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Dispute Settlement Body Special Session

SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

REPORT BY THE CHAIRMAN, AMBASSADOR RONALD SABORÍO SOTO

1 INTRODUCTION

1.1. The objective of this report is to provide an overview of recent work of the Special Session of the Dispute Settlement Body and to present to Members my overall assessment of the state-of-play and way forward towards concluding the negotiations.

1.2. My sense remains, as previously reported to the Membership[1], that the work conducted to date provides a solid foundation for a successful conclusion of the negotiations. Members have a shared responsibility to ensure that meaningful improvements and clarifications to the DSU can be agreed as soon as possible, for the benefit of the entire Membership. The time has come for us to make decisions. This will however require further efforts by all participants to confirm the elements on which convergence can be achieved and to translate this into agreed legal text.

1.3. Since this negotiation started, the number of disputes initiated under the DSU has doubled, to now closely approach the 500 mark[2], and two thirds of the Membership have taken part in dispute settlement proceedings.[3] As a result, vast experience has been accumulated under the DSU over the 20 years since the creation of the WTO, covering all phases of the dispute settlement process. We have learned from this experience how valuable the dispute settlement procedures embodied in the DSU are to Members, and by extension to the functioning of the multilateral trading system as a whole.

1.4. The work in the negotiations has reflected this experience and the lessons drawn from it. The remarkable success of the dispute settlement system has brought with it certain challenges and made it necessary to consider how the management of dispute settlement proceedings can be improved. The urgency of this task was recently stressed by the Director-General and acknowledged by Members.[4] This is an integral part of the context against which this negotiation takes place and makes a successful outcome all the more timely and important.

1.5. All Members share a common interest in systemic improvements to the DSU that would increase the effectiveness of dispute settlement as a key instrument of predictability and security in the multilateral trading system. This is true for all Members alike, whether they have been frequent users of procedures under the DSU or not.

1.6. Members today have an important opportunity, and responsibility, to strengthen the institutional foundations of the WTO by fulfilling the Ministerial mandate to improve and clarify the DSU.[5] Doing so will ensure that WTO dispute settlement can continue to serve the Membership effectively and contribute to the security and predictability of the multilateral trading system into the future.

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[1] See TN/DS/26, 30 January 2015.
[2] As of 31 July 2015, 497 disputes had been initiated.
[3] See Statement by the Director-General regarding dispute settlement activities, 26 September 2014, at WT/DSB/M/350.
[4] *Ibid*.
[5] WT/MIN(01)/DEC/1, para. 30.

2 OVERVIEW AND GUIDING PRINCIPLES

2.1. In my last formal report to the TNC mentioned above, I described in some detail our work until the beginning of this year. Since then, work has continued to focus on searching for solutions at the conceptual level and for flexibilities that would allow remaining gaps to be bridged. The aim of this work has been to find convergence across all areas around realistic and balanced improvements and clarifications to the DSU.

2.2. It has been often expressed that a guiding principle in these negotiations should be to "do no harm" where the system currently functions well. Our mandate is to agree on "improvements and clarifications": it is understood that no amount of "trade-offs" will lead participants to accept specific outcomes that they would consider detrimental to the functioning of the system. Rather than "trade-offs", I have urged participants to think in terms of overall balances, for an outcome reflecting the collective view of the Membership as to what will improve and clarify WTO dispute settlement procedures.

2.3. Our recent work has been organized around 12 themes.[6] Beyond these individual areas of work, however, the proposals under discussion have spanned across all phases of the proceedings. Further, what is at stake is an overall balance that, while taking into account any systemic interests, ensures that the procedures as a whole can operate as effectively as possible. This involves finding outcomes based on a balance across all stages of the proceedings, and assessing the potential for various elements taken together to constitute "improvements and clarifications" for the benefit of all Members.

2.4. In the conduct of further work, the focus must now be on solutions that would be both achievable in light of the concerns expressed by various participants and workable in practice. This requires participants to be open to alternative ways of achieving their objectives and to take into account the views and concerns expressed by others. We should also draw upon the extensive experience and practices already in place under the DSU where this is instructive for our negotiation.

2.5. A number of proposals under consideration aim to address procedural issues that have given rise to litigation. Multilateral clarification of such issues has the potential to enhance efficiency by avoiding unnecessary uncertainty and litigation of procedural issues. At a time when the system is under significant pressure, this consideration should be an integral part of Members' assessment of the potential benefits that may arise from these negotiations.

