Open hearings in the WTO dispute settlement mechanism: the current state of play

MARCEAU, Gabrielle Zoe

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Gabrielle Marceau

Professeure associée à l’Université de Genève

I. Introduction

The issue of transparency in the World Trade Organization (WTO) extends to all divisions and functions, and most particularly to dispute settlement, an area that can have broad ramifications for the political, economic and civil interests of members as well as the international community at large. In recent years, the WTO has consistently demonstrated its commitment to transparency in dispute settlement, offering increasing opportunities for individuals and public interest groups to stay apprised of disputes, and to voice their positions on important issues. Notably, WTO panels and the Appellate Body frequently accept and consider amicus curiae briefs, thereby allowing civil society groups and other non-state actors the opportunity to provide some input into WTO dispute settlement proceedings. A new milestone in the transparency of the dispute settlement process was reached in 2005 when the European Communities (EC), Canada and the United States submitted a joint request for the first panel hearings to be open to public observation for the parallel disputes US – Continued Suspension and Canada – Continued Suspension. Despite strong objections raised by third parties, the panel authorized the open hearing, ending the « closed » nature of dispute settlement that had spanned over 60 years under the General Agreement on Tariffs and Trade (GATT) and later, the WTO. However, it was not until 2008, that the EC, Canada and the United States submitted the first joint request for open appellate hearings during their appeal US/Canada – Continued Suspension. Since authorizing these first instances of open panel and appellate hearings, panels and the Appellate
Body (AB) have considered the question of open hearings on a case-by-case basis, when requested by the parties to the dispute.

This article discusses the issue of open hearings in the WTO dispute settlement system, offering a brief historical overview, as well as analysis of the main legal and policy arguments raised and relied upon to provide public access to panel and Appellate Body proceedings. Subsequently, this Article describes how the Secretariat has implemented this new procedure, and offers a series of recommendations.

II. Historical background

The confidential nature of dispute settlement hearings is rooted in the historic practice of the GATT. At the time of its establishment, the GATT did not have a dispute settlement mechanism and disputes were primarily resolved via diplomatic channels. In addition, twice a year, inter-state disputes were discussed in the context of meetings of Contracting Parties, subsequently leading to the creation of working parties to resolve them. According to HUDEC, these working parties were charged with the need to « negotiate a political solution acceptable to the key parties with direct interest in the matter [...] » . Even after the 1955 introduction of the idea that disputes should be presented to an independent panel of experts, the diplomatic nature of dispute settlement still prevailed. WEILER remarks that:

« Confidentiality is the hallmark of diplomacy [...] in GATT dispute resolution there was a double level of confidentiality: once a panel was established, only a narrow range of actors, even within the GATT, were privy to the proceedings. At its conclusion, the outside world was treated to a perfunctory account [...] Panel reports were for many years hard to come by in a timely fashion except for a few privileged cognoscenti. The secrecy surrounding the dispute resolution process is one of the clearest indications of its perception as diplomacy through other means ».

Furthermore, most « disputes » were, for a long period of time, handled by diplomats, a fact that is closely linked with the confidential character of GATT panel proceedings. As WEILER explained:

« Although disputes might have raised broad systemic issues of relevance and consequence far beyond the immediate parties, process tended to treat them as discrete eruptions between Members requiring “settlement”. This would be attempted in the
The Uruguay Round triggered a dramatic shift in the approach to dispute settlement, and the WTO transitioned from a system that was primarily diplomacy-oriented to one that was firmly rooted in rule-of-law. The creation of a standing AB was not the only major innovation; institutional reform also came in the form of the automatic adoption of panel reports, which differed from the earlier practice of requiring consensus. But despite the change in ideology surrounding dispute settlement and increasing demands for transparency, open hearings still remain an exception in WTO dispute settlement proceedings.

