

**NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF
THE DISPUTE SETTLEMENT UNDERSTANDING ON
IMPROVING FLEXIBILITY AND MEMBER CONTROL
IN WTO DISPUTE SETTLEMENT**

Textual Contribution by Chile and the United States

The following communication, dated 11 March 2003, has been received from the Permanent Missions of Chile and the United States.

- (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.¹

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

- (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.”² 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.”

- (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 meeting³ 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.⁴ 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.”

² [NOTE TO READERS: the proposed new sentences replicates the language in the first two sentences of DSU Article 12.7.]

³ [No change proposed to footnote in current DSU.]

⁴ [No change proposed to footnote in current DSU.]

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.⁵ 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.”

- (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~~⁶ 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.”

[Further elaboration could be developed in discussions with Members.]

⁵ 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^d day if the 3^d 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.

⁶ 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.]

- (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*

[To be supplied after further discussions with Members.]