2.6. The value of codifying existing practices, where agreeable to all, should also not be underestimated. An explicit endorsement and consolidation of procedural solutions developed through practice would provide greater predictability and security for all Members. It would also lead to efficiency gains and better allocation of resources by averting the need for repeat consideration of such issues in individual disputes.

2.7. Finally, participants should be guided by the considerations outlined in my 2008 Report[7], including limiting changes to what is necessary to achieve the intended purpose, ensuring drafting consistency throughout the DSU, and bearing in mind the procedural coherence of the system as a whole.

3 STATE OF PLAY AND WORK AHEAD

3.1. In this section, I present my assessment of what I see as a basis for further work, building on the work to date. In earlier phases, we conducted extensive work based on draft legal text on all issues.[8] Building on this text-based work, recent work has focused on bridging outstanding gaps at the conceptual level. It is against this background that I am setting out my assessment in this section – describing where we are in closing those gaps at the conceptual level. Further work will however need to involve a return to text-based discussion as soon as possible, to consolidate any convergences achieved at the conceptual level.

[6] See TN/DS/25, Appendix A, paras. 15-16.
[7] *Ibid*, paras. 10-11.
[8] See TN/DS/25, TN/DS/26, and JOB/DS/14.

3.2. My assessment and any suggestions put forward below are presented under my own responsibility, without prejudice to participants' positions. Ultimately, it will be for Members collectively to determine what can be part of a successful outcome.

3.3. In presenting this assessment, I am guided by the interests and needs expressed by all participants throughout these negotiations. I am also guided by the assumption that the shared objective is to achieve an ambitious yet realistic outcome that reflects the interests of all Members and can bring about meaningful improvements to the manner in which disputes are administered under the DSU.

3.4. I consider that certain issues are sufficiently mature to be part of a final outcome and do not require active work at this stage.[9] In our future work, therefore, we need to focus on those other elements under consideration that could secure a balanced outcome at a level of ambition matching the efforts invested by all in our negotiation.

3.5. Beyond the general consideration that improvements or clarifications to the DSU could provide systemic efficiency gains for all Members, various dimensions have emerged from the discussions that may inform Members' shared view of the proper balances to be achieved. I have taken these into account in my assessment below. This includes a consideration of the respective roles of parties to the dispute, interested Members as third parties, other Members, and the wider public. It also entails consideration of the respective roles of parties to the dispute in driving the process, of independent adjudicators in shaping their rulings, and of the DSB as the institutional decision-making forum in which Members may engage on issues of systemic interest. There should also be a reflection of the interests of all Members, including those facing greater constraints in participating in the system effectively.

3.6. To facilitate an overall perspective on proposed improvements and clarifications in their proper context, specific issues are presented below on the basis of procedural stages under the DSU, rather than according to the 12 themes mentioned above.

3.7. Where mature draft text is already available reflecting elements of convergence, this is indicated. Where further work is required to develop such text in line with elements of convergence, this is also identified. Draft legal text presented and discussed in earlier phases of the negotiations will often provide a useful basis for translating existing and future conceptual convergence into final agreed text.

3.8. In general, the suggested work described below does not prejudge the legal form through which specific improvements or clarifications would be introduced. It remains to be determined which of these could be addressed through DSB action, rather than formal amendments to the DSU.

3.1 Consultations

3.9. Regarding the **time-frame for consultations**, the overall objective has been to allow the proceedings to advance as promptly as possible following the initiation of the dispute, while allowing sufficient time, in particular for developing country respondents, to engage in meaningful consultations and to prepare for potential subsequent panel proceedings. Based on recent work in this area, my understanding is that there is support for allowing consultations to start at the latest 45 days after the request for consultations, rather than after 30 days, where the responding party is a developing country Member. Further work could focus on finalizing legal text reflecting this.

3.10. Regarding conditions for interested Members to be **joined in consultations as third parties**, earlier work has led to convergence[10] around specific text[11] to reflect two shared objectives, namely (i) the automatic acceptance of requests to be joined in consultations in the absence of a timely rejection notification by the respondent; and (ii) transparency on all responses to such requests – whether negative or positive. The text developed also assumes the continued issuance of a Secretariat document with information in respect of accepted third parties.

[9] See JOB/DS/19, p. 1.
[10] See TN/DS/26, Annex 2, para. 785.
[11] Article 4.11(b), JOB/DS/14, p. 3.

3.11. My understanding is that there is also support for facilitating more efficient consultations, including for developing country Members, by promoting **advance questions** being sent in preparation for consultations, e.g. 7 days in advance. As regards **the venue of consultations**, there is support for allowing a developing country respondent to request that the consultations be held in its capital, or if that is not practicable for the complainant, through videoconference. Further work could focus on draft legal text to reflect these elements.

