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1 RULE 21: APPELLANT'S SUBMISSION

1.1 Text of Rule 21

Appellant's Submission

21. (1) The appellant shall, on the same day as the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 and serve a copy of the submission on the other parties to the dispute and third parties.

(2) A written submission referred to in paragraph 1 shall

- (a) be dated and signed by the appellant; and
- (b) set out

- (i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof;

- (ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and

- (iii) the nature of the decision or ruling sought.

1.2 Materials attached to an appellant's submission

1. In *US – Shrimp*, the United States attached three *amicus curiae* briefs as exhibits to its appellant's submission. India, Pakistan and Thailand objected to these briefs being appended to the appellant's submission, and requested that the Appellate Body not consider these briefs. Among other things, they argued that by virtue of the incorporation of "unauthorized material" through the attachment of the exhibits, the United States' submission could no longer be considered a "precise statement" as required by Rule 21(2) of the Working Procedures. The Appellate Body stated that:

"We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.

In the present appeal, the United States has made it clear that its views 'on the legal issues in this appeal' are found in 'the main U.S. submission.' The United States has confirmed its agreement with the legal arguments in the attached submissions of the non-governmental organizations, to the extent that those arguments 'concur with the U.S. arguments set out in [its] main submission.'

We admit, therefore, the briefs attached to the appellant's submission of the United States as part of that appellant's submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only,

we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission."¹

1.3 Rule 21(2): requirements of an appellant's submission

2. In *EC – Bananas III*, Ecuador argued that the European Communities did not properly set out any allegation of error concerning a particular of the panel report in the Notice of Appeal, as required by Rule 20(2)(d), or in its appellant's submission, as required by Rule 21(2). The Appellate Body agreed with Ecuador:

"In our view, the claims of error by the European Communities set out in paragraphs (c) and (d) of the Notice of Appeal do not cover the Panel's finding in paragraph 7.93 of the Panel Reports. The finding in that paragraph explicitly deals with Ecuador's right to invoke Article XIII:2 or XIII:4 of the GATT 1994, given that Ecuador acceded to the WTO *after* the *WTO Agreement* entered into force and *after* the tariff quota for the BFA countries had been negotiated and inscribed in the EC Schedule to the GATT 1994. There is no specific mention of this Panel finding in either the Notice of Appeal or in the main arguments of the appellant's submission by the European Communities. Therefore, Ecuador had no notice that the European Communities was appealing this finding. For these reasons, we conclude that the Panel's finding in paragraph 7.93 of the Panel Reports should be excluded from the scope of this appeal."²

3. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body contrasted the requirements of Rule 20(2)(d), regarding the Notice of Appeal, with the requirements of Rule 21(2):

"[B]oth the Notice of Appeal and the appellant's submission must set out the allegations of errors; but, the appellant's submission must be more specific in this regard. The appellant's submission must be precise as to the grounds of appeal, the legal arguments which support it, and the provisions of the covered agreements and other legal sources upon which the appellant relies."³

4. In *Japan – DRAMs*, Japan appealed several findings by the Panel. In respect of one of those findings, relating to the existence of a "benefit" under Article 1.1(b) of the SCM Agreement, Korea argued that Japan's appellant's submission did not satisfy the requirements of Rule 21(2) and the requirements of due process. The Appellate Body disagreed, and stated that:

"Japan provides extensive arguments, in its appellant's submission, to support its assertion that the Panel's review of the JIA's determination of entrustment or direction is erroneous. As we see it, a careful reading of Japan's appellant's submission should have indicated to Korea that these arguments are also relevant with respect to the Panel's review of the JIA's benefit determination. Therefore, in our view, Japan's appellant's submission satisfies the requirements of Rule 21(2) of the *Working Procedures* and of due process."⁴

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¹ Appellate Body Report, *US – Shrimp*, paras. 89-91.

² Appellate Body Report, *EC – Bananas III*, para. 152.

³ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 59.

⁴ Appellate Body Report, *Japan – DRAMs*, para. 146.