The need for open hearings has not only been requested by the public, but has also occasionally been highlighted by former AB Members themselves. James Bacchus commented that an appellate process « is a tedious, boring, exhausting process, and if the world saw it, they would be bored. But they would also be reassured because it is also an objective, thorough and fair process in which jurists considers every argument that’s made, however silly it may be, at considerable length ». Mitsuo Matsushita further supported the idea of allowing open hearings, arguing that: « allowing the general public to attend oral hearings would promote the transparency of the appellate process and increase the acceptance of the process by civil society by providing them with a glimpse of the process ». The idea of opening panel and appellate hearings for public observation is also supported by some developed country Members of the WTO, in addition to a number of developing countries and academics.

It was not until the 2005 joint request in the US/Canada – Continued Suspension that the parties to the dispute succeeded in breaking new ground for public access to proceedings. Since that first request, at least ten panel meetings have been open to the public, to varying degrees. There were also

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11 Ibid., see paras. 1.6, 1.7, 6.7 – 6.11 and paras. 7.1 – 7.51 of the Canada and United States Reports.
12 At the time of writing, at least the following disputes had open panel meetings: United States – Measures Affecting Trade in Large Civil Aircraft - Second Complaint (US – Large Civil Aircraft (2nd Complaint)), DS153 ; European Communities and its Member States – Tariff Treatment of Certain Information Technology Products (EC – IT Products), DS275, DS276, DS277 ; Australia –
two instances where panels declined to grant requests for open hearings. For example, in Brazil - Retreaded Tyres\(^3\), the request was not submitted by parties to the dispute, but by an NGO, the Center for International Environmental Law (CIEL) which sought the opportunity of web-casting the first substantive meeting of the panel. After taking into account the views of the parties and third parties, the panel determined that meetings would be held in closed sessions\(^4\). In US – Upland Cotton (Article 21.5 – Brazil)\(^5\) the panel also declined the request of the United States to open the portions of the hearing where the United States expressed its positions to the public\(^6\). Nevertheless, in 2008, the success of open panel meetings led to the first joint request by the parties for an open hearing of the US/Canada - Continued Suspension appeal. Since then, at least seven appellate hearings have been open to the public\(^7\), in addition to one arbitration hearing\(^8\).

Despite this progress and continued negotiations on reforming the Understanding on Rules and Procedures Governing the Settlement of Disputes, Members have still been unable to reach a consensus that oral hearings of panels and the AB should be open to public observation. This paper aims to give an overview of the current state of play of open panel, appellate and arbitration hearings, highlighting both the legal and policy-oriented arguments put forth both in favor and against this practice. In the Section III, the paper will examine the legal arguments at the heart of open panel and appellate hearings, which also apply to arbitration hearings. It will also discuss a number of policy issues that relate to the dispute settlement mechanism in its entirety. The Section IV of this paper will detail the
procedural and logistical responses of panels, the AB and the WTO Secretariat to requests for open hearings.

III. Arguments For and Against Open Hearings: The Current State of Play

This section will give an overview of the legal and policy-oriented arguments for and against open hearings at both the panel and appellate stages; highlighting those which panels or the AB used in their legal analysis in the merged US/Canada – Continued Suspension dispute. Unlike the legal analysis, which engages different articles in the DSU depending on whether the hearing takes place before a panel or the AB, the policy-oriented arguments will be grouped as they apply to both instances, and concern the dispute settlement mechanism in its entirety.

A. Legal arguments

1. Panel Hearings

The starting point of the legal analysis regarding opening panel hearings for public observation includes DSU Articles 12 (and Appendix 3), 14.1, 17.10 and 18. Opposing interpretations of these articles have been put forth both to support and restrict a panel’s ability to authorize public panel hearings.

In addressing the Working Procedures for panels, DSU Appendix 3, second paragraph, states that panels shall meet in closed sessions. However, this provision is subject to Article 12.1 of the DSU, which provides that « panels shall follow the Working Procedures in Appendix 3, unless the panel decides otherwise after consulting parties to the dispute » (emphasis added). The argument supporting open panel hearings thus depends on allocating the necessary weight to the will of the parties to the dispute; one of the basic principles in dispute settlement is the right of parties to consult with each other and with the panel to reach mutual agreement on the conduct of disputes. In that light, the rights given to parties under Article 12.1 should be put into effect to allow a panel to adopt working procedures for open hearings. Article 18.2 of the DSU provides further context to these rights, stating that « nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public », including the Working Procedures set out in Appendix 3, as it is part of the DSU. Additionally, in the case where third parties oppose opening panel hearings, the argument has been advanced that Article 12.1 of the DSU indicates that departing from Appendix 3 can only be based on consulting with parties to the
dispute, so third parties for instance cannot preclude the parties’ requests for open hearings.