3.2 Panel proceedings

3.12. The **establishment of panels** at the first meeting at which they are considered by the DSB could bring efficiency gains for the system. However, at this point, there does not appear to be convergence around this concept, primarily due to concerns over the need to have sufficient time to prepare for the panel proceedings that follow. Such concerns could be addressed at least partly if the timeframe for the presentation of the respondent's first written submission were adapted, as discussed below. Consideration might also be given to panel establishment at the first DSB meeting but extending the minimum time required before a panel request may be considered by the DSB.

3.13. On **panel composition**, convergence reached to clarify the **overall combination of expertise** required in the composition of panels is already reflected in mature draft legal text.[12] We have also extensively discussed possible improvements to the **process for selecting panelists**. While there is support for this objective, it has not been possible, to date, to find convergence around the proposed mechanism as presented. In this context, it has been suggested that the panel composition process could be facilitated if Members agreed to ease the restrictions on **non-governmental nationals of third party Members** serving as panelists. To the extent that participants would consider this to be useful, draft legal text would need to be developed.

3.14. With respect to the **timetable for panel proceedings**, my understanding is that there is support for rebalancing the timing of first written submissions under the indicative timetable in Appendix 3, by reducing the period for the complainant's first written submission (e.g. to 1-2 weeks) and ensuring that more time is allocated for the preparation of the respondent's first written submission (e.g. 4-6 weeks). There is also support for requiring **panel proceedings to be suspended** upon joint request of the parties to facilitate the negotiation of a mutually agreed solution between them[13], and mature text is available to reflect this.[14]

3.15. With respect to **third party rights in panel proceedings**, two aspects have been considered: (i) the conditions for expressing third party interest; and (ii) the level of third party rights to be granted to those Members who have expressed such interest.

3.16. My understanding is that there is support for codifying the current **10-day rule** for notifying third party interest, provided that the flexibility remains for **later notifications** to be considered. Work remains to clarify through draft legal text the exact role of the parties and the panel in considering such notifications, taking into account any linkages to panel composition, including the implications of potentially easing the selection of non-government third party nationals as panelists.

3.17. There is also support for enhancing the **rights to be accorded to third parties** to include, in addition to the current level of default rights under the DSU: (i) presence at the entirety of both substantive meetings with the panel; and (ii) the right to receive all written submissions of the parties prior to the panel's interim report. At the same time, the opportunity for the panel to grant additional third party rights (such as enhanced "active" participation rights), upon third party request and following consultation with the parties, could be maintained.

3.18. There is also broad support for the introduction in the DSU of language to require panels to adopt procedures for the **protection of strictly confidential information** (SCI), if requested by a party. Detailed text has been considered in this respect, and further work could focus on finalizing such text. In light of concerns expressed, the definition of the type of information to be

[12] TN/DS/26, Annex 2, paras. 334-335 and Article 8.2, JOB/DS/14, p. 4.
[13] TN/DS/26, Annex 2, para. 19.
[14] Article 12.12 JOB/DS/14, p. 7.

covered under such procedures and other operational details might be left to be determined on a case-by-case basis, possibly drawing on an indicative default procedure.

3.19. With respect to the proposal to allow **public observation of panel meetings** (subject to SCI protection), various sensitivities remain, and it has been suggested that an incremental approach could be pursued. On that basis, further work could focus on identifying flexible solutions.

3.20. To date, panel meetings have been opened on an *ad hoc* basis, upon agreement of the parties in individual disputes.[15] This level of openness could be a good starting point for consolidating current practices. Requiring panels to open their meetings to public observation where the parties agree could provide greater certainty than is achieved now on an *ad hoc* basis, while preserving the flexibility that is considered necessary by a number of participants. The specific modalities of hearings open to public observation could be clarified through standardized procedures or left for the panel to define in consultation with the parties and in light of the particular circumstances of the case.

3.21. This issue could also be considered as part of an overall balance of interests between the participation rights of Members and access of non-Members. An incremental approach could also take into account the view that Members may have a particular interest in following developments in WTO disputes. In this light, consideration could be given to **opening panel meetings to Members,** in addition to the *ad hoc* opening of meetings to the public.

