147, and *Brazil – Aircraft*, paras. 123 and 125.

<sup>34</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 17-19 and Annex III.

<sup>35</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, para. 26.

'the general layer of confidentiality that applies in WTO dispute settlement proceedings, as foreseen in Articles 18.2 and 13.1 of the DSU' and 'the additional layer of protection of sensitive business information that a panel may choose to adopt'. The Appellate Body has further emphasized that, 'absent any request from the participants, procedures for additional protection of BCI do not apply in ... appellate proceedings.' In this dispute, no request for additional protection of BCI has been made on appeal. The Additional Working Procedures on BCI adopted by the Panel do not cover these appellate proceedings and therefore only the 'general layer of confidentiality' under the provisions of the DSU applies."<sup>36</sup>

30. In *EU – Fatty Alcohols (Indonesia)*, the Appellate Body set out the criteria for granting additional protection for confidential information:

"On such occasions, it is the duty of the participants to request and justify the need for additional protection of confidential information. While it is for the participants to request additional protection of confidential information, pursuant to Article 17.9 of the DSU and Rule 16(1) of the Working Procedures, it is for the Appellate Body, relying upon objective criteria, to determine whether the information submitted by the participants deserves additional protection, as well as the degree of protection that is warranted. Such objective criteria could include, for example: whether the information is proprietary; *whether it is in the public domain or protected*; whether it has a high commercial value for the originator of the information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market.

Any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves. Moreover, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm that could result from disclosure. When additional procedures to protect BCI are adopted, the Appellate Body must also 'adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential'. "<sup>37</sup>

31. The Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* made the following observation with regard to the drafting of the public version of a panel report in cases where BCI procedures are adopted:

"It is, moreover, for the adjudicator to ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudication process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand. That same balance must be struck by a panel in applying any additional procedures adopted. This means, among other things, that, when considering whether to redact information from its report, a panel 'should bear in mind the rights of third parties and other WTO Members under various provisions of the DSU' and 'ensure that the public version of its report circulated to all Members of the WTO is understandable.' "<sup>38</sup>

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<sup>36</sup> Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 1.13. See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 5.3-5.4.

<sup>37</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, paras. 3.2-3.3.

<sup>38</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3.

32. In *Russia – Railway Equipment*, the Appellate Body granted the participants' joint request to treat the information designated as business confidential information (BCI) by the Panel as confidential on appeal pursuant to Rule 16(1) of the Working Procedures. Specifically, the Appellate Body stated:

"At the oral hearing, the participants jointly requested the Division hearing the appeal to continue treating the information designated as business confidential information (BCI) by the Panel under its additional working procedures for the protection of BCI as confidential also on appeal. In particular, Ukraine referred to the protection of the identity of individual producers, information regarding the certificates, and the specific number of decisions at issue. No third participant raised objections in connection with this request.

We recall that any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, and the Working Procedures themselves. Moreover, in adopting such procedures, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudication process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other. This means, among other considerations, that the Appellate Body should bear in mind the need for transparency and 'the rights of third parties and other WTO Members under various provisions of the DSU', and should ensure that the public version of its report circulated to all Members of the WTO is understandable.

In the circumstances of the present appeal, we consider that treating the relevant information as confidential does not unduly affect our ability to adjudicate this dispute, the participation rights of the third participants, or the rights and interests of the WTO membership at large. We note in this respect the absence of comments by third participants regarding the participant's joint request, as well as the rather limited information designated as BCI. Based on the foregoing, we grant the participants' joint request to treat the information designated as BCI by the Panel as confidential on appeal pursuant to Rule 16(1) of the Working Procedures. Accordingly, this Appellate Body Report does not contain information designated as BCI by the Panel."<sup>39</sup>

### **1.3.5.2 Relationship between Article 18.2 and the Anti-Dumping Agreement**

#### **1.3.5.2.1 Designation of information as BCI by a non-WTO entity**

33. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Panel confronted the issue of automatically classifying as BCI, for the Panel proceedings, information submitted as confidential information in the underlying anti-dumping investigation. The European Union argued that designation of information as BCI could not be delegated to non-WTO entities or persons. The Panel held that, given the relationship between the provisions of the Anti-Dumping Agreement and the DSU, governing the treatment of confidential information, the confidential status of the information provided in the context of an investigation would in some way continue to apply in dispute settlement proceedings related to that investigation:

