

FLEXIBILITY AND MEMBER CONTROL

Revised Textual Proposal by Chile and the United States

Communication from Chile and the United States

The following communication, dated 30 May 2007, is being circulated at the request of the delegation of Chile and the United States.

Following further informal discussions with delegations in the context of the Special Session of the Dispute Settlement Body, Chile and the United States have revised the proposed text for items (a) through (e) of their proposal on flexibility and Member control. Those revisions have particularly benefitted from three simple guidelines that can help clarify and improve agreement text: (1) use the same term throughout to mean the same concept, (2) wherever possible, use singular rather than plural terms, and (3) avoid the use of the passive voice.

The original textual proposal was circulated as TN/DS/W/52 and reproduced in TN/DS/W/82. In this document, additions to the existing text of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* are indicated through double-underlining, and deletions are indicated through strike-through. In addition, changes from the original textual proposal are indicated in bold.¹

- (a) *interim reports at the Appellate Body stage*

Article 17

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 ~~circulate~~**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 ~~circulate~~**submit** its report. In no case shall the proceedings exceed ~~90~~ 120 days.

¹ Additional conforming amendments, such as corrections to Article references, may be needed or appropriate once the substantive text has been agreed upon.

(b) Following the consideration of submissions and oral arguments, the Appellate Body shall issue an interim report to the parties **to the dispute**, 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 **to the dispute** 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 **to the dispute**, the Appellate Body shall hold a further meeting with the parties **to the dispute** on the issues identified in the written comments. If **no party to the dispute submits comments** within the comment period, the interim report shall be considered the final report and circulated promptly to the Members. The **Appellate Body shall include in its final report** a discussion of the **comments** made at the interim review stage.

- (b) *providing a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report*

Article 12

7. Where the parties to the dispute ~~fail~~**have failed** to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the ~~report of a~~ panel shall set out **in its report** the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. The panel shall not include in its report circulated to the Members any finding, any finding together with its basic rationale, or a basic rationale behind a finding (where there is more than one basic rationale behind the finding), that the parties to the dispute have agreed is not to be included. Where ~~a settlement of the matter among the parties to the dispute has been found~~have reached a solution to the matter, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

Article 17

13. Where the parties to the dispute **fail** 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 Appellate Body shall set out in its report** the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. The Appellate Body shall not include in its report circulated to the Members any finding, any finding together with its basic rationale, or a basic rationale behind a finding (where there is more than one basic rationale behind the finding), that the parties to the dispute have agreed is not to be included. Where the parties to the dispute have reached a solution to the matter, the report of the Appellate Body shall be confined to a brief description of the case and to reporting that a solution has been reached, and the report of the panel shall be void and of no legal effect. Where the parties to the dispute have reached a solution to the appeal: (a) the report of the Appellate Body shall be confined to a brief description of the case and to reporting that a solution to the appeal has been reached, and (b) if a party to the dispute so requests, the DSB shall adopt the panel report within 21 days of circulation of the Appellate Body report, unless the DSB decides by consensus not to adopt the report.

- (c) *"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*

Article 16

4. Within 60 days after the date of circulation of a panel report to the Members, the DSB shall adopt the report ~~shall be adopted at a DSB meeting~~⁷ 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.² The DSB may by consensus decide not to adopt a finding in the report or a 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.

Article 17

14. The DSB shall adopt 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.³ The DSB may by consensus decide not to adopt a finding in the report or a basic rationale behind a finding. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

(See also proposed DSB decision below.)

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 3rd day if the 3rd 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.⁴ The Member shall specify in the proposal the finding, or the basic rationale behind a finding, at issue and give a brief description of the reason not to adopt."

² [No change proposed to footnote 7 in current DSU:] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

³ [No change proposed to footnote 8 in current DSU:] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

⁴ 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 3rd day if the 3rd 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 panel report together with the Appellate Body report is proposed to be considered if a party has filed a notice of appeal.

- (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*

Article 12

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 to the dispute 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 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.

Article 17

In addition to the amendment under item (a) above:

(c) The Appellate Body shall suspend its work where the parties to the dispute 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*

Article 8

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