On the other hand, a differing interpretation of DSU Article 12.1, read in context of the remainder of Article 12, would allow the panel to deviate from the Working Procedures in Appendix 3 only to ensure high-quality panel reports as stipulated in Article 12.2, essentially a qualitative objective. Thus, it might be argued that the discretion given to panels by virtue of Article 12.1 does not extend to allowing the panels to modify substantive DSU provisions that provide for closed panel sessions because these modifications will not serve to improve the quality of the panel reports.

In US/Canada - Suspension of Obligations, the Panel recognized the closed nature of panel hearings as determined in Appendix 3, but reaffirmed that Article 12.1 allows it to deviate from these Working Procedures based on consultations with the parties to the dispute. However it emphasized that this discretion only extends as far as the working procedures in Appendix 3 and not to other provisions in the DSU. Accordingly, any adaptations made by the panel to provisions in Appendix 3 cannot be prohibited by any provision of the DSU.29

Another DSU Article at the center of the debate is Article 14.1, which states that « panel deliberations shall be confidential », thus potentially limiting a panel’s discretion. Both the arguments supporting and negating a panel’s right to authorize public hearings focus on opposing interpretations of the term « deliberations ». The argument for open panel meetings would designate the term « deliberations » as referring only to the internal discussions of the panel in the absence of the parties, including the decision it intends to reach and the supporting reasoning. Both the French and Spanish versions of the DSU support this reading, with the respective translations délibérations and deliberaciones coinciding with this definition of « deliberations ». Further contextual support is found in the remainder of Article 14, which relates to the independent work of the panel, indicative of the drafters’ intention to exclude panel hearings from the scope of this provision. Additionally, the drafters’ use of the term « proceedings » in DSU Article 17.10 is a further indication of the distinction between the meaning of the term « deliberations » and the broader interpretation of the term « proceedings ». The opposing view gives the term « deliberations » a broader scope, encompassing oral hearings as well.

In addressing the question of the interpretation of the term « deliberations » in Article 14.1, the panel agreed that the term was not intended to address the exchange of arguments between parties, but in fact only encompassed the internal discussions of the panel. The panel further used Articles 14.1 and 12 to give context to their interpretation, noting that

Article 14 deals with confidentiality in the work of panels while the conduct of proceedings is covered by Article 12, thus opening panel hearings would not breach Article 14. On the question of confidentiality, supporters of open panel hearings use DSU Article 18.2 as context for defining the breadth and limits of « confidentiality » in the panel process. Article 18.2 of the DSU provides for protecting the confidentiality of parties to a dispute stating « […] Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential ».

In this regard, the panel in *US/Canada – Continued Suspension* stated that the scope of confidentiality is clear as including only those statements which are designated as confidential by the Members themselves. A broader interpretation would put the panel in a position where it treats information that the Members themselves do not consider confidential as confidential.

The panel in *US/Canada – Continued Suspension* further reaffirmed that by requesting open hearings, parties to the dispute were exercising their rights to disclose statements of their own positions to the public, in accordance with DSU Article 18.2. By allowing for open panel hearings with the correct procedural and logistical preparations, parties wishing to keep their submissions confidential can do so without impeding the right of other Members to forgo their own confidentiality.

One of the arguments potentially undermining a panel’s authority to allow for open hearings is precisely the fact that the role of third parties in disputes has already been regulated by DSU Article 10, which specifies the rules for third party participation. The fact that the role of third parties has been expressly provided for could be indicative of an intention to exclude other parties, including the public, from participating, even in passive manner, in oral panel hearings.

