



**COMMUNICATION FROM THE EUROPEAN UNION, CHINA, CANADA, INDIA, NORWAY,
NEW ZEALAND, SWITZERLAND, AUSTRALIA, REPUBLIC OF KOREA,
ICELAND, SINGAPORE, MEXICO, COSTA RICA AND MONTENEGRO
TO THE GENERAL COUNCIL**

*Revision**

The following communication, dated 10 December 2018, is being circulated at the request of the delegations of the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro.

INTRODUCTION

We are deeply concerned that the enduring absence of consensus in the Dispute Settlement Body ("DSB") to fill the vacancies on the Appellate Body risks undermining the viability of the WTO dispute settlement system.

We acknowledge the successful contribution of the dispute settlement system to the security and predictability of the multilateral trading system. We recognise the essential role of the Appellate Body within the system that serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements without adding to or diminishing the rights and obligations provided therein.

At the same time, we acknowledge that concerns have been raised about the functioning of the dispute settlement system and are ready to work on solutions, while preserving the essential features of the system and of its Appellate Body.

To this end, we call on all Members to fill the vacancies on the Appellate Body and to amend certain provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").¹ The proposed amendments aim at improving the DSU while addressing the concerns that have been raised on these issues.

PROPOSED AMENDMENTS

Transitional rules for outgoing Appellate Body members

Concerns have been expressed that the Appellate Body does not have the authority to deem someone who is not an Appellate Body member to be a member.

It is proposed that a transitional rule for outgoing Appellate Body members is adopted by the WTO Membership itself through an amendment of the DSU. The DSU would provide that an outgoing Appellate Body member shall complete the disposition of a pending appeal in which a hearing has already taken place during that member's term.

* This revision is to add Montenegro as co-sponsor to the submission.

¹ If the amendment of the DSU proves to be impracticable to achieve this objective swiftly, we will consider other legal instruments appropriate for that purpose.

The issue of 90 days

Concerns have been expressed with the timelines for appellate proceedings and with the absence of consultation of the parties when the 90-day timeframe provided for in Article 17.5 of the DSU is exceeded and with the alleged lack of transparency.

It is proposed to amend the 90-days rule in Article 17.5 of the DSU by providing an enhanced consultation and transparency obligation for the Appellate Body. Article 17.5 would provide for the possibility for the parties to agree to the exceeding of the 90-day timeframe. In practice, the Appellate Body would need to consult with the parties early in appellate proceedings – or before the appeal is filed – if it estimates that the report will be circulated outside 90 days. If there is no agreement of the parties on the exceeding of this timeframe there could be a mechanism pursuant to which the procedure or working arrangements for the particular appeal could be adapted to ensure the meeting of the 90-day timeframe. For example, the Appellate Body could propose to the parties to voluntarily focus the scope of the appeal, set an indicative page limit on the parties' submissions or it could take appropriate measures to reduce the length of its report. This could also include the publication of the report in the language of the appeal only, for the purposes of meeting the 90-day timeframe (the translation to the other WTO languages and formal circulation and adoption would come later).

It should however be clear that those changes do not affect the existing rules on the validity or the adoption of late reports.

The meaning of municipal law as an issue of fact

Concerns have been expressed with the Appellate Body review of panel findings as to the meaning of domestic legislation.

It is proposed to clarify, for greater certainty, that issues of law covered in the panel report and legal interpretations developed by the panel, in the meaning of Article 17.6 of the DSU, while they include the legal characterisation of the measures at issue under the WTO rules, and the panel's objective assessment according to Article 11 of the DSU, they do not include the meaning itself of the municipal measures.

Findings unnecessary for the resolution of the dispute

Concerns have been expressed that the Appellate Body has a tendency to make findings on issues not necessary to resolve a dispute.

It is proposed to amend Article 17.12 of the DSU to provide that the Appellate Body shall address each of the issues raised on appeal by the parties to the dispute to the extent this is necessary for the resolution of the dispute.

Indirectly, this amendment would also address the concern related to the timelines of appellate proceedings (cf the issue of 90 days).

The issue of precedent

Concerns have been expressed with the Appellate Body's approach to treat its own reports effectively as precedent that panels are to follow absent "cogent reasons".

It is proposed that annual meetings are held between the Appellate Body and WTO Members (in the DSB) where Members could express their views in a manner unrelated to the adoption of particular reports (as laid down currently in Article 17.14 of the DSU). This would provide an additional "channel of communication" where concerns with regard to some Appellate Body approaches, systemic issues or trends in the jurisprudence could be voiced. Adequate transparency and ground rules for such meetings would need to be put in place, in order to avoid undue pressure on Appellate Body members.

These proposed amendments are contained in the Annex. In view of the urgency of the matter, and in order to allow for the appointments to take place swiftly, we are hereby proposing that these amendments be adopted by the General Council as soon as possible, pursuant to Articles IV:2 and X:8 of the Marrakesh Agreement Establishing the World Trade Organization.

ANNEX

**AMENDMENT OF CERTAIN PROVISIONS OF
THE UNDERSTANDING ON RULES AND PROCEDURES
GOVERNING THE SETTLEMENT OF DISPUTES**

Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") shall be amended as follows:

1. In paragraph 2 the following sentence shall be added:

"The outgoing person shall complete the disposition of an appeal in which the oral hearing has been held."

2. Paragraph 5 shall be amended to read as follows:

"As a general rule, the proceedings shall not exceed 60 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 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 days, unless the parties agree otherwise on a proposal from the Appellate Body. The parties shall give sympathetic consideration to such proposals. In the absence of such agreement of the parties, if the Appellate Body considers that it cannot submit its report within 90 days it shall, after consulting with the parties, propose them specific procedures or working arrangements and take appropriate organizational measures, without prejudice to the procedural rights and obligations of the parties under this agreement, with a view to enabling the Appellate Body to submit its report within that period. The parties shall cooperate to enable the Appellate Body to circulate its report within 90 days."

3. A footnote 7 bis shall be inserted to paragraph 6 that shall read as follows:

"For greater certainty, the "issues of law covered in the panel report and legal interpretations developed by the panel" do not include the panel findings with regard to the meaning of the municipal measures of a party but do include the panel findings with regard to their legal characterisation under the covered agreements".

4. Paragraph 12 shall be amended to read as follows:

"The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding, to the extent necessary for the resolution of the dispute."

5. Paragraph 15 shall be inserted. It shall be preceded by a sub-heading "Meetings with the Appellate Body" and it shall read as follows:

"Meetings with the Appellate Body"

Once a year, the DSB shall meet in the presence of the Appellate Body. At such meetings, any Member may express its views on adopted Appellate Body reports. The meetings shall be open to all Members and their conduct shall be respectful of the independence and impartiality of the Appellate Body. The DSB shall adopt the rules applicable to such meetings on a proposal from the Chairman of the DSB and in consultation with the Appellate Body."
