

AMENDMENTS TO THE *WORKING PROCEDURES FOR APPELLATE REVIEW*

Communication from the Appellate Body

The following communication, dated 9 April 2003, from the Chairman of the Appellate Body, addressed to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

Thank you for the letter of 3 February 2003, in which your predecessor, Ambassador Pérez del Castillo, transmitted to the Appellate Body the comments of WTO Members on the proposed amendments to the *Working Procedures for Appellate Review* (the "*Working Procedures*"). The proposed amendments were attached as Annex A to my letter of 17 December 2002, which was circulated to Members on 19 December 2002 as document WT/AB/WP/5.

The Appellate Body welcomes these comments from Members, and has taken them into account in preparing the final version of the amendments, a copy of which is attached. The reasons for the proposed amendments were explained in my letter of 17 December 2002. In the light of the comments by Members, we have now made a few minor modifications to the amendments, which are explained below. Some stylistic changes have also been made in the Spanish version of the amendments so as to better reflect the content of the English original.

The amendments will come into effect on 1 May 2003. Until that date, the Appellate Body will continue to apply the *Working Procedures* as amended in September 2002.

Consequential Amendments to Rules 1, 16, 18, 19 and 28, and to Annex I

We proposed to modify the definition of "third participant" in Rule 1 as a consequential amendment to the changes to Rule 24. In the final version of the amendments, we have simplified the definition so as to include all third parties that file a written submission and/or appear at the oral hearing.

With respect to the proposed new paragraph (3) to Rule 28, we have added the phrase "who shall also be given an opportunity to respond" to the end of this provision. We did so to clarify that third parties receiving questions, responses or memoranda will be afforded the same opportunity to respond as the participants and third participants in the appeal.

No additional changes were made to the proposed consequential amendments to Rules 16, 18, and 19, nor to the proposed consequential amendment to Annex I.

***NOTE CONCERNING DOCUMENT NUMBER:** This Communication was originally issued on 10 April 2003 as document WT/AB/WP/6. For technical reasons (explained in WT/AB/WP/W/9), it has been re-issued on 4 January 2005 as document WT/AB/WP/W/7.

Amendments to Rule 24

Rule 24 sets forth the various ways in which third parties may participate in an appeal. Since the proposal circulated on 19 December 2002, no changes of substance have been made to the proposed amendments to paragraphs (1) and (2) of Rule 24. Minor additions have been made to the third paragraph of Rule 24 to recognize that the filing of written submissions by third parties is encouraged not only to facilitate the work of the division, but also in order that the participants and other third participants will have notice of the positions a third participant will take at the oral hearing. The fourth paragraph of Rule 24 has also been slightly modified so as to distinguish between, on the one hand, a *notification* by a third party that it will *appear* at the oral hearing and, on the other hand, a *request* by a third party to appear *and make an oral statement* at the oral hearing. This distinction is also reflected in the additional changes to Rule 27(3), discussed below.

Amendments to Rule 27(3)

Rule 27(3) sets forth the mechanism according to which third parties may appear and participate in the oral hearing. In order to clarify the distinction between a third party's right to appear at the oral hearing and its entitlement to make an oral statement at that hearing, we have split into two separate sub-paragraphs the provision that was Rule 27(3)(b) in Annex A to my December 2002 letter. New sub-paragraph (b) to Rule 27(3) has been added to clarify that third parties that have, pursuant to Rule 24(4), notified their intent to *appear* at the oral hearing, will be entitled to do so. Sub-paragraph (c) is a slightly modified version of sub-paragraph (b) from Annex A. This provision now makes clear that when a third party has requested, pursuant to Rule 24(4), to *make an oral statement* at the oral hearing, then whether that party may make an oral statement and respond to the questioning at the oral hearing will be subject to the discretion of the division hearing the appeal.

Application of the Amended Rules

Having received the comments of Members, and having completed consultations with the Director-General and the Chairman of the DSB, we wish to inform Members that the proposed amendments to the *Working Procedures* set forth in the Annex to this letter will take effect as from 1 May 2003. A revised, consolidated version of the *Working Procedures* will be circulated in the three working languages of the WTO on that date.

Annex

Amendments to the Working Procedures for Appellate Review

1. The definition of "third participant" in Rule 1 shall be deleted and replaced by the following:

"third participant"

means any third party that has filed a written submission pursuant to Rule 24(1); or any third party that appears at the oral hearing, whether or not it makes an oral statement at that hearing.

2. Rule 24 shall be deleted and replaced by the following:

Third Participants

24. (1) Any third party may file a written submission containing the grounds and legal arguments in support of its position. Such submission shall be filed within 25 days after the date of the filing of the Notice of Appeal.

(2) A third party not filing a written submission shall, within the same period of 25 days, notify the Secretariat in writing if it intends to appear at the oral hearing, and, if so, whether it intends to make an oral statement.

(3) Third participants are encouraged to file written submissions to facilitate their positions being taken fully into account by the division hearing the appeal and in order that participants and other third participants will have notice of positions to be taken at the oral hearing.

(4) Any third party that has neither filed a written submission pursuant to paragraph (1), nor notified the Secretariat pursuant to paragraph (2), may notify the Secretariat that it intends to appear at the oral hearing, and may request to make an oral statement at the hearing. Such notifications and requests should be notified to the Secretariat in writing at the earliest opportunity.

3. Paragraph 3 of Rule 27 shall be deleted and replaced by the following:

- (3) (a) Any third party that has filed a submission pursuant to Rule 24(1), or has notified the Secretariat pursuant to Rule 24(2) that it intends to appear at the oral hearing, may appear at the oral hearing, make an oral statement at the hearing, and respond to questions posed by the division.
- (b) Any third party that has notified the Secretariat pursuant to Rule 24(4) that it intends to appear at the oral hearing may appear at the oral hearing.
- (c) Any third party that has made a request pursuant to Rule 24(4) may, at the discretion of the division hearing the appeal, taking into account the requirements of due process, make an oral statement at the hearing, and respond to questions posed by the division.

4. Paragraph 1 of Rule 16 shall be deleted and replaced by the following:

- (1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.

5. Paragraph 5 of Rule 18 shall be deleted and replaced by the following:

- (5) Upon authorization by the division, a participant or a third participant may correct clerical errors in any of its submissions. Such correction shall be made within 3 days of the filing of the original submission and a copy of the revised version shall be filed with the Secretariat and served upon the other parties to the dispute, participants, third parties and third participants.

6. Rule 19 shall be deleted and replaced by the following:

Ex Parte Communications

- (1) Neither a division nor any of its Members shall meet with or contact one party to the dispute, participant, third party or third participant in the absence of the other parties to the dispute, participants, third parties and third participants.
- (2) No Member of the division may discuss any aspect of the subject matter of an appeal with any party to the dispute, participant, third party or third participant in the absence of the other Members of the division.
- (3) A Member who is not assigned to the division hearing the appeal shall not discuss any aspect of the subject matter of the appeal with any party to the dispute, participant, third party or third participant.

7. The following paragraph 3 shall be added to Rule 28:

- (3) When the questions or requests for memoranda are made prior to the oral hearing, then the questions or requests, as well as the responses or memoranda, shall also be made available to the third parties, who shall also be given an opportunity to respond.

8. The fourth row of the Table in Annex I shall be deleted and replaced by the following:

Appellee(s) Submission(s) ¹	25	12
Third Participant(s) Submission(s) ²	25	12
Third Participant(s) Notification(s) ³	25	12

¹Rules 22 and 23(3).

²Rule 24(1).

³Rule 24(2).