3.22. Discussions on the **publicity of submissions** involve similar considerations, and here too, a realistic solution could be based on an intermediate option involving neither immediate full access to all documents, nor complete confidentiality of all submissions. The DSU already embodies a requirement to provide, upon a Member's request, a non-confidential summary of the information contained in written submissions that could be disclosed to the public.[16] Panel reports themselves also contain summaries of the arguments presented by parties and third parties. Therefore, what is at stake is primarily the timing and form in which information becomes available, rather than a decision to make public information that would otherwise remain permanently confidential. A solution on this issue could address: (i) the range of documents concerned (for example written submissions, non-confidential summaries); (ii) practical modalities for making these documents available without additional burdens on submitting Members; and (iii) the moment at which various documents could become publicly available (during the proceedings or, at the latest, at the time of circulation of the report).

3.23. **Unsolicited *amicus curiae* briefs** remain a sensitive issue. To date, non-Members have no recognized entitlement to file unsolicited *amicus* briefs or to have these considered by panels; at the same time, panels have not been prevented from accepting such briefs on an *ad hoc* basis.[17] This leaves a degree of uncertainty as to how such filings may be received and approached in a given case. In particular, there is currently no *a priori* limitation on the timing, length, or procedures for filing an *amicus* brief, which can be a source of disruption in the proceedings.

3.24. There is limited common ground among participants that only parties and third parties have the right to present submissions and be heard in panel proceedings. However, views are opposed on the general acceptability of unsolicited briefs. In light of this, I see no basis to develop a general solution at this point. In the absence of such general solution, participants might consider whether there is readiness to confirm the limited common ground and explore means to assist panels facing unsolicited amicus briefs on an *ad hoc* basis.

3.25. Text[18] was developed in earlier phases to allow the **final report of the panel** to be made available in its original language at the time of its issuance to the parties, without affecting the timelines for adoption of the report. Nonetheless, recent discussions have shown outstanding concerns for some participants about the availability of panel reports in all three WTO languages.

[15] As of 31 July 2015, panel meetings have been opened to public observation in 22 original and compliance disputes.

[16] See Article 18.2 of the DSU.

[17] As of 31 July 2015, panels have referred to receiving one or more unsolicited *amicus curiae* briefs in 33 original and compliance disputes.

[18] See TN/DS/25, p. A-24 and JOB/DS/1, p. 7.

3.3 Appellate Body proceedings

3.26. It is understood and endorsed that one of the objectives in respect of **SCI protection** would be to ensure continuity in the protection of information beyond the panel stage, to cover also appellate (and any subsequent) proceedings. Accordingly, the solutions to be finalized in regard to SCI protection at the panel stage would also cover subsequent stages of WTO dispute settlement.

3.27. Many participants would value the opportunity for Members to notify a **third party interest** for the first time at the appellate stage. This would allow Members' views to be heard in respect of legal issues under appeal that they may not have been able to anticipate on the basis of the panel request, and thus enhance Members' participation in, and access to, WTO dispute settlement. However, some concerns remain, in particular in relation to the potential impact on the management of the proceedings for both the Appellate Body and the parties. As suggested in the discussions, the practical details of managing potential multiple third participants could be left to the Appellate Body to clarify through its own Working Procedures. If it is considered necessary, general principles could be developed to ensure that the Appellate Body takes due account of the parties' interests in the organization of its work with third participants.

3.28. Favourable consideration has been given to the possibility of **suspending appellate proceedings** upon joint request of the parties, in the interest of facilitating the negotiation of a mutually agreed solution between the parties. Further work could focus on text clarifying the exact terms and conditions under which this could be done. Specifically, it has been suggested that a time limit should be placed on this opportunity (for example at the latest by the time of the oral hearing) as well as on the duration and possibly the number of instances of such suspension (for example a maximum of 6 months only once) in order to address any implications for the efficient management of appellate work in a predictable manner.

3.29. There is currently no **remand** mechanism available in the DSU to complete the analysis of claims left unresolved at the end of the original appellate proceedings.[19]

3.30. Recent work has allowed important progress toward clarifying the essential features of a possible mechanism to allow unresolved issues to be addressed on an expedited basis and avoid the initiation of entirely new proceedings for this purpose. The following elements have been identified as a possible basis for a solution:

- the Appellate Body would finalize and circulate its report, identifying any issues for which remand would be available;
- the Appellate Body would be prevented from making findings and recommendations on issues that risk being modified after completion of the remand proceedings;
- only the complaining party would have the right to initiate remand, to address only those issues identified by the Appellate Body;
- the remand panel would make all necessary factual and legal findings and circulate a final remand report;
- the remand panel report would be subject to appeal; and
- the initial and remand panel and Appellate Body reports would be subject to single adoption.

