

# NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING

## FURTHER CONTRIBUTION OF THE UNITED STATES ON IMPROVING FLEXIBILITY AND MEMBER CONTROL IN WTO DISPUTE SETTLEMENT

This further contribution of the United States is divided into three parts: Part I introduces this contribution; part II recalls textual proposals that the United States is making in these negotiations; and part III sets out a suggestion for additional guidance for WTO adjudicative bodies.

### I. INTRODUCTION

In DSB discussions to date on the DSU, Members have re-emphasized that the central objective of the dispute settlement system should be the prompt resolution of disputes between parties. For that reason, Members have emphasized both the importance of ensuring that dispute settlement procedures facilitate resolution of a dispute and, as part of this approach, the need for flexibility in the system to allow parties to resolve disputes in a prompt manner. Members have indicated that it is important to retain the flexibility that already exists in the system. Members have also identified that there are areas that could benefit from additional flexibility.

At the same time, while Members have acknowledged the general effectiveness of the DSU, there have been concerns that some limitations in the current procedures may have resulted, in some cases, in an interpretative approach or legal reasoning applied by WTO adjudicative bodies (i.e., panels, the Appellate Body and arbitrators) that could have benefitted from additional Member review. Members have not always, during proceedings or in the adoption process for reports, had a full opportunity to ensure that the findings of the adjudicative bodies will contribute to resolving the disputes.

Under the WTO dispute settlement system, adoption of panel and Appellate Body reports is quasi-automatic under the reverse consensus rule. However, the reasoning and findings of reports may at times go beyond what the parties consider to be necessary to resolve the dispute, or, in some circumstances, may even be counter-productive to resolution of the dispute. It is proposed that there should be mechanisms that would enhance the parties' flexibility to resolve the dispute and Members' control over the adoption process.

Accordingly, panel and Appellate Body reasoning and findings should not go beyond those aspects of the dispute that the complainant and respondent parties consider necessary to resolve the dispute. Some Members have indicated that sensitive areas that could have benefitted from additional opportunity for Member discussion and review include, for example:

- a) situations where the relevant WTO text does not address an issue, leading to concerns over whether an adjudicative body might "fill the gap" and consequently add to or diminish rights and obligations under the relevant agreement instead of clarifying those rights and obligations;

- Gaps may reflect a situation where there was a limit upon what negotiators were able to agree. Alternatively, gaps may reflect an absence of any consideration by negotiators of the particular detail at issue.
- b) situations in which legal concepts outside the WTO texts have been applied in a WTO dispute settlement proceeding, including asserted principles of international law other than customary international law rules of interpretation.

Members may wish to consider ways they can provide additional guidance to adjudicative bodies, both in the context of the current negotiations and during individual disputes, including through procedures which strengthen Member control and flexibility. At the same time, Members may wish to consider whether the current DSU provides sufficient assurance that the members of panels have the appropriate expertise to appreciate the issues presented. In doing so, Members can also enhance their ability to resolve disputes at any time in the process.

## II. PROPOSED TEXTUAL LANGUAGE

In these negotiations (see TN/DS/W/52) the United States proposes a number of textual amendments to provide additional flexibility and Member control in WTO dispute settlement. These are:

- a) *making provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report.*

### Proposed text:

Paragraph 5 of Article 17 is amended as follows:

- “5. (a) As a general rule, the proceedings shall not exceed ~~60~~ 90 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within ~~60~~ 90 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ~~90~~ 120 days.
- (b) Following the consideration of submissions and oral arguments, the Appellate Body shall issue an interim report to the parties, including both the descriptive sections and the Appellate Body's findings and conclusions.

Within a period of time set by the Appellate Body, a party may submit a written request for the Appellate Body to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the Appellate Body shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final report and circulated promptly to the Members. The final Appellate Body report shall include a discussion of the arguments made at the interim review stage.”<sup>1</sup>

[NOTE: to ensure that the overall time frame for the dispute settlement process remains the same, 30 days could be reallocated to the Appellate Body’s review from other phases of the process, for example by providing that a panel will be established at the first DSB meeting at which the request is considered.]

- b) *providing a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that are not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference*

Proposed text:

Paragraph 7 of Article 12 is amended by inserting after the second sentence the following new sentence:

“The panel shall not include in the final panel report any finding, or basic rationale behind a finding, that the parties have agreed is not to be included.”

Paragraph 13 of Article 17 is amended to read as follows:

“Where the parties to the dispute have failed to develop a mutually satisfactory solution, the Appellate Body shall submit its findings in the form of a written report to the DSB. In such cases, the report of the Appellate Body shall set out the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.”<sup>2</sup> The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. The Appellate Body shall not include in the final report any finding, or basic rationale behind a finding, that the parties have agreed is not to be included.”

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<sup>1</sup> [NOTE TO READERS: this proposed language replicates the language in DSU Article 15.2.]

<sup>2</sup> [NOTE TO READERS: the proposed new sentences replicate the language in the first two sentences of DSU Article 12.7.]

- c) *making provision for some form of “partial adoption” procedure, where the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute*

Paragraph 4 of Article 16 is amended to read as follows:

“4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting<sup>3</sup> unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. However, the DSB may by consensus decide not to adopt a finding in the report or the basic rationale behind a finding. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.”

Paragraph 14 of Article 17 is amended as follows:

“14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.<sup>4</sup> However, the DSB may by consensus decide not to adopt a finding in the report or the basic rationale behind a finding. A party to the dispute does not need to accept any finding or basic rationale that the DSB has not adopted. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.”

