**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

# ADDENDUM 2

III(C). DRAFT PARAMETERS CONCERNING THE MEASURE UNDER REVIEW 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 help inform the question of the measure under review in WTO dispute settlement:

***Order of analysis***

Article 3.4 of the DSU provides that: "Recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." Accordingly, the purpose of the dispute settlement system is not to produce reports or to "make law," but rather to help Members resolve trade disputes among them.

WTO adjudicative bodies should avoid making findings that are not aimed at resolving the dispute. It is useful to bear in mind that such bodies are not permitted to render authoritative interpretations of the covered agreements.[1] It is also useful to bear in mind that the "matter" that is referred to dispute settlement in the standard terms of reference under Article 7 of the DSU consists of the particular "measure" challenged together with the claims concerning that measure.[2]

The order of analysis followed by WTO adjudicative bodies should respect the function assigned to those bodies. In particular, the order of analysis should respect the fact that findings need to relate to "measures affecting the operation of any covered agreement"[3] taken by a Member.

For example, consider the situation where one party claims another Member's measure does *x*, and that *x* is inconsistent with a provision of a covered agreement, but the responding Member claims that its measure does not do *x*. In such a situation, it would not be appropriate for a WTO adjudicative body first to make findings on whether *x* is inconsistent with a provision of a covered agreement before making findings on whether the measure at issue actually does *x*. Otherwise, in the event that the body finds that the measure does not do *x*, the body's finding that *x* is inconsistent with a covered agreement is not aimed at a "measure[] affecting the operation of

[1] Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* makes clear that the Ministerial Conference and the General Council "have the exclusive authority to adopt interpretations" of the covered agreements.

[2] *See, e.g.,* Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 72.

[3] Article 4.2 of the DSU.

any covered agreement taken within the territory" of a Member.[4] Instead the finding is an advisory opinion divorced from the measure at issue (and therefore divorced from the actual "matter" referred to the body).

A further implication of the "measure affecting" language is that WTO dispute settlement is not concerned in a dispute with a measure of a Member that expired prior to the date of the request for consultations by another Member in that dispute or that otherwise does not exist as of the date of the request for consultations.

The question of whether a measure does *x* is a factual question because at that point it is not a question of the interpretation of a provision of a covered agreement or of whether a provision applies to the measure.

***Definition of a measure***

It is useful to recall that the covered agreements do not define the term "measure." There is no such definition because the content of the term may vary from case to case. For example, what constitutes a "measure" for purposes of the *General Agreement on Tariffs and Trade 1994* may be different from what constitutes a measure for purposes of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* or the DSU.

The Appellate Body has suggested that "instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance."[5] The Appellate Body, in using the term "could constitute" clearly indicated that this is not intended to be a definition of "measure," but rather one starting point for analysis. In particular, not all such "instruments" are measures and not all measures are "instruments." For example, a measure may not be an "instrument" but may be an "action" by a Member or in some cases could be viewed as "inaction" by a Member.[6] See for example the discussion by the Appellate Body in *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*: "In the practice established under the GATT 1947, a 'measure' may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government. A measure can also be an omission or a failure to act on the part of a

[4] Article 4.2 of the DSU.

[5] Appellate Body Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 82.

[6] For example, a failure to submit a notification to the WTO could be viewed as "inaction." (See, *e.g.*, Article 12.6 of the *Agreement on Safeguards*.)

Member."[7]

Conversely, not all "instruments"[8] that contain rules or norms are "measures."[9] For example, a "measure" would not include:

(1) legislative history that does not itself have any legal standing or effect other than as legislative history;

(2) statements without effect, for example, a statement by an individual legislator that is solely the expression of that individual's view; and

(3) statements in court decisions that are *obiter dicta*, or dissenting opinions in court decisions.

***Mandatory vs. discretionary measures***

A WTO adjudicative body is not permitted to presume that a Member will choose to breach a covered agreement. Accordingly, where a measure provides a Member with the discretion to comply with a covered agreement, the measure may not be found to be inconsistent as such with the covered agreement, even if the discretion is broad enough also to permit the Member to act in a manner that would breach the covered agreement.

[7] WT/DS60/AB/R at footnote 47, internal citations omitted.

[8] Definitions of "instrument" include: "A formal or legal document in writing, such as a contract, deed, will, bond, or lease" and "Anything reduced to writing, a document of a formal or solemn character, a writing given as a means of affording evidence." Black's Law Dictionary, Sixth Edition.

[9] Instruments that are not "measures" could nonetheless in some circumstances assist in understanding the meaning of a particular measure.