3.31. This combination of elements would be intended to address in particular concerns about the time-frame implications of remand as well as the need to ensure the greatest possible level of clarity and security in the mechanism. Allowing the remand panel to complete both the relevant factual and legal analyses, and deferring the adoption of all recommendations and rulings until

[19] To date, the Appellate Body explained that it has been able to "complete the analysis" in 25 disputes. In 31 disputes, the Appellate Body explained that it could not complete the analysis. For a description of the types of situations in which the Appellate Body cannot complete the analysis, see for example the Appellate Body Reports in *Canada – Feed-in Tariff Program / Renewable Energy* at paragraph 5.224.

completion of the remand procedure, would bring the procedures closer to known DSU processes. Restricting the initiation of remand to the complainant would also eliminate the risk of dilatory tactics by the respondent, since it would be for the complainant to decide whether to pursue the remand issues and which remand issues identified by the Appellate Body to pursue, thus retaining some control over any associated additional time for the completion of the proceedings.

3.32. While there is significant support for the introduction of such mechanism to facilitate a full and prompt resolution of disputes, it has always been clear that convergence on this issue would require a high level of assurance that no unintended consequences would arise in the proceedings. In particular, there remains some concern as to how remand may affect the overall flow of the proceedings, including the Appellate Body's practice in relation to completing its analysis and the risk of an endless loop of litigation through multiple remands. These concerns will need to be addressed if remand is to be introduced. This might be done for example by a clear affirmation by the Membership that it encourages the Appellate Body to complete its analysis wherever possible, in the interest of a prompt and full dispute resolution, and by limiting the opportunity for remand to a single recourse per dispute. Further work on this issue could focus on developing draft text reflecting the elements above, assessing how they would operate, and confirming whether they could provide a sound basis to address this issue.

3.33. With respect to **open hearings and the publicity of submissions**, the considerations and options for increased transparency at the panel stage may be similarly applied to the appellate stage. This could entail opening Appellate Body meetings to Members and, where the parties to a dispute agree, to public observation. A solution addressing the documents to be made available at the panel stage, as well as the timing and modalities for doing so, might also be extended to appellate proceedings.

3.34. Similar to the panel stage, there has been discussion of the possibility of clarifying the treatment of **unsolicited *amicus* briefs** submitted to the Appellate Body. In addition to the important differences of views existing in relation to such briefs in general, their relevance at the appellate stage has been questioned. Given this context, at this point, I see no basis to develop a general solution to address this issue at the appellate stage.

3.35. The possibility of introducing **interim review** at the appellate stage has also been discussed, but concerns have been expressed about the intended scope of such review and its potential impact on the Appellate Body's exercise of its independent adjudicating function. As a result, I do not perceive a clear basis for achieving convergence on this proposal in its current form. Concerns about re-litigation of issues decided by the Appellate Body might be addressed by exploring appropriate procedural safeguards. To the extent that the underlying interest is to allow parties to a dispute the opportunity to express their views on precise aspects of Appellate Body rulings that they would disagree with, it has been suggested that this could be achieved through enhanced mechanisms for the parties to express their views on the report. For example, it may be explored whether the final report of the Appellate Body would not be subject to revision, but open to comment or a joint statement of the parties to be recorded in a document relating to the dispute.

3.36. As has been discussed by certain Members outside our negotiations, experience shows that the **timeframe of 90 days for completing Appellate Body proceedings** under Article 17.5 is not always sufficient. In our negotiations, we have proposals regarding the timeframes of proceedings, and a mandate to improve and clarify the DSU. Therefore, I believe that there could be merit in addressing the 90-day issue in this negotiation by providing a durable solution, to the extent it could form part of a balanced outcome. Such solution could possibly involve extending the timeframe for completing appellate proceedings and/or agreeing on terms respectful of both parties' interests and the independence of the Appellate Body under which this timeframe could be exceeded in exceptional circumstances. This could meet current workload challenges in a way that gives parties greater predictability while preserving the ability of the Appellate Body to produce high quality reports. Should Members wish to pursue possible solutions in this respect, this would need to be based on more specific suggestions.

3.4 Adoption and compliance

3.37. While the possibility of facilitating a more rapid **adoption of panel reports** has been considered, I have not seen a specific interest in pursuing this in recent discussions.