"We agree with China that the BCI Procedures do not detract from the ability of Members to designate information as confidential under Article 18.2 of the DSU. It is clear that the designation of confidential information in anti-dumping proceedings, as provided for in Article 6.5 of the Anti-Dumping Agreement, is distinct from the designation of BCI for purposes of DSU proceedings. However, we consider that these designations are closely related because in disputes under the Anti-Dumping Agreement the Panel is not the initial trier of facts. Rather, according to the proper standard of review, the Panel must review whether the investigating authority's establishment of the facts was proper, and whether its evaluation of those facts was unbiased and objective. The Panel's review must be based on the record

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<sup>39</sup> Appellate Body Report, *Russia – Railway Equipment*, paras. 1.11-1.13.

developed by the investigating authority. The Panel may not have regard to new information that was not on the authority's record.

In our view, Article 17.7 of the Anti-Dumping Agreement reflects this relationship when it provides that '[c]onfidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information'. We note that this provision is included as a special or additional rule and procedure in Appendix 2 of the DSU, which prevail over the rules and procedures in the DSU to the extent that there is a difference between these two sets of provisions. We understand that, in the context of a dispute brought under the Anti-Dumping Agreement, the phrase 'confidential information' in Article 17.7 refers to the confidential information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7. This understanding is supported by the terms of Article 17.7 of the Anti-Dumping Agreement and Article 18.2 of the DSU. Article 17.7 refers to confidential information provided by a 'person, body or authority'; whereas Article 18.2 refers to confidential information provided by a 'Member'. In other words, Article 17.7 envisages that confidential information on the authority's record – obtained from a 'person, body or authority' – may be provided to a panel, and imposes on the panel a non-disclosure obligation similar to that imposed on the authority by the last sentence of Article 6.5. Considering that a panel's review is limited to the authority's record, in practice the designation under Article 18.2 of the DSU should generally not arise in a case brought under the Anti-Dumping Agreement, since the issue of designation of the information on the authority's record is already addressed by Articles 6.5 and 17.7 of the Anti-Dumping Agreement."<sup>40</sup>

34. The Appellate Body disagreed with the Panel's reasoning, and pointed out:

"As we see it, in its reasoning, the Panel conflated: (i) the confidentiality obligations under the Anti-Dumping Agreement setting the framework for confidential treatment of information that is applicable in the context of *domestic* anti-dumping proceedings; and (ii) the confidentiality obligations applicable in *WTO* dispute settlement proceedings. In addition, the Panel also conflated: (i) confidentiality requirements generally applicable in *WTO* proceedings or in anti-dumping proceedings as foreseen in the above-mentioned provisions of the DSU and the Anti-Dumping Agreement; and (ii) the additional layer of protection of sensitive business information provided under special procedures adopted by a panel for the purposes of a particular dispute. Contrary to what the Panel appears to have suggested, whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a *WTO* panel under the confidentiality requirements generally applicable in *WTO* dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the *WTO* panel."<sup>41</sup>

35. The Panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)* further explained that the parties should not be required to provide an authorizing letter from the entity that submitted confidential information in the underlying anti-dumping investigation, on the ground that provision of information to the Panel did not amount to disclosure under Article 6.5 of the Anti-Dumping Agreement:

"In addition, we consider there is a clear relationship between Articles 6.5 and 17.7. While the former provision regulates when confidential information may be disclosed by investigating authorities, the latter provision regulates when such information may be disclosed by a panel. As stated above, panels are not the initial triers of facts. Rather, panels review an investigating authority's establishment and evaluation of facts. Thus, it would seem logical that a panel should be subject to similar non-disclosure obligations when reviewing the investigating authority's assessment of the body of information, including confidential information, available on the record of the anti-dumping proceedings. In our view, this indicates that the 'provision' of confidential information to the panel in the context of a dispute under the Anti-

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<sup>40</sup> Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.20-7.21.