DSB decision on the procedure for partial adoption:

“A Member proposing that a finding, or basic rationale behind a finding, in a panel or Appellate Body report should not be adopted by the Dispute Settlement Body shall submit the proposal in writing to the Dispute Settlement Body no later than 3 days (or the WTO working day following the 3<sup>rd</sup> day if the 3<sup>rd</sup> day is a non-working day for the WTO) after the issuance of the airgram convening the meeting at which the report is proposed to be considered.<sup>5</sup> The Member shall specify in the proposal the finding, or the basic

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<sup>3</sup> [No change proposed to footnote in current DSU.]

<sup>4</sup> [No change proposed to footnote in current DSU.]

<sup>5</sup> In the case of a panel report, the Member shall submit the proposal no later than 3 days (or the WTO working day following the 3<sup>rd</sup> day if the 3<sup>rd</sup> day is a non-working day for the WTO) after the issuance of the airgram convening either: (1) the meeting at which the panel report is proposed to be considered if no party has filed a notice of appeal; or (2) the meeting at which the

rationale, behind a finding at issue and give a brief description of the reason not to adopt.”

- d) *providing the parties a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue to work on resolving the dispute*

Paragraph 12 of Article 12 is amended as follows:

“12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. The panel shall suspend its work where the parties so agree. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, ~~paragraph 1 of~~<sup>6</sup> Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.”

In addition to the amendment under item (a) above, paragraph 5 of Article 17 is amended by adding at the end:

“(c) The Appellate Body shall suspend its work where the parties so agree. In the event of such a suspension, the time-frames set out in this paragraph, Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended.”

- e) *ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute*

Paragraph 2 of Article 8 is amended as follows:

“2. Panel members should be selected with a view to ensuring the independence of the members, expertise to examine the matter at issue in the dispute, a sufficiently diverse background and a wide spectrum of experience.”

- f) *providing some form of additional guidance to WTO adjudicative bodies concerning i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and ii) rules of interpretation of the WTO agreements.*

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panel report together with the Appellate Body report is proposed to be considered if a party has filed a notice of appeal.

<sup>6</sup> [NOTE TO READERS: proposed deletion of “paragraph 1 of” is to correct an error in the current DSU since Article 20 only has one paragraph.]

[To be supplied after further discussions with Members.]

Members have been engaged in the further discussions envisioned in item (f) of the proposal. Based on those discussions, it is proposed to provide additional guidance to WTO adjudicative bodies in some areas. In this further contribution, the following draft parameters are proposed.

III. DRAFT PARAMETERS CONCERNING THE USE OF PUBLIC INTERNATIONAL LAW IN WTO DISPUTE SETTLEMENT

In light of the questions posed in TN/DS/W/74 and the useful and enlightening discussion with other Members to date, it is suggested that the following parameters reflect the proper role of public international law in WTO dispute settlement:

***Areas in which public international law plays a role in WTO dispute settlement***

Members recognize that public international law plays an important role in WTO dispute settlement. In particular, there are three important means through which public international law plays a role.

First, the *Marrakesh Agreement Establishing the World Trade Organization* is itself public international law.

Second, in Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) Members recognize with respect to the covered agreements that the WTO dispute settlement system serves “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” The WTO Appellate Body recognized that this description in Article 3.2 of the role of the WTO dispute settlement system “reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”<sup>7</sup>

Those customary rules of interpretation of public international law are reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties, including as stated in Article 31(3)(c) any relevant rules of international law (i.e., rules relevant to treaty interpretation) applicable in the relations between the parties.

- c) It is useful to note that in the commentary of the International Law Commission concerning Articles 31 and 32 of the Vienna Convention, the Commission observed that it is not possible to identify principles of international law that apply in all instances. Rather, this must be examined on a case-by-case basis. The Commission stated:

“Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts.... Thus it would be possible to find sufficient evidence of

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<sup>7</sup> *United States - Standards for Conventional and Reformulated Gasoline* (WT/DS2/AB/R), page 17.

recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.”<sup>8</sup>

- d) It is also important to identify the sources from which the rules relevant to treaty interpretation are obtained. An international instrument that is not in force embodies relevant international rules only to the extent that it reflects principles of customary international law. An international instrument that is in force, in addition to possibly reflecting principles of customary international law, may also embody relevant international rules as between the parties to that instrument, but not to non-parties.

Third, the covered agreements include numerous references to other public international law. Some examples include Article XV:4 of the *General Agreement on Tariffs and Trade 1994* (referring to the Articles of Agreement of the International Monetary Fund) and Article 2 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (referring to the Paris Convention, Berne Convention, Rome Convention and Treaty on Intellectual Property in Respect of Integrated Circuits).

### **Limitations on the use of public international law in WTO dispute settlement**

Recognizing that international dispute settlement fora vary regarding the breadth of their adjudicatory authority, WTO dispute settlement under the DSU is focused on the adjudication of rights and obligations under specified agreements. These “covered agreements” are listed in Appendix 1 of the DSU. While other international law might properly play a role in WTO

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<sup>8</sup> Report of the International Law Commission on its eighteenth session, 4 May to 19 July 1966 (A/6309/Rev.1). Articles 31 and 32 were at that time Articles 27 and 28.

dispute settlement fora, it is not the function of WTO dispute settlement to adjudicate rights and obligations beyond those in the covered agreements.

**Consideration of procedural approaches of other adjudicative bodies**

In addition, Members recognize that each WTO adjudicative body is tasked with managing its own proceedings, including developing its own working procedures. It is natural that in managing its proceedings, a body may wish to consider how other adjudicative bodies have approached similar procedural issues, including other international adjudicative bodies as well as those in an individual Member. Ultimately, however, such consideration is a question of the body exercising its discretion as to how to manage its proceedings; such consideration is not a question of interpreting a covered agreement in accordance with public international law.