3.38. We have not, at this stage, seen convergence on a **partial deletion or adoption of panel or Appellate Body reports,** due to serious concerns over the impact that this may have on the integrity of the adjudicators' rulings. It was also noted in this context that, even absent partial adoption, the parties to a dispute would remain in a position to take account of their common views in the context of determining the means for implementation of the rulings at issue. There is also some willingness to consider alternative ways of ensuring that the views of the Membership on the rulings, and in particular those of the parties to the dispute, are given appropriate visibility upon the adoption of the reports. This could be explored further, on the basis of more specific suggestions.

3.39. In respect of the **duration of the reasonable period of time (RPT) for implementation**, discussions have focused on the manner in which the interests of developing country Members should be taken into account. The current general guideline period of 15 months for arbitrators is not called into question, nor is the current practice of arbitrators of determining the RPT based on the "shortest period possible"[20] within the implementing Member's legal system. Proponents seek to clarify that it is appropriate to take into account the specific circumstances of implementing developing country Members in establishing an RPT – whether this is done through arbitration or by agreement of the parties. Arbitrators to date have paid particular attention to demonstrated affected interests of developing country members, with reference to Article 21.2 of the DSU.[21] Members may consider reaffirming that it is appropriate, in determining the RPT, to take due account of such interests of developing country Members. This may enhance the predictability of the RPT by operationalizing Article 21.2 of the DSU in a more explicit manner.

3.40. There is convergence on the introduction of an enhanced **notification requirement at the end of the RPT** for the responding Member to notify to the DSB all relevant information, including a description, the text, and the date of entry into force of the measures taken to comply with DSB recommendations and rulings, and to explain how these achieve compliance with such recommendations and rulings. In addition to improving surveillance by the DSB, such notification would facilitate the complaining Member's assessment of whether compliance has been achieved.

3.41. Earlier work in respect of "sequencing" also led to draft legal text to clarify certain aspects of **compliance proceedings under Article 21.5** of the DSU. This draft legal text reflects the shared understanding that:

- sympathetic consideration would be accorded by the requested party to consultations requested as early as halfway through the RPT (or after the DSB meeting at which no RPT is requested);
- after measures have been taken to comply, consultations are not necessary before requesting the establishment of a compliance panel;
- compliance proceedings would be initiated by the complaining party;
- the compliance panel would be established at the first meeting of the DSB where a request is made and the same panelists as in the original proceedings would be appointed;
- the compliance panel's report would be subject to appeal; and
- if compliance proceedings lead to a finding of non-compliance, there would be no additional RPT to comply.

[20] Award of the Arbitrator, *EC — Hormones (Article 21.3(c))*, para. 26.

[21] See Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, paras. 81-82. Article 21.2 of the DSU provides: "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

3.42. My understanding is that there is also support for confirming that **third party rights in compliance proceedings** would be accorded on the same terms as in original proceedings, *mutatis mutandis*, before the panel and the Appellate Body, and where relevant in consultations.

3.43. In the context of discussions on "effective compliance", it has been proposed that **surveillance of implementation** be strengthened through administrative measures to be applied in the event of continued non-compliance beyond the end of the RPT. Recent discussions suggest that such measures could include regular notification to the DSB, the General Council, and the Ministerial Conference. Further work on this issue could focus on clarifying through draft legal text the details of such measures, including their frequency and the situations to which they would apply.

3.44. In respect of "**sequencing**", it is understood that, where there is genuine disagreement as to whether compliance has been achieved, a determination of compliance is necessary before an authorization to suspend obligations may be granted. Mature draft text was developed in earlier phases of our work to reflect this by providing that compliance proceedings under Article 21.5 should be completed before an authorization to suspend obligations pursuant to Article 22 can be granted, if there is a disagreement as to whether compliance has been achieved.[22] In recent discussions, alternative procedural avenues were mentioned to address concerns with foreclosing direct recourse to Article 22 where there has been no *bona fide* effort to comply. However, these alternatives have not been explored in detail, and my understanding at this point is that, as part of an overall agreement, the current text may provide the basis for a permanent solution to this issue.

3.45. As regards **third party rights in retaliation arbitral proceedings**, past arbitrators have considered requests for participation rights by interested Members on an *ad hoc* basis. We have not discussed this issue in detail recently, but past discussions suggested mixed views on this, as well as on the possibility of **appealing Article 22.6 arbitration decisions**, in light of some participants' views that such proceedings, to the extent that they involve primarily factual and determinations of a bilateral nature, do not warrant third party participation or appeal. Further work on these issues may need to take into account in particular the outcome on sequencing in respect of compliance determinations.

3.46. A number of proposals relate to the suspension of concessions or other obligations, reflecting the importance attached to **effective compliance** by a number of participants.