<sup>41</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

Dumping Agreement does not amount to its 'disclosure' under Article 6.5. Accordingly, we do not consider that a Member 'providing' confidential information to a panel under Article 17.7 of the Anti-Dumping Agreement would cause its investigating authority to violate its obligation under Article 6.5 not to 'disclose' that information."<sup>42</sup>

36. On appeal, the Appellate Body declared "moot and of no legal effect" the Panel's findings concerning the provision of authorizing letters, and did not make any further findings in this regard.<sup>43</sup>

### **1.3.5.3 Table of proceedings in which additional procedures to protect business confidential information (BCI) or similar procedures were requested**

37. For a table providing information on proceedings in which one or both parties requested additional BCI or similar procedures, see the chapter of the Analytical Index on "DS information tables".

### **1.3.5.4 Public version of the panel Report in case of BCI**

38. It is common for panels to redact any BCI from the version of its report that is circulated to Members and the public.

39. In *Japan – DRAMs (Korea)*, several passages had been omitted from the public version of the Panel Report because Japan and Korea had indicated that those passages contained BCI. The European Communities, although acknowledging that BCI must be respected, claimed that the Panel had dealt with it in such a sweeping manner that the Panel Report had become unintelligible for third parties, and as a result its rights as a third party have been affected.<sup>44</sup> The Appellate Body resumed the panels' duties in this regard as follows:

"While a panel must not disclose information which is by its nature confidential, a panel, in deciding to redact such information from its report at the request of one or both of the parties, should bear in mind the rights of third parties and other WTO Members under various provisions of the DSU, such as Articles 12.7 and 16. Accordingly, a panel must make efforts to ensure that the public version of its report circulated to all Members of the WTO is understandable."<sup>45</sup>

40. In *Russia – Railway Equipment*, the Panel adopted BCI procedures. Ukraine, the complainant, argued that certain information about the identity of Ukrainian companies and about the situation in certain regions of Ukraine constitutes BCI.<sup>46</sup> The Panel first noted the Appellate Body's prior pronouncements on this issue, and the definition of BCI in the procedures adopted by the Panel:

"The Panel notes that in keeping with the Appellate Body's guidance, in considering the parties' views on what information should be designated as BCI in the public version of the Report, it will strike a balance between, on the one hand, the need for protection of BCI and, on the other hand, the rights of third parties and other WTO Members under the DSU and the need to prepare a public version of the Report that is understandable.

The definition of BCI applicable in these proceedings has the following elements: (a) a party has designated the information as BCI; (b) the designated information is not available in the public domain; and (c) the release of the information would prejudice an essential interest of the Member supplying the information or the entity that supplied it to the Member. Information satisfying these three elements is entitled

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<sup>42</sup> Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.28.

<sup>43</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.317.

<sup>44</sup> See European Communities' third participant's submission, para. 10 (quoting Panel Report, paras. 7.205 and 7.206).

<sup>45</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 279. See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3.

<sup>46</sup> Panel Report, *Russia – Railway Equipment*, paras. 7.214-7.215.

to the special confidentiality protection afforded under the Additional Working Procedures on BCI."<sup>47</sup>

41. The Panel in *Russia – Railway Equipment* then noted that part of the information designated as BCI by Ukraine was already in public domain, and considered that such information did not satisfy the definition of BCI.<sup>48</sup> In the Panel's view, for its final report to be understandable, it would have "to disclose at least some of the information that is already publicly available, such as the products concerned."<sup>49</sup> However, in order to protect the confidentiality of information that did constitute BCI, the Panel in its Final Report did not disclose the names of the Ukrainian producers and certain other information.<sup>50</sup> In the Panel's view, with this safeguard, the disclosure of the information on the products concerned "would not prejudice an essential interest of any of the entities that provided BCI to the parties, or of a party."<sup>51</sup>

42. The Panel in *Russia – Railway Equipment* declined to treat as BCI information concerning the safety situation in Ukraine, on the grounds that such information was in the public domain and did not concern the commercial or business interest of companies:

