

## **NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING**

Contribution by Chile and the United States

### **ON IMPROVING FLEXIBILITY AND MEMBER CONTROL IN WTO DISPUTE SETTLEMENT**

In DSB discussions to date on the DSU, Members have re-emphasized that the central objective of the dispute settlement system should be the prompt resolution of disputes between parties. For that reason, Members have emphasized both the importance of ensuring that dispute settlement procedures facilitate resolution of a dispute and, as part of this approach, the need for flexibility in the system to allow parties to resolve disputes in a prompt manner. Members have indicated that it is important to retain the flexibility that already exists in the system. Members have also identified that there are areas that could benefit from additional flexibility.

At the same time, while Members have acknowledged the general effectiveness of the DSU, there have been concerns that some limitations in the current procedures may have resulted, in some cases, in an interpretative approach or legal reasoning applied by WTO adjudicative bodies (ie panels, the Appellate Body and arbitrators) that could have benefitted from additional Member review. Members have not always, during proceedings or in the adoption process for reports, had a full opportunity to ensure that the findings of the adjudicative bodies will contribute to resolving the disputes.

The WTO dispute settlement system is almost unique in that adoption of panel and Appellate Body reports is quasi-automatic under the reverse consensus rule. However, the reasoning and findings of reports may at times go beyond what the parties consider to be necessary to resolve the dispute, or, in some circumstances, may even be counter-productive to resolution of the dispute. It is proposed that there should be mechanisms that would enhance the parties' flexibility to resolve the dispute and Members' control over the adoption process.

Accordingly, panel and Appellate Body reasoning and findings should not go beyond those aspects of the dispute that the complainant and respondent parties consider necessary to resolve the dispute. Some Members have indicated that sensitive areas that could have benefitted from additional opportunity for Member discussion and review include, for example:

- a) situations where the relevant WTO text does not address an issue, leading to concerns over whether an adjudicative body might "fill the gap" and consequently add to or diminish rights and obligations under the relevant agreement instead of clarifying those rights and obligations
  - Gaps may reflect a situation where there was a limit upon what negotiators were able to agree. Alternatively, gaps may reflect an absence of any consideration by negotiators of the particular detail at issue

- b) situations in which legal concepts outside the WTO texts have been applied in a WTO dispute settlement proceeding, including asserted principles of international law other than customary international law rules of interpretation (eg state responsibility, proportionality)

Members may wish to consider ways they can provide additional guidance to adjudicative bodies, both in the context of the current negotiations and during individual disputes, including through procedures which strengthen Member control and flexibility. At the same time, Members may wish to consider whether the current DSU provides sufficient assurance that the members of panels have the appropriate expertise to appreciate the issues presented. In doing so, Members can also enhance their ability to resolve disputes at any time in the process.

Proposal for possible options for enhancing dispute settlement:

- a) making provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report.
  - Strengthening reports would be especially useful at the appellate stage, since there is no opportunity for further appeals or argumentation
- 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
- 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
- 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
  - currently there is no provision for suspending Appellate Body proceedings once they are commenced, and panel proceedings can only be suspended if the panel accepts the request of the complaining party
- e) ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute
- 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.

The Members making this contribution to the negotiations on improvements and clarifications of the Dispute Settlement Understanding look forward to working with other Members on the elaboration of these ideas.