The final legal basis upon which both arguments for and against open panel hearings are based is the *Rules of Conduct*. A limited reading of Article VII of the *Rules of Conduct* would, at face value, assert that each covered person must maintain the confidentiality of the proceedings, in direct opposition to the concept of open hearings. However, a more broad interpretation lends itself to the possibility that Article VII does not in fact preclude open panel hearings. Although in Article II, Paragraph 1 it is stated

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20 Ibid., para. 7.47
21 Ibid., para. 7.48
22 Ibid.
that persons « shall respect the confidentiality of the proceedings », if parties to
the dispute have designated their oral submissions as not confidential, then
there is no confidentiality to respect in the first place. Furthermore, it is stated
that « these rules shall in no way modify the rights and obligations of
Members under the DSU nor the rules and procedures therein », therefore a
panel’s ability to establish working procedures for open hearings under DSU
Article 12.1 is supported by the Rules of Conduct. The panel also confirmed this
reading of Article VII of the Rules of Conduct, stating that the confidentiality
obligation contained therein is applicable only to the extent that it is not
inconsistent with DSU provisions.  

2. Appellate Body Hearings

The interpretation of DSU Article 17.10, which provides that « the proceedings
of the Appellate Body shall be confidential »25, lies at the heart of arguments
both for and against the practice of open hearings.

Key to the arguments is the interpretation of the term « proceedings » and
whether or not it includes appellate hearings. Proponents of open appellate
hearings interpret « proceedings » to encompass only the internal work of the
AB, including deliberations and reaching a decision. However to interpret the
term in a broader manner to include external procedures such as oral hearings
would be inconsistent with the existing practice of the AB and could lead to
limiting the AB from referring to arguments of parties in the final report and
could extend as far as limiting the notices of appeal from being circulated to
WTO Members and made public.

In Canada - Aircraft26, the AB opted for a broad reading noting that « […]
the term ‘proceedings’ [means] the entire process by which an appeal is
prosecuted from the initiation of an appeal to the circulation of the Appellate
Body report, including the oral hearing »27. Nevertheless, in the case of
opening appellate hearings, in US/Canada – Continued Suspension, the AB found
that DSU Article 17.10 must be read in context, particularly taking into account
DSU Article 18.2.28.

As mentioned earlier, DSU Article 18.2 provides that « […] nothing in this
Understanding shall preclude a party to a dispute from disclosing statements
of its own positions to the public […] ». Consequently if both parties to a

25 The full text of Article 17.10 of the DSU : « The proceedings of the Appellate Body shall be
confidential. The reports of the Appellate Body shall be drafted without the presence of the parties
to the dispute and in the light of the information provided and the statements made ».
26 See Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft,
28 Ibid.
dispute request open appellate hearings, they are putting into effect their choice to disclose statements of their own positions to the public and since Article 18.2 does not detail a means through which Members’ positions may be made public, this right can be exercised after or during the hearing. Furthermore, when reading Article 17.10 in conjunction with Article 18.2, the phrase « […] Nothing in this Understanding […] » should be taken to mean that not even Article 17.10 could preclude a party from disclosing its own positions to the public, including those made during an appellate hearing. The flipside to this argument is that parties could pave the way for a situation where, by mutual consent, parties to a dispute can override multilaterally agreed rules.

The AB comprehensively addressed the question of the relationship between DSU Articles 17.10 and 18.2 in a number of its procedural rulings. The AB agreed that by virtue of Article 18.2, parties have the choice to forgo confidentiality with regard to their statements. The AB also pointed out that the second sentence of Article 18.2 provides that « Members shall treat as confidential information submitted by another Member […] which that Member has designated as confidential », which would be redundant if Article 17.10 obliged parties to respect confidentiality with regard to all elements of the appellate proceedings. Furthermore, the last sentence of Article 18.2 ensures that the designation of confidentiality by one Member does not preclude the other from forgoing confidentiality. Thus, the AB confirmed that « Article 18.2 provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute ». The limitations of the confidentiality rule in Article 17.10 were also emphasized by the AB, taking into account elements essential to the appellate process such as the notices of appeal and AB reports (containing summaries of all parties’ arguments and often quotes) which are also disclosed to the public, concluding that « […] under the DSU, confidentiality is relative and time-bound ». Additionally, in the appeals for the disputes US – Shrimp (Thailand) and US – Customs Bond Directive, third parties, who were external to the dispute, were allowed to attend the consolidated oral hearing.