3.47. As regards the **calculation of the level of nullification or impairment**, recent discussions left unclear the relationship between proposals to determine a reference period for the calculation and the inclusion of the period starting from the end of the RPT in the calculation. Earlier discussions suggested that the need for a reference period should be assessed with a degree of flexibility and that concerns existed with respect to the potential retroactivity associated with the inclusion of the period from the end of the RPT in the calculation of the level of nullification or impairment.

3.48. The proposal regarding the **impact of challenged measures on the economy of developing countries** as an element in calculating the level of nullification or impairment seeks to build upon Article 21.8, which requires the DSB to take into account this factor in considering what action it might take in the context of surveillance of implementation. Concerns remain however on the conceptual and practical implications of having a distinct level of nullification or impairment for developing countries.

3.49. In discussions on **cross-retaliation,** the general sequence of principles and procedures embodied in the current Article 22.3 has not been questioned. Facilitated cross-retaliation was proposed as special and differential treatment for developing country Members in general. There is broad recognition that Members that face particular challenges in their ability to retaliate effectively should have access to cross-retaliation. However, there is concern that any facilitation of this process should be closely linked to the existence of such constraints in a particular case.

[22] Articles 22.2bis and 22.6, JOB/DS/14, pp. 13-14.

3.50. Based on the discussions, my sense is that further work could focus in the first instance on building upon solutions developed in practice, in particular as regards cross-retaliation. Arbitrators to date have taken into account a range of circumstances in determining whether same-agreement or same-sector retaliation was not "practicable or effective" within the meaning of Article 22.3, including an imbalance in terms of trade volume between the parties, situations where the complaining party is highly dependent on imports from the other party[23], the proportion of relevant trade affected by the inconsistent measure[24], and the level of diversification of the economy.[25] Further work on this issue could explore the possibility of the Membership explicitly confirming the relevance of such considerations in applying the principles of Article 22.3, including in considering the factors identified in Article 22.3(d)(ii)[26] and recognizing that this type of constraint may affect in particular developing country Members.

3.51. There is support for introducing in the DSU an obligation for **notifying measures taken pursuant to an authorization to suspend concessions or other obligations**, and mature draft legal text has been developed to reflect this.[27]

3.52. Recent work among proponents of **post-retaliation** has led to significant progress towards clarifying the procedures to withdraw an authorization to retaliate, where it is established that the respondent has achieved compliance. Recent discussions focused in particular on the relationship between the initiation of compliance proceedings and the allocation of burden of proof in this post-retaliation context[28], and proponents have developed a common understanding on the following basis:

- the implementing Member would be subject to an obligation to provide an enhanced notification of compliance;
- there would be a mechanism for a formal request to the DSB for removal of the authorization to suspend obligations, which includes automatic removal of the authorization if certain defined steps are not taken within a specified period of time;
- the complaining party would have recourse to consultations if it requests it;
- the complaining party is in the best position to define the scope of the disagreement and would be responsible for doing so;
- the implementing Member would bear the initial onus of demonstrating its compliance with respect to the provisions with which it was found to be non-compliant in the initial proceedings; and
- the authorization to suspend obligations would remain in place until withdrawn or modified by the DSB, either through decision (e.g. adoption of a compliance report) or automatic expiry through inaction.

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[23] Decision of the Arbitrator, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 73.

[24] *Ibid.*, para. 84.

[25] Decision of the Arbitrator, *US – Gambling (Article 22.6 – US),* para. 3.108.

[26] Article 22.3(d)(ii) refers to "the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations".

[27] See Article 22.7, JOB/DS/14, p. 15.

[28] These issues were addressed by the Appellate Body in *US - Continued suspension.* See Appellate Body Reports*, US — Continued Suspension / Canada — Continued Suspension,* paras. 358–365. In these reports, the Appellate Body observed that "[m]uch of the reluctance of the parties to secure a definitive determination in respect of Article 22.8 is the apprehension that, upon initiation, a party will attract the full burden of proof" and clarified that, in its view, "the allocation of the burden of proof, in the context of Article 22.8, should not be determined simply on the basis of a mechanistic rule that the party who initiates the proceedings bears the burden of proof". It further identified the considerations that should, in its view, guide the allocation of burden of proof in this context. The Appellate Body has also observed that Article 21.5 compliance proceedings "form part of a continuum of events" together with original proceedings, and that "[a] panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background." See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

3.53. These elements would embody a degree of parallelism with the pre-retaliation phase, through recourse to the procedures established under Article 21.5, modified as reflected above, where there is a disagreement as to whether compliance has been achieved. These elements also embody a degree of parallelism with the procedural steps towards the initial authorization to retaliate.

