



GUIDELINE DEVELOPMENT DISCUSSION

COMMUNICATION FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU TO THE GENERAL COUNCIL

*Revision**

The following communication, dated 5 April 2019, is being circulated at the request of the delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

1 INTRODUCTION

1.1. We fully recognize the critical importance of the WTO dispute settlement mechanism to the rules-based multilateral trading system. In our view, a well-functioning Appellate Body which adheres strictly to the rules negotiated and agreed by WTO Members is an essential pillar of the whole system. In this regard, the continuing impasse in launching the selection process to fill the vacant seats on the Appellate Body, which raises the real prospect of a total paralysis of the Body, and the indication that the Appellate Body has for long been straying from some of the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), are both matters of serious concern to us.

1.2. It is greatly appreciated that certain Members have raised these important issues and we welcome the proposals tabled with a view to addressing these concerns, including the communications from the European Union and several Members in WT/GC/W/752, from Australia, Singapore and several Members in WT/GC/W/754, from Honduras in WT/GC/W/758, 759, 760 and 761 and from Brazil in WT/GC/W/767. Having also taken note of all the relevant discussions at meetings of the General Council and the Dispute Settlement Body ("DSB"), we recall in particular the wide divergence of views among Members as to how such concerns should be addressed, and even whether such concerns are well-founded.

1.3. For ease of reference, we shall hereinafter refer to the five issues being addressed in WT/GC/W/752 as (1) the Rule 15 issue; (2) the 90 days issue; (3) the municipal law issue; (4) the advisory opinion issue, and; (5) the precedent issue, and to the issue being addressed in WT/GC/W/754 as "the overreach issue". The actual content of each issue is not repeated from here onwards.

1.4. To further explore the present controversy, we find it helpful to start with the 90 days issue. In the previous discussions, many Members appeared to attribute the cause of this issue to the overload of work at the Appellate Body. With the DSU negotiators in 1995 not having foreseen the trends of increasing numbers and complexity of appeals, the time-frame set in Article 17.5 of the DSU is simply not practical today.

* For the ease of reference of the reader, this revised version includes a new section 3 entitled "Suggestions on the Guidelines" about the substance of the possible guidelines. Other revisions are made in paragraph 2.4 (elaborating on the principles of the possible interaction mechanisms), paragraph 2.5 (emphasizing the risk of over-prescriptiveness) and paragraph 2.6 (elaborating on the time factor of this issue).

1.5. Some Members, on the other hand, appear to consider that the 90 days issue results from the Appellate Body's wilful disregard of the DSU rules, or at least its failure to make every effort to comply with them. Moreover, there are indications that in some recent disputes, despite the appeal processes having far exceeded the 90 days, the Appellate Body has still spent time and pages on addressing issues not directly related to resolving the disputes.

1.6. Without wishing to pass judgment on which argument may better explain the 90 days issue, we might start by recalling some well-known facts about the establishment of the Appellate Body in the first place. During the negotiations of the DSU in the Uruguay Round, Members displayed no intention of creating a strong international trade court. The Appellate Body that exists today was born more out of an afterthought of the negotiators, or a safety-valve in the event of the occasional "bad" panel report¹. In this regard, Article 17 of the DSU lays down a number of constraints on the Appellate Body. Article 17.6, for example, limits the appellate review to only issues of law, with no remand mechanism provided for. Institutionally, compared to other international courts, (e.g., the International Court of Justice), the Appellate Body is composed of fewer adjudicators (seven) with a shorter term of office (four years and being reappointed once). Moreover, Article 17.3 of the DSU requires that all Appellate Body members "shall be available at all times and on short notice", implying that they serve on a part-time basis.

1.7. From this perspective, the very tight timeframe set out in Article 17.5 of the DSU may not be interpreted simply as an outdated or bad piece of legislation. Instead, it might be viewed as another element laid down deliberately by the negotiators in order to circumscribe the Appellate Body's function. In addition to being a procedural deadline, the tight timeframe may have further implications for the Appellate Body's approach to disputes.²

1.8. It is also useful to recall, and the literature indicates this as well, that the Appellate Body has undergone a major process of self-evolution over the last two decades before reaching its current state of being widely recognized as the highest adjudicatory organ in the multilateral trading system.³

1.9. Again, no judgment of this evolution is intended here. We just want to point out that a gap does indeed exist between, on the one hand, what the Members in 1995 intended the Appellate Body to be, and on the other, what the Appellate Body really is and does today. In our view, it is this gap that underlies the issues raised above, therefore it should serve as the focus of our future solution-oriented discussions.