"The Report also contains information regarding the security and safety situation in Ukraine as well as references to specific regions in Ukraine. All such information is in the public domain, as it is based on published media reports and a report of the Office of the United Nations High Commissioner on Human Rights (OHCHR) submitted as evidence by Russia. Moreover, we note that our Additional Working Procedures concern the protection of business confidential information. Neither party has substantiated that this information regarding the security and safety situation in Ukraine and specific regions in Ukraine is relevant to the protection of commercial or business interests of companies and hence is 'business confidential'. As this information does not meet the definition of BCI applicable in these proceedings, we cannot accept Ukraine's request to redact this information from the public version of our Report."<sup>52</sup>

43. The Panel in *Russia – Railway Equipment* declined to treat as BCI the entirety of the information submitted in certain exhibits, noting that a document does not automatically become BCI simply because it has specific contents that are BCI:

"Finally, we observe that the analysis set out in certain sections of the Report requires references to the content of certain exhibits that the submitting party has designated in their entirety as BCI. We do not disclose specific content of those exhibits, except if we consider that the relevant content does not satisfy the three definitional elements of BCI. Indeed, a document is not automatically BCI in its entirety merely because it has some specific content that constitutes BCI. Were it otherwise, a party could prevent the disclosure of information that is important to the understanding of a panel report merely by reference to one discrete piece of information that is business confidential."<sup>53</sup>

### **1.3.6 Public panel hearings**

#### **1.3.6.1 General**

44. In *US/Canada – Continued Suspension*, the Panel opened its hearings to the public at the request of the disputing parties. Since this was the first time in GATT/WTO history that a panel had held hearings open for public observation, the Panel deemed it appropriate to elaborate further on the reasons why it agreed to open its substantive meetings for public observation. The Panel saw no inconsistency with its decision to hold hearings open for public observation with Article 18.2:

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<sup>47</sup> Panel Report, *Russia – Railway Equipment*, paras. 7.218-7.219.

<sup>48</sup> Panel Report, *Russia – Railway Equipment*, para. 7.220.

<sup>49</sup> Panel Report, *Russia – Railway Equipment*, para. 7.221.

<sup>50</sup> Panel Report, *Russia – Railway Equipment*, para. 7.221.

<sup>51</sup> Panel Report, *Russia – Railway Equipment*, para. 7.222.

<sup>52</sup> Panel Report, *Russia – Railway Equipment*, para. 7.223.

<sup>53</sup> Panel Report, *Russia – Railway Equipment*, para. 7.224.

"Regarding the requirement contained in Article 18.2 of the DSU that '[w]ritten submissions to the panel ... shall be treated as confidential', we note that, by opening its hearings to public observation, the Panel did not disclose to the public the content of the parties' written submissions. By making statements to which the public could listen, the parties themselves exercised their right under Article 18.2 to 'disclos[e] statements of [their] own positions to the public'. The Panel is mindful that, by asking questions or seeking clarifications during the hearings with respect to written submissions of the parties, it may have itself 'disclosed' the content of such submissions. However, the Panel notes that at all times the parties retained the right to request that specific statements of theirs not be broadcasted so as to remain confidential and that, in this case, the parties had made their written submissions public. The Panel notes also that Article 18.2 provides that 'Members shall treat as confidential information submitted by another Member to the Panel or the Appellate Body *which that Member has designated as confidential*.' We consider that this sentence clarifies the scope of the confidentiality requirement which applies to the Panel and to Members, and that panels have to keep confidential only the information that has been designated as confidential or which has otherwise not been disclosed to the public. Any other interpretation would imply a double standard, whereby panels would have to treat as confidential information which a WTO Member does not have to treat as confidential. The Panel also notes that, by requesting that the Panel hold hearings open to public observation, the parties to this dispute have implicitly accepted that their arguments be public, with the exception of those they would identify as confidential."<sup>54</sup>