3.54. Further work on this issue should confirm these elements as possible basis for a permanent solution on this issue and focus on draft legal text to reflect such solution.

3.5 Mutually agreed solutions

3.55. **Mutually agreed solutions** negotiated between the parties to a dispute remain acknowledged as the preferred outcome. The above-mentioned proposals on the suspension of panel and appellate proceedings upon the parties' agreement are intended to enhance the opportunities for parties to negotiate such solutions. In addition, there has been convergence on the goal of improving notification of such solutions to the DSB. This has been reflected in mature draft text in earlier phases of the work.[29] Further work on this issue should focus on finalizing such text, clarifying in particular the level of detail to be required in the notification.

3.6 Capacity building

3.56. It is recognized that a successful outcome will need to address the constraints faced by some Members in accessing the system. As discussed above, access to dispute settlement may be improved through a variety of avenues within the procedures themselves, including the enhancement of third party rights, increased transparency, and generally the benefits of any added security, predictability, and efficiency in the procedures. In addition to recognizing developing country interests in various phases of the proceedings, recent discussions have addressed a number of solutions to enhance developing country Members' access to dispute settlement through **capacity building** on international trade law and support in litigation.

3.57. In particular, there has been positive engagement as regards creating a funding mechanism targeted at trade law-related technical assistance and dispute settlement capacity building, within the context of an overall package. This could possibly target initial impediments to more meaningful participation in dispute settlement proceedings. It has also been suggested that contributions need not only be financial, but that they could also be "in-kind" in the form of legal training and expertise. In addition to establishing a stable framework or "funding envelope", it has been suggested that voluntary funding programs could exist in parallel to provide resources to such capacity building facility. Future work could focus on specifying the types of activities to be supported and the resources to be contributed, whether in the form of funding or technical assistance.

3.58. In this connection, there has also been consideration of the potential role of the ACWL, having regard for its separate institutional character and governance, and how its activities might be supported to improve developing countries' access and capacity in WTO dispute settlement. There is recognition that solutions in this respect would have to be based on, and driven by, an active commitment of ACWL members and contributors.

3.7 DSB action

3.59. Proposals to address specific issues through the Membership's collective action in the DSB span across various aspects of WTO dispute settlement.

3.60. In respect of proposals on **guidance to WTO adjudicators**, there is some willingness to look at providing further clarity on the operation of the procedures, in a manner that may assist in applying and administering the rules more efficiently, provided that the independence of adjudicators is maintained. There are different levels of comfort with the various elements proposed for DSB action in this regard, and further work should focus on identifying the areas in which there is a level of shared understanding. Based on the views I have heard, this might include affirming Members' commitment to key DSU principles, including prompt and effective

[29] See Article 3.6, JOB/DS/14, p. 2.

settlement of disputes, and reiterating that that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided under the covered agreements. Potential DSB action in this context might also address certain principles of treaty interpretation that are widely recognized to be relevant across WTO disputes.

3.61. In addition, issues of common interest that affect the functioning of the DSU could be the object of collective guidance from the Membership through the DSB. **Current procedural challenges** in WTO dispute settlement, such as matters relating to workload and efficiency, could also be addressed through DSB action based on specific proposals.

3.62. More generally, it has been suggested that the **role of the DSB in administering the rules and procedures of the DSU** could be strengthened, for instance by introducing in the agenda of the DSB a regular consideration of general oversight issues and providing a forum to discuss on an on-going basis any procedural issues of shared concern. Such oversight by the DSB could lead to incrementally developing durable solutions to issues identified by the Membership in this context. Members could consider explicitly endorsing such a role for the DSB, in light of Article 2.1 of the DSU.

4 NEXT STEPS

4.1. As we resume our work in September, we should focus on confirming what would constitute the basis for a successful outcome. My assessment above is intended to facilitate this task by identifying what I would see as a fruitful basis for further work at this stage, based on discussions to date. Of course it will be for Members to determine what they see as an acceptable and desirable outcome to these negotiations.

4.2. As we progress in this effort, we should also aim to move promptly to text-based discussions reflecting the most recent state-of-play and emerging convergences. As described above, in certain areas, no further text-based work should be needed. In other areas however, updated text will be necessary to reflect the evolution of discussions and the most recent work. Where proponents have already been working on such updated text, I encourage them to share it with other participants promptly.

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