2 PROPOSED APPROACH

2.1. In light of the above, we propose that Members immediately enter into discussions for the purpose of developing guidelines on the future functioning of the Appellate Body. In these discussions, Members should thoroughly examine the DSU and, if necessary, the relevant negotiation materials so as to more clearly portray the role of the Appellate Body. One important objective will be to clarify any explicit or implicit boundaries that Members in the Uruguay Round have intended to impose on the Appellate Body.

2.2. More specifically, in the guidelines to be developed, Members may want to clarify certain DSU provisions so as to provide better, more clear-cut operational rules for the Appellate Body to follow. In respect to some provisions considered to be clear and relevant today, Members may also want to re-confirm the obligations imposed thereof by emphasizing their importance, or by providing further

¹ See, for example, Peter Van den Bossche, "From Afterthought to Centerpiece - The WTO Appellate Body and its Rise to Prominence in the World Trading System" in Rufus Yerxa and Bruce Wilson (eds.), *Key Issues in WTO Dispute Settlement – The First Ten Years* (Cambridge University Press, 2005), p. 64. ("As a safety measure against such 'bad' panel reports, the negotiators provided for an appellate review mechanism. The introduction of appellate review was a *quid pro quo* for the quasi-automatic adoption of panel reports.")

² See, for example, Robert Howse, "The World Trade Organization 20 Years: Global Governance by Judiciary", *European Journal of International Law* Vol. 27 no. 1 (2016), 9, p.20. ("By establishing appellate review only for error of law and giving appellate review a very tight timeline (60 to 90 days), the Uruguay Round negotiators virtually guaranteed that a factual basis determined by essentially amateur adjudicators and technocrats within the WTO bureaucracy would be decisive in framing the disputes.")

³ See, in general, Howse, *supra* note 2. See also, David Unterhalter, "The Authority of an Institution: The Appellate Body under Review", in Gabrielle Marceau (ed.) *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press, 2015), pp. 466-475.

elaboration on the underlying objective of these provisions in order to guide the Appellate Body's future practices.

2.3. Furthermore, Members should consider ways of harmonizing the potential conflicts among certain DSU provisions that have been raised in the previous discussions. For example, to address the advisory opinion issue, Members may want to develop interpretations enabling a harmonious reading between the Appellate Body's obligation to address "each of the issues" under Article 17.12 on the one hand, and the "prompt settlement" obligation under Article 3.3 on the other.

2.4. Moreover, some Members are also concerned that "if the Appellate Body does not follow the explicit and existing rules as laid down in the DSU, why should it follow any of the amendments or footnotes in the DSU either?" In which case, we are drawn to the conclusion that the real problem facing us today might lie not in the rules amendment, but in the enforcement of the rules of the DSU. Indeed, in our opinion, it is in this area of enforcement where the guidelines can play their most important and effective role. Through the guidelines, Members may establish mechanisms to enhance the transparency of the Appellate Body's relevant practices. Certain examples of such mechanisms have been provided in the previous proposals, such as holding annual meetings between the Appellate Body and Members as suggested in WT/GC/W/752, or the external review mechanism as suggested in WT/GC/W/760. We consider that, in order to minimize administrative costs and at the same time maintain the Appellate Body's independence, such mechanisms may, to the largest extent, make use of the already existing practices, such as the Appellate Body's annual report or the expression of views under Article 17.14 of the DSU. With the collective contribution of Members, we believe a suitable balance can be struck between effective enforcement and the ever-evolving global trading environment.

2.5. Lastly, in developing the guidelines and relevant mechanisms, Members should avoid over-prescriptiveness and over-intrusiveness with regard to the Appellate Body's interpretive approaches. Article 3.2 of the DSU already provides that the dispute settlement system should carry out its interpretive task "in accordance with customary rules of interpretation of public international law". The more rigid the norms or interventional controls are, the more they tend to undermine the Appellate Body's independence and to limit its ability to deal with the increasing dynamics of disputes. Excessive intervention may also raise "adverse selection" concerns over the composition of the Appellate Body; i.e., persons of recognized authority and with demonstrable expertise in law, international trade, and other relevant areas, may be reluctant to operate within such a rigid, ossified framework.

2.6. Given the present urgency of the matter, we propose that the above guideline development process should be completed in the most expeditious way (within [X] days). Another important reason for proposing the development process as a solution to the existing impasse is that we are dealing with a tentative timeframe. Without the need to undergo possible treaty amendment procedures at the domestic level, there is a greater chance that Members will be able to complete the guideline development process in a timely manner, thus avoiding the otherwise likely total paralysis of the Appellate Body at the end of year 2019.

