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1 RULE 25: TRANSMITTAL OF THE RECORD

1.1 Text of Rule 25

Transmittal of Record

25. (1) Upon the filing of a Notice of Appeal, the Director-General of the WTO shall transmit forthwith to the Appellate Body the complete record of the panel proceeding.

(2) The complete record of the panel proceeding includes, but is not limited to:

- (a) written submissions, rebuttal submissions, and supporting evidence attached thereto by the parties to the dispute and the third parties;
- (b) written arguments submitted at the panel meetings with the parties to the dispute and the third parties, the recordings of such panel meetings, and any written answers to questions posed at such panel meetings;
- (c) the correspondence relating to the panel dispute between the panel or the WTO Secretariat and the parties to the dispute or the third parties; and
- (d) any other documentation submitted to the panel.

1.2 Request to delay the transmittal to the Appellate Body of certain information

1. In *EC and certain member States – Large Civil Aircraft*, the Division declined the participants' joint request that it ask the Panel to delay the transmittal to the Appellate Body of any information classified as BCI or HSBI on the Panel record until after the Appellate Body had adopted additional measures regarding BCI and HSBI. The Division noted that Rule 25 of the Working Procedures requires that the panel record be transmitted to the Appellate Body upon the filing of a Notice of Appeal. However, the Division, taking into consideration the participants' concern with regard to the protection of BCI and HSBI contained in the Panel record decided, on a provisional basis, to provide additional protection to all BCI and HSBI transmitted to the Appellate Body during the period leading up to the definitive ruling on the participants' request for additional procedures.¹

2. The Appellate Body followed a similar approach in *US – Large Civil Aircraft (2nd complaint)*, providing additional protection to all BCI/HSBI transmitted as part of the panel record, pending its final decision on the EU request for additional BCI/HSBI procedures.²

1.3 Correspondence not contained in the record of the panel proceedings

3. In *US – Zeroing (EC) (Article 21.5 - EC)*, the European Communities submitted an exhibit containing certain e-mails. The United States objected to the submission of this exhibit and claimed that it was a new piece of evidence that could not be considered in the appellate proceedings. The European Communities responded that the exhibit had already been transmitted to the Appellate Body as part of the record of the Panel proceedings because, under Rule 25(2) of the Working Procedures, "[t]he complete record of the panel proceeding includes ... the correspondence relating to the panel dispute between the panel or the WTO Secretariat and the

¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 18.

² Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 23-25.

parties to the dispute or the third parties". The Appellate Body agreed with the United States, and stated that:

"Having examined the record of the Panel proceedings, transmitted to the Appellate Body under Rule 25(1) of the *Working Procedures*, we have found that it does not contain the exchange of e-mails referred to in Exhibit EC-62. Accordingly, we conclude that Exhibit-62 is new evidence that cannot be considered at the appellate stage."³

Current as of: December 2020

³ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 - EC)*, para. 171.