45. In *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, the Panel agreed with the United States' request for the partially open meetings in order to publicly disclose its statements at the Panel's substantive meetings. The Panel explained that Article 18.2 of the DSU covers written as well as oral statements and one party cannot simply block another party's right to disclose its statements:

"We observe in this regard that, according to Article 18.2 of the DSU, nothing in the DSU precludes a party 'from disclosing statements of its own positions to the public'. According to the Appellate Body, this provision allows a party to forego confidentiality protection in respect of statements of its own positions. The Appellate Body has further confirmed that Article 18.2 covers not just statements in written form, but also oral statements and responses to questions at Appellate Body hearings. The same holds true, in our view, for oral statements and responses given at meetings of panels. We further observe that Article 18.2 does not stipulate that a party may disclose its statements only once, or only after any meetings of a WTO adjudicator with the parties.

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Mexico further seems to consider that in respect of meetings or hearings, the DSU protects the confidentiality of the relationship between the parties taken as a group and a WTO adjudicator, rather than between each of the parties and a WTO adjudicator. We note, however, that Article 18.2 gives each party individually the right to disclose statements of its own positions. Where a fully open meeting is to be held, it is clear that all parties need to request authorization to disclose the statements of their own positions that they wish to make at the meeting. This does not imply, however, that one party can simply veto another party's request that it be authorized to disclose statements of its own positions. Indeed, this is also the approach taken by the Appellate Body in respect of third parties participating in its hearings (which the Appellate Body refers to as 'third participants'). Although the Appellate Body has referred to a relationship of confidentiality between 'the third participants' and itself, it has authorized those third participants that so wished to lift the confidentiality of their statements at the hearing, despite objections by other third participants. Thus, the Appellate Body did not impose an inflexible 'all-or-none' rule for the lifting of confidentiality. In our view, this approach is equally appropriate in respect of the relationship between the parties and any WTO adjudicator. Indeed, it would be

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<sup>54</sup> Panel Reports, *US/Canada – Continued Suspension*, para. 7.48.

incongruous to permit individual third parties to forego confidentiality protection in respect of their statements (in those disputes where the parties have requested the same) even as other third parties wish to hold on to that protection, but to withhold that same opportunity from a party merely because another party objects to the granting of such an opportunity. Put another way, when it comes to authorizing the lifting of confidentiality protection for their statements, we consider that we should treat parties no less favourably than third parties."<sup>55</sup>

46. On appeal, Mexico challenged the Panel's decision to hold a partially open hearing. The Appellate Body first rejected the United States' argument that this claim did not concern an issue of law covered in the panel report.<sup>56</sup> However, the Appellate Body declined to rule on this issue on the grounds that Mexico's appeal did not directly relate to the matter at issue in this dispute, and that Mexico requested the Appellate Body to make a ruling to clarify whether future panels and DSU Article 22.6 arbitrators could hold partially open hearings.<sup>57</sup>

47. In *China – Agricultural Producers*, the Panel departed from the reasoning of the Panel in *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)* and declined the United States' request to partially open the meetings to the public.<sup>58</sup> In so concluding, the Panel underlined the importance of parties' agreement as a factor to consider in accepting such requests:

"Regarding the integrity of the panel process, and, in particular, the due process considerations arising from the divergent interests of the parties, we believe that not having consent from all the parties is a factor that should be heavily weighed by the Panel. Although we are well aware that partially open meetings might be an option in situations where one party does not agree to hold a fully open meeting, as was signalled by the arbitrator in *US – Tuna II (Mexico) (Article 22.6 – US)*, we do not necessarily agree with the reasoning presented by the arbitrator in those proceedings, as discussed previously. In our view, if the Panel is going to exercise its discretionary powers to adopt procedural rules, consent by the parties involved in the dispute should be an important factor to weigh in its decision."<sup>59</sup>

48. In *US – Ripe Olives from Spain*, in response to the restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, and at the request of the parties, the Panel's meetings were opened to the public. After consulting with the parties, the Panel decided to webcast audio recordings of the meetings. A portion of the Panel's meeting with the third parties was also opened to the public.<sup>60</sup>

### **1.3.6.2 Table of hearings opened to public observation**

49. For a table providing information on panel, Appellate Body and Article 22.6 meetings/hearings opened to the public, see the chapter of the Analytical Index on "DS information tables".