30 Ibid., para. 5.
Article 17.10 required absolute confidentiality, then the AB could not have authorized external third parties to observe the hearings.

The question of whether or not the AB is granted the necessary power to authorize open hearings also forms part of the debate. Proponents argue that Article 17.10 cannot preclude open appellate hearings because the DSU does not envision an AB oral hearing in the first instance, so the scope of this provision could not extend to a question relating to these hearings. In the same light, since the AB was « empowered » by DSU Article 17.934 to write its Working Procedures35 and to create the « oral hearing »36 which was not foreseen in the DSU, the AB also logically has the power to authorize an oral hearing that is open to the public.

In its first procedural ruling in the US/Canada - Continued Suspension case, the AB confirmed that in fact, « [t]he oral hearing was instituted by the Appellate Body in its Working Procedures, which were drawn up pursuant to Article 17.9 of the DSU. The conduct and organization of the oral hearing falls within the authority of the Appellate Body (compétence de la compétence) pursuant to Rule 27 of the Working Procedures. Thus the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the joint request of the participants as long as this does not adversely affect the rights and interests of the third participants […] »37.

The AB also addressed arguments that DSU Article 17.10 limits its powers to authorize the lifting of confidentiality. In the same procedural ruling, the AB clarified that « the confidentiality of the deliberations is necessary to protect the integrity, impartiality, and independence of the appellate process. In our view, such concerns do not arise in a situation where […] the Appellate Body authorizes the lifting of the confidentiality of the participants' statements in response to a joint request »38.

The issue of maintaining the confidentiality of third parties' submissions is another factor in the debate on open hearings. With regard to this aspect, the AB made an important distinction in its first procedural ruling, which it upheld in the five subsequent instances. The AB identified two relationships, one between the AB and the main parties to the dispute and the other between

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34 The full text of Article 17.9 of the DSU: « Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information ».  
36 Ibid., Rule 27.  
the third parties and the AB. The confidentiality requirement in the DSU is designed to protect these separate relationships, and the joint request of the main parties to forgo their confidentiality does not undermine the interests of the third parties or undermine the adjudicative function of the AB. The AB clarified, "the right to confidentiality of third participant's vis-à-vis the Appellate Body is not implicated by the joint request. The question is thus whether the request of the participants to forgo confidentiality protection satisfies the requirements of fairness and integrity that are essential attributes of the appellate process and define the relationship between the Appellate Body and the participants. The AB went even further to define the rights of third parties, emphasizing that their relationship to the dispute lies only in their interest in the systemic legal interpretation of provisions in the covered agreements, and thus they should not influence the manner in which confidentiality is dealt with in the relationship between the AB and the main parties to the dispute. In fact, "[...] third participants would have to identify a specific interest in their relationship with the Appellate Body that would be adversely affected [...]" should the open hearing be granted.

Thus, despite compelling arguments that both support and undermine the need to authorize open hearings, the AB has consistently adopted a broad interpretation of the relevant DSU articles in a manner which puts a ceiling on the application of confidentiality in the appellate process while defining the rights and relationships of the parties to the dispute. The next section will briefly address the most pertinent policy arguments put forth by WTO Members and academia.

B. Policy-Oriented Arguments

In addition to the specific legal arguments addressed by panels and the AB, it is also important to take into account the policy-oriented arguments that can be made both for and against the practice of open hearings.

By one view, the matter of open hearings was an issue of such importance that the decision should have been addressed by the WTO Membership as a whole, and not by a panel or the AB, arguably in excess of their mandates. Furthermore, given that negotiations had not yet been completed and consensus not yet reached within the framework of the DSU review, some argued that allowing a ruling on this issue would be the equivalent of taking a back-door and would effectively favor some members over others. The argument was based on the fact that the WTO is a Member-driven institution and thus it is solely up to the Members to decide whether or not to open panel

39 Ibid., para. 6.
40 Ibid., para. 9.
and appellate proceedings to the public. By this token, opening dispute
settlement hearings is a cross cutting issue that should have been addressed
across the WTO in its entirety, not concluded by a panel or the AB in one
dispute.

