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**1 RULE 16: GENERAL PROVISIONS**

**1.1 Text of Rule 16**

**General Provisions**

16. (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.

(2) In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

**1.2 Rule 16(1): adoption of special or additional procedure for purposes of a particular appeal**

**1.2.1 Special procedure to protect business confidential information**

1. In *Brazil – Aircraft*, Brazil and Canada requested that the Appellate Body apply, *mutatis mutandis*, the procedures governing business confidential information adopted by the panel in that case. The Appellate Body issued a preliminary ruling<sup>1</sup> in which it concluded that it was not necessary, under the circumstances of this case, to adopt additional procedures to protect business confidential information.<sup>2</sup>

2. The Appellate Body did adopt additional procedures to protect business confidential information in *EC and certain member States – Large Civil Aircraft*.<sup>3</sup> The Appellate Body clarified that:

<sup>1</sup> The Appellate Body issued its "preliminary ruling" following a "preliminary hearing" on the issue.

<sup>2</sup> Appellate Body Report, *Brazil – Aircraft*, paras. 9, 104 and 119. See also Appellate Body Report, *Canada – Aircraft*, paras. 6, 126 and 141.

<sup>3</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 17-19 and Annex III.

"[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>4</sup>

3. In *Thailand - Cigarettes (Philippines)*, the Appellate Body explained that:

"The Panel adopted additional working procedures for the protection of business confidential information ('BCI'), but we have not done so in this appeal. Neither participant requested that we adopt additional procedures for the protection of BCI in these appellate proceedings, although the Philippines made a conditional request that we consult the participants in the event that we considered it necessary to refer to information that was considered to be BCI in the proceedings before the Panel. We have not found it necessary to refer to any such information in this Report."<sup>5</sup>

4. 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>6</sup>

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<sup>4</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, para. 26.

<sup>5</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 10.

<sup>6</sup> Appellate Body Report, *Russia – Railway Equipment*, paras. 1.11-1.13.

### 1.2.2 Special procedure for dealing with possible *amicus curiae* submissions

5. In *EC – Asbestos*, the Appellate Body adopted a special procedure, pursuant to Rule 16(1) of its Working Procedures, to deal with any possible submissions received from *amicus curiae*. The additional procedure was posted on the WTO website on 8 November 2000 and provided as follows:

"1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon on Thursday, 16 November 2000*.

3. An application for leave to file such a written brief shall:

(a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;

(b) be in no case longer than three typed pages;

(c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;

(d) specify the nature of the interest the applicant has in this appeal;

(e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;

(f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and

(g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

5. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

6. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

7. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon on Monday, 27 November 2000*.

8. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

- (a) be dated and signed by the person filing the brief;
- (b) be concise and in no case longer than 20 typed pages, including any appendices; and
- (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon on Monday, 27 November 2000*.

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (emphasis original)<sup>7</sup>

### 1.2.3 Special procedure to consolidate multiple appeals with substantial overlap in content

6. The Appellate Body has consolidated appellate proceedings on a number of occasions due to the substantial overlap in the content of the disputes.<sup>8</sup> In *US – Shrimp (Thailand) / US – Customs Bond Directive*, for example, the Appellate Body explained that:

"[I]n the interests of "fairness and orderly procedure", as referred to in Rule 16(1) of the *Working Procedures*, and in agreement with the participants, the appellate proceedings in respect of the appeals by both Thailand and India would be consolidated due to the substantial overlap in the content of the disputes. A single Division would hear and decide both appeals, and a single oral hearing would be held by the Division. Further to a request by the United States, and in consultation with the participants, the Division extended, pursuant to Rule 16(2) of the *Working Procedures*, the time periods for the filing of the other appellant's submissions by the United States, as well as for the filing of appellees' and third participants' submissions. The Division also invited all third parties in *US – Shrimp (Thailand)* and *US – Customs Bonds Directive* to attend the single oral hearing in the consolidated appellate proceedings, noting, however, the understanding that, in their written submissions and oral statements, the third participants would address only the issues appealed in the dispute(s) to which they were third parties in the panel proceedings."<sup>9</sup>

### 1.2.4 Special procedure for public observation of the oral hearing

7. See the Section on Rule 27 of the Working Procedures for information on the Appellate Body's practice relating to open hearings.

<sup>7</sup> Appellate Body Report, *EC – Asbestos*, para. 52. See also document WT/DS135/9.

<sup>8</sup> See e.g. Appellate Body Reports, *US – 1916 Act*, para. 7; *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 16; *US/Canada – Continued Suspension*, para. 27; and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 23; *China – HP-SSST*, para. 1.24.

<sup>9</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 16.

**1.2.5 Special procedure arising from replacement of Member on the Division**

8. In *US – Lead and Bismuth II*, due to the passing away of Mr. Christopher Beeby, the Appellate Body, pursuant to Rule 13 of the Working Procedures, had selected Mr. Julio Lacarte-Muró to replace him. In view of these extraordinary circumstances, the newly-constituted Division decided, pursuant to Rule 16(1), and in the interests of fairness and orderly procedure in the conduct of this appeal, to hold another oral hearing. On that date, the participants and third participants presented oral arguments and responded to questions put to them by the Members of the newly-constituted Division.<sup>10</sup>

**1.3 Rule 16(2): request to modify a time-period set out in the Working Procedures for the filing of documents or the date set out in the working schedule for the oral hearing**

9. The Appellate Body has modified time-periods upon request in proceedings when it was satisfied that there were "exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness".<sup>11</sup>

10. The Appellate Body has declined requests to modify time-periods when it was not demonstrated that there were such circumstances.<sup>12</sup>

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<sup>10</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 8.

<sup>11</sup> See e.g. Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 2; *Guatemala – Cement I*, para. 4; *EC – Bed Linen*, footnote 12 to para. 6; *US – FSC (Article 21.5 – EC)*, para. 8.

<sup>12</sup> See e.g. Appellate Body Reports, *US – Shrimp (Viet Nam)*, para. 1.7; *US – Countervailing and Anti-Dumping Duties (China)*, para. 1.15; *Mexico – Anti-Dumping Measures on Rice*, paras. 9-10.