### **1.3.7 Article 22.6 proceedings**

50. In *US – Upland Cotton (Article 22.6 – US I)*, the Arbitrator stated that:

"Article 18.2 of the DSU provides 'Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.' The Arbitrator considers that the same rule also applies to these arbitration proceedings. Therefore Members shall treat the information designated by the United States as confidential, and are under an obligation not to disclose it to anyone not involved in the proceedings. The Arbitrator

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<sup>55</sup> Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. 7.18 and 7.20.

<sup>56</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, paras. 6.313 and 6.315.

<sup>57</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, para. 6.319.

<sup>58</sup> Panel Report, *China – Agricultural Producers*, para. 7.31.

<sup>59</sup> Panel Report, *China – Agricultural Producers*, para. 7.30.

<sup>60</sup> Panel Report, *US – Ripe Olives from Spain*, para. 1.11.

is also under an obligation not to disclose such confidential information in its Decisions."<sup>61</sup>

51. In *US-Tuna II (Mexico) (Article 22.6 - US)*, the Arbitrator agreed with the United States' request for the partially open meetings in order to publicly disclose its statements at the Arbitrator's substantive meetings:

"We observe in this regard that, according to Article 18.2 of the DSU, nothing in the DSU precludes a party 'from disclosing statements of its own positions to the public'. According to the Appellate Body, this provision allows a party to forego confidentiality protection in respect of statements of its own positions. The Appellate Body has further confirmed that Article 18.2 of the DSU covers not just statements in written form, but also oral statements and responses to questions at Appellate Body hearings. The same holds true, in our view, for oral statements and responses given at meetings of panels and Article 22.6 arbitrators. We further observe that Article 18.2 of the DSU does not stipulate that a party may disclose its statements only once, or only after any meetings of a WTO adjudicator with the parties."<sup>62</sup>

52. In *US – Washing Machines (Article 22.6 – US)*, the Arbitrator declined the United States' request to partially open its meeting with the parties to the public.<sup>63</sup>

53. In *US – Large Civil Aircraft (2<sup>nd</sup> Complaint) (Article 22.6 - US)*, both parties agreed that the substantive meeting should be made available to the public to the extent that is was reasonable to do so. Therefore, the Arbitrator adopted Additional Working Procedures for the Substantive Meeting with the Arbitrator.<sup>64</sup>

### **1.3.8 Private lawyers involved in WTO dispute settlement proceedings**

54. The Panel in *EC – Tariff Preferences* addressed the issue of whether the joint representation of the complaining party and a third party by the same legal counsel breached any confidentiality rules under the DSU. The Panel considered that all Members involved in the dispute settlement process have the obligation of ensuring confidentiality as required under Article 18.2 and Article 14.1 as well as the Working Procedures of the DSU. The Panel also noted that this obligation extended to all representatives of the parties, including their legal counsel:

"As a general matter, the Panel considers that Members involved in the dispute settlement process have the obligation of ensuring confidentiality, as required by Article 18.2, Article 14.1 and the Working Procedures, regardless of who serves as their legal counsel. Needless to say, this obligation of Members involved in the dispute settlement process must be respected by all of their representatives, including legal counsel. In addition, as a general professional discipline, it is the responsibility of counsel to maintain the confidentiality of all communications between it and the party (or third party) it represents. In this regard, the Panel again notes that bar associations in many jurisdictions have elaborated rules of conduct dealing explicitly with confidentiality between clients and their legal counsel."<sup>65</sup>

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<sup>61</sup> Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 1.33.

<sup>62</sup> Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 - US)*, para. 2.19.

<sup>63</sup> Decision by the Arbitrator, *US – Washing Machines (Article 22.6 – US)*, Annex D-1.

<sup>64</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint) (Article 22.6)*, paras. 2.6-2.7 and Annex-3.

<sup>65</sup> Panel Report, *EC – Tariff Preferences*, para. 7.16.