This was one of the few policy related arguments which the panel
addressed in its ruling in US/Canada – Continued Suspension, where it
emphasized that a panel’s mandate includes clarifying existing provisions of
the covered agreements in accordance with customary rules of interpretation
of public international law which is what it undertook without prejudice to
issues under negotiation in the DSU review process41.

Another argument put forth in the context of open panel hearings is that
panel authorization could have implications on budgetary issues,
interpretation into the official languages, and other necessary practices. The
main question involved how the panel proposed to undertake the additional
costs of opening the hearing to the public without the Budget Committee
having considered the matter. By the time the AB open hearings were
authorized, this argument no longer applied, as many of the procedural
aspects had been accounted for.

One of the key issues at the heart of the policy debate concerning AB
hearings is whether or not it would make sense for the AB to be barred from
doing what panels have been allowed to do for three years. Considering the
structure of the dispute settlement system in the WTO, with ad hoc panels, and
a standing permanent AB which often reverses, modifies and corrects panel
decisions, it could become awkward for the AB, as the « arbiter of last resort »
to not follow suit. This would also negatively impact the legitimacy of the
dispute settlement mechanism if oral hearings were open at the panel stage
and then closed at the appellate stage. As EHRING pointed out « the Appellate
Body is the official face of justice in the multilateral trading system and has a
unique authority and prestige »42. Thus, by allowing for open hearings at the
appellate level, the AB consolidated and confirmed the previous practice of
panels.

Another aspect of the policy argument supporting open appellate hearings
involves the benefits accruing to a number of parties including the Members
themselves, in addition to various members of civil society. In terms of the
benefits to Members themselves, open panel and appellate hearings would
allow a number of Member delegations to follow a dispute more closely
without being third parties. EHRING also points out the importance of the
Members themselves having confidence in WTO dispute settlement to the

41 Panel Report, US/Canada – Continued Suspension, para. 7.50.
42 EHRING,  « Public Access to Dispute Settlement Hearings in the World Trade Organization »,
internal stability of the institution. The governments of Members, as subjects of the legal order established by the dispute settlement mechanism, also must have confidence that the system does in fact hold all Members equally accountable to their rights and obligations in the covered agreements. By opening appellate hearings to the public, many Members that have not been third parties to disputes or engaged in their own disputes will have the opportunity to follow the entirety of the legal process from the panel stage through to the appeal. This would also serve as a valuable learning tool for developing countries, which would thus be able to benefit from following the process through to the appellate stage.

Finally, supporters of the practice of open hearings have pointed out that the practice could solidify the credibility of the WTO within the international community. In the early years of the WTO’s existence, representatives of civil society including, NGOs, academics, and journalists, consistently called for greater openness of the WTO dispute settlement mechanism. Proponents argued that open panel and appellate hearings could help to create confidence in the dispute settlement process, thus translating into confidence in the outcome of the proceedings and solutions for implementation. More specifically, when the dispute at hand addresses issues of great social concern, for example the protection of human and animal health and scientific advances, open hearings would be in line with the manifestation of public interest in the WTO.

IV. The Evolution of Open Panel and Appellate Hearings

The controversial nature of the issue of open hearings is also further reflected in the procedural and logistical response of the panels, AB and the WTO Secretariat, outlined in the next subsections of this paper.

A. Response of the Panels and the AB

In terms of open panel hearings, the 2005 merged dispute US/Canada - Continued Suspension was the first instance where the panel authorized a request for open panel sessions and later, for open hearings with scientific experts. It was a lengthy procedural process, lasting seven weeks, characterized by an extensive exchange of arguments between the parties, the third parties and the panel. In addition to questions posed by the panel, there were three rounds of written submissions and two organizational meetings between the panel and the parties. Subsequent panels further consolidated the
2005 success by always acceding to joint requests without entering into the legal analysis, thus streamlining the process.

