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1 ARTICLE 18

1.1 Text of Article 18

Article 18

Communications with the Panel

"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 inform

consider that Brazil's decision to disclose the entirety of the statements of position
contained in its first written submission to the Panel (excluding

"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.

15. 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 c

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.

" 20

U.S. 7.6 (a). 8 - 16 ()] 1

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

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. ³¹

1.3.5 Additional procedures to protect Business Confidential Information (BCI)

1.3.5.1 General

26. 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 (o)-2.3 (w)8.7 (ev.413 0 - (ro)Tj -0.0(Td [(B)1 (r)-4.7 (a)-4

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 their 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. ³⁸

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

32. 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. TcTg/TT0 17 Td [(Tj -0.wTj) 0.004 Tc 01ChA0006 Tc 0.096

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 confid

to the special confidentiality protection afforded under the Additional Working Procedures on BCI." ⁴⁶

40. 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. ⁴⁷ 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, 693 on h toescl, 693 t

"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."⁵³

44. 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 partial lift of the 0.3mSt.227 006 Tce.413tt47 0 Td [(

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." ⁵⁴

45. 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. ⁵⁵ 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. ⁵⁶

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