2.7. In terms of the legal form of the guidelines, we propose that Members consider following the procedures under Article IX:2 of the WTO Agreement and the framework suggested in WT/GC/W/754 to form an authoritative interpretation of the DSU. Another route to adoption of the guidelines, which Members may consider taking, would be through a decision of the General Council or the DSB.

2.8. We should have the understanding that once this proposal is adopted, Members could immediately agree to initiate the selection processes to fill the vacancies of the Appellate Body, so as to allow the Appellate Body to work in accordance with the agreed guidelines at its full capacity.

2.9. Members should continue to closely monitor the Appellate Body's operations. In the case that after a certain period of time ([Z] months), the Appellate Body, despite fully adhering to the guidelines, still finds it difficult to observe certain procedural limits (such as the 90 days deadline) due to the overload of work, Members should consider addressing these issues by amending the DSU. Such amendments might include expanding the timeframe or increasing the number of Appellate Body members, as suggested by the European Union and several Members in WT/GC/W/753.

2.10. The process is demonstrated in the flow-chart at the end of this document, using the 90 days issue as an example.

3 SUGGESTIONS ON THE GUIDELINES

3.1. Based on the principles laid out above, we here make suggestions on the possible guidelines relating to the five issues addressed in WT/GC/W/752 and the mechanisms which will enhance interactions between the Appellate Body and Members.

3.2. **The Rule 15 issue.** Members re-confirm that the rules as set out in Article 17.2 of the DSU, relating to the term of office and the procedure for appointment and re-appointment of Appellate Body members, should be strictly followed. A case where a person who ceases to be an Appellate Body member continues his or her disposition of an appeal can only be allowed by the DSB, or should be based on transitional rules agreed by the whole WTO Membership.⁴

3.3. **The 90 days issue.** Members re-confirm that the timeframes set out in Article 17.5 of the DSU are mandatory. These timeframes reflect Members' strong desire for the prompt settlement of disputes, as also indicated in Articles 3.3 and 21.1 of the DSU. Reading these timeframe provisions together with Article 17.6 of the DSU should also give the effect that the appellate review be limited to issues of law which are necessary for the resolution of the dispute. Nevertheless, in consideration of practical needs, Members agree that these timeframes could be extended on the agreement of the disputing parties.

3.4. **The municipal law issue.** Members re-confirm that under Article 17.6 of the DSU, the Appellate Review should be limited to issues of law. For greater certainty, the "issues of law" here do not include the panel findings with regard to the meaning of the municipal measures of a Member. Members agree that the Appellate Body should refuse to review any appeals raised under Article 11 of the DSU on the panel's factual findings unless the appellant establishes a *prima facie* case that the panel committed an egregious error that calls into question the good faith of that panel⁵.

3.5. **The advisory opinion issue.** Members clarify that Articles 3.3, 3.4, 17.5 and 17.12, being read together, should mean that the Appellate Body should review issues of law being raised to the extent that they achieve a prompt and satisfactory settlement of the dispute.

3.6. **The precedent issue.** Members confirm that, under the DSU, panel and Appellate Body reports do not have binding precedential values. Findings of a panel and the Appellate Body should be based on the covered agreements and the evidence presented in each individual dispute. Nevertheless, for the purpose of providing security and predictability to the multilateral trading system as noted in Article 3.2 of the DSU, and to protect Members' legitimate legal expectations, the reasoning and interpretations made in prior disputes by panels and the Appellate Body may be taken into account by an adjudicator, after proper and independent deliberation, in addressing relevant issues.

3.7. **Interaction mechanism.** For the purpose of facilitating communications between the Appellate Body and the WTO Members, the Secretariat should periodically publish a report to highlight and summarize the views and concerns expressed by Members under Article 17.14 of the DSU on Appellate Body reports, in particular those relating to issues covered in these guidelines or other issues of systemic significance (e.g. by exceeding the 90-days deadline). The Appellate Body shall endeavour to respond to those views and concerns by adapting its practices accordingly, and to indicate which steps it has taken to that effect in its annual report or, if it deems proper, in a dedicated document, which may be published at a higher frequency.

⁴ In the latter case, we suggest Members to consider the following text of the transitional rule: A person who ceases to be a Member of the Appellate Body may complete the disposition of any appeal to which that person was assigned while a Member, and in which the oral hearing has been held. That person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.

⁵ Appellate Body Report, *EC – Hormones*, para. 133.