The procedural response of the AB to requests for open hearings has been standardized since the first request in US/Canada - Continued Suspension. Since the latter case was the first instance where such a request was brought to the AB, the procedures were more comprehensive; however they did not vary much from the subsequently consolidated procedures. After receiving requests from the disputing parties to the dispute, the AB invited third parties to comment, in the case of US/Canada - Continued Suspension on the «admissibility» of opening appellate hearings, while in subsequent cases, it was more generally on the request and proposed logistical modalities. In the case of US/Canada - Continued Suspension, third participants were also given the opportunity to comment on the submissions made by other third participants. An oral hearing was subsequently held where the AB explored the issues relating to the joint request to open the hearings and then invited all parties to submit any further comments. As with the more recent cases, the AB made a separate procedural ruling summarizing the arguments of the parties and third parties, outlining the AB’s reasons for authorizing the public viewing of the proceedings and adopting additional logistical procedures in accordance with Rule 16(1) of the Working Procedures. In the more recent case of the arbitration proceedings, parties to the dispute US - Zeroing (EC) (Article 22.6 – US) also submitted a request for an open hearing, which was accepted by the arbitration panel on the basis of continuing efforts for increased transparency.

B. Response of the Secretariat

The domain of logistical procedures to accommodate the request for open hearings falls squarely within the hands of the WTO Secretariat. Typically, the same procedures apply to open panel, AB and arbitration hearings where once the authorization for an open hearing has been given, the Secretariat must

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44 Since the US/Canada – Continued Suspension case was the first where a request for an open appellate hearing was filed, the arguments of the parties, as expressed in their joint request and consequent commentary, are fully examined in the final AB report, whereas in the following instances, the arguments and subsequent comments of the parties are summarized in the Procedural Ruling attached as an Annex to these particular reports.


47 The full text of Rule 16 (1) of the Working Procedures states: « 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.»

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issue a notice of the oral hearing to the general public who is required to register in advance. Places are also reserved for delegates of WTO Members who wish to observe the proceedings. The oral hearings are typically open to public observation through simultaneous closed-circuit television, which is broadcast in a separate room. Preparations are also made to accommodate third parties who wish to maintain the confidentiality of their submissions.

In the first open panel hearing for the merged dispute US/Canada – Continued Suspension, the public was able to observe the entirety of the panel hearing, except for third party submissions that were deemed confidential. The session was broadcast through closed circuit television in three different languages in separate rooms. This gave the Secretariat the flexibility to control risks of interference and allowed for better seating plans. Over 200 people attended the first open panel hearing, eventually dropping to 60 people including a number of delegates from WTO Members. EHRING noted that « [...] there was no discernible effect on the conduct of the hearings, in particular no ‘trial by media’, no security or other incident, no additional pressure on the panelists or the parties, and no effect on the serenity and professionalism with which the litigators argued their case before the panel [...] »48.

In the subsequent open panel hearings in EC and US – Large Civil Aircraft, the practice varied slightly. In terms of registration, instead of publishing a public notice on the WTO website, the parties to the disputes themselves were charged with collecting public registrations. In these disputes, special accommodations were also made to protect highly sensitive business information in light of the insistence of the EC and the United States to remain as transparent as possible. The Secretariat opted to film the proceedings, and broadcast the non-confidential parts to the public the next day. Although it can be argued that these modalities do not reflect the same degree of transparency as simultaneous video broadcasting, this was the optimal solution given the available technical options and the fact that parties had designated parts of their submissions as confidential. In the panel hearing of EC – Bananas III (Article 21.5 – US), the public viewed the proceedings from the gallery in the same room because no other room was available.

With regard to third parties, panels have adopted different procedures in the instance where some third parties have indicated that their interventions are confidential. In the earliest cases, panels opted to keep the entire third party sessions closed, but more recent panels have given third parties the option to make public submissions. From a logistical perspective, that simply meant that third party sessions were divided into public and non-public time slots. In EC – Bananas III (Article 21.5 – US), a number of Members made their

48 EHRING (n. 42) p. 1025.
first public interventions including Belize, Cameroun, Colombia, Côte d’Ivoire, Dominica, the Dominican Republic, Ecuador, Jamaica, Japan, Nicaragua, Panama, Saint Vincent and the Grenadines, St Lucia and Suriname. However, in the US - Continued Zeroing dispute, Brazil, China, India, Korea and Mexico rendered confidential oral statements, while the third party session was open to public observation for Japan, Norway and Chinese Taipei to make their oral statements. More recently in Australia - Apples all the third parties made public oral statements, including Chile, EC, Japan, Pakistan, Chinese Taipei and the United States.

In terms of open appellate hearings, the same procedures applied. The policy of direct public notice and registration on the WTO website has been adopted. All the open hearings have been viewed via closed circuit television broadcast in a separate room, except for two disputes - US - Zeroing (Japan) (Article 21.5) and US - Bananas III (Article 21.5 - Ecuador II) (Article 21.5 - US) - where the appellate hearings were viewed from a separate building outside of the WTO premises. In the first case of open appellate hearings in US/Canada - Continued Suspension, accommodations were also made for third parties who wished to keep their submissions confidential, with the broadcast interrupted when Brazil and India made their oral submissions. On the other hand, it is interesting to note that by the second joint request for open appellate hearings in EC - Bananas III (Article 21.5 – US/Ecuador II), none of the third parties including Brazil, requested that their interventions remain confidential, and this led to the first entirely open appellate hearing\(^49\).

V. Conclusions : Future Developments

The aim of this Article was to set forth the current state of play of open panel, appellate and arbitration hearings. The evolution of open hearings from panels to the AB to arbitrations reflects the WTO’s continued efforts to respond to calls for transparency, both internally and externally. Nevertheless, these developments are still considered modest in the face of demands made by WTO Members, NGOs and civil society.

There is no doubt that dispute settlement in the WTO has evolved since the first request for open panel hearings in 2005. More importantly, the way in which open hearings are viewed by the Members themselves is evolving, as increasing experience serves to allay a number of their concerns. The continuation of this trend may be reflected at the negotiating table, hopefully by envisioning the inclusion of open hearings in discussions on DSU reform. The jurisprudence also stands to deepen its response to increasing requests for public hearings. The AB may eventually reverse its current practice so that

\(^{49}\) Ewing (n. 42) p. 1035.
instead of requests being required for open hearings, hearings will automatically be open to the public. An exception may arise if parties request a closed hearing for the purpose of protecting confidential business information or valid interests at risk. In terms of confidential business information, there are already a number of provisions in the covered agreements that specifically provide for this type of protection including Article 6.5 of the Anti-Dumping Agreement and Article 12.4 of the Agreement on Subsidies and Countervailing Measures. These allow panels and the AB to build on this framework of confidentiality. With regard to valid interests at risk, the AB might decide to apply the same rule it uses in defining the conditions upon which third parties can interfere in the authorization of open hearings: the party that invokes confidentiality must demonstrate the adverse effects of revealing certain information. However this specific development is not particularly likely in the near future.

From a procedural perspective, there is room for other options. For example, allowing the public to be admitted to the actual room where the hearing is being held could serve as an important attestation to the degree of transparency pursued by Members. There are also possibilities for simultaneous internet broadcasting, a practice that could ensure a wider range of viewers, particularly students, academics and citizens from developing countries. However, there are still concerns over the ability to record the hearings and whether this would lead to opportunities for altering statements and taking them out of context.

Openness and transparency in WTO dispute settlement has greatly increased since the early GATT days, thanks in no small part to the practice of public hearings. This practice has not only helped to demystify the public perception of WTO dispute mechanisms, it has provided Members with assurance that innovations in transparency will not pose an unwarranted obstacle to the smooth functioning of the dispute settlement system. This leaves future prospects for a greater degree of transparency highly likely.

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50 Articles 6.5 of the Anti-Dumping Agreement and Article 12.4 of the Agreement on Subsidies and Countervailing Measures provide: Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.