WORLD TRADE ORGANIZATION

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Dispute Settlement Body
Special Session

SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

Report by the Chairman, Ambassador Ronald Saborío Soto,
to the Trade Negotiations Committee

1. In my last written report on 22 March 2010[1], I informed the TNC that we had completed a first round discussion of all issues contained in the consolidated draft legal text contained in the document that I had issued under my own responsibility in July 2008, which was endorsed by participants as basis for our further work in November 2008.[2]

2. Since May 2010, as anticipated in my last report, we initiated a more intensive process, building on earlier work. So far, we met seven times in this context, based on a combination of meetings in variable geometry depending on the issue being discussed. On each occasion, I conducted informal consultations with interested delegations over the course of a week, with an open-ended informal meeting of the Special Session at the end of the week to report on the work to the entire Membership. In addition, delegations have continued to work individually and among themselves to advance discussions further.

3. In the context of our continuing work and in advance of the upcoming informal meeting of the TNC on 29 April, I would like to take the opportunity to provide an update on the state of our ongoing work. The July 2008 text has brought focus to the discussion and provided a unified basis for our continued work. Participants have engaged in our recent work in a constructive spirit, and we have made measurable progress in a number of areas. This is reflected in the summaries attached to this Report, which reflect the oral reports I presented at the end of each week of meetings since May 2010.[3] Specifically, we are close to an understanding on draft legal text on sequencing, we have identified key points of convergence on post-retaliation, and we have conducted constructive work on third-party rights, timesavings and various aspects of effective compliance. We have also discussed certain aspects of flexibility and Member-control, and in that context, made substantial progress towards draft legal text on the suspension of panel proceedings.

4. Nonetheless, much work remains to be done in order to reach agreement. As described in my July 2008 report, and as confirmed recently, the work has been conducted on the assumption and understanding that all issues must progress in parallel, and we have not yet completed, in this phase of the negotiaitons, discussion on all of the issues contained in this text. Further work is therefore required in order to complete this phase of the negotiation. In addition to completing the work on the issues referred to above, we will need to discuss also panel composition, remand, mutually agreed solutions, strictly confidential information, transparency and *amicus curiae* briefs and developing country interests, including special and differential treatment. A successful conclusion to the

[1] See TN/DS/24 of 22 March 2010.
[2] See TN/DS/23, para. 2. This text was initially circulated as an informal document (JOB(08)/81) on 18 July 2008 and is reproduced as Appendix A below.
[3] See the Chairman's summaries of recent work, reproduced as Appendix B below.

negotiations will also require additional flexibility in Members' positions. Based on my recent consultations, my understanding is that participants are fully committed to continuing to work constructively for the successful completion of this work, toward a rapid conclusion of the negotiations.

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APPENDIX A

JOB(08)/81 18 July 2008

SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

Report by the Chairman

Introduction

1. Paragraph 30 of the Doha Ministerial Declaration mandated "negotiations on improvements and clarifications of the Dispute Settlement Understanding". In Hong Kong, Ministers further instructed us to "continue to work towards a rapid conclusion" of these negotiations.

2. We have worked on the basis of revised proposals submitted by Members and groups of Members, reflecting drafting improvements as well as an effort to seek convergence. Since the beginning of last year, we have had two complete rounds of consultations on all issues on this basis. I believe that each of this rounds produced progress and further convergence on a number of proposals.

3. As announced at the end of our most recent consultations, I now issue this document under my own responsibility to take stock of our recent work, and to provide a basis for its continuation towards a rapid conclusion as instructed by Ministers.

4. The first part of this document provides an overall assessment of the state-of-play of our work, and highlights some general considerations that I believe can provide useful guidance to facilitate our further work. The second part of this document is a consolidated draft legal text, based on the contributions of Members as well as my own assessments (Annex 1). This draft legal text follows the structure of the DSU and is intended to provide a basis for our further work. Finally, a thematic overview of the issues under discussion is included in Annex 2, summarising my perceptions on the progress accomplished so far and outlining possible orientations of our future work.

Overall assessment

5. Perhaps the most significant achievement in our work over the past year and a half has been the clarification and consolidation of the issues under consideration. Members and groups of Members have engaged in an earnest exercise of reviewing and revising their proposals, and presented revised versions of their proposals for improvements and clarifications of the DSU. These revised proposals take into account the comments of other participants on earlier versions of the various proposals. This effort, which has been supported by informal Member-driven processes, has now provided us with a sound basis for the conclusion of work.

6. Nonetheless, as I indicated recently, it appears to me that not all the issues under discussion have reached the same stage of maturity at this point. In general, the level of convergence on various issues still varies significantly. On a number of issues, both the concepts and the relevant legal texts have been extensively discussed, and it is relatively easy to foresee, on the basis of the texts under consideration, where the options lie and what parameters might guide the choices. On the other hand, there are also issues in respect of which there has been only limited focus on specific legal text so far, and further work is clearly needed for the text (and sometimes also the underlying concepts) to reach a comparable level of maturity. Finally, there are issues in respect of which interested delegations have been working among themselves towards providing improved text as basis for our future work, reflecting an effort to take into account comments received from other delegations and attempts to build convergence towards an acceptable outcome. I have been encouraging and supporting such

efforts, which I believe have been one of the most constructive and productive aspects of our recent work.

7. I have taken into account this overall context in preparing this document. My key objective has been to provide us with the best possible basis for our future work, and to propose as much as possible a basis from which we can advance towards the identification of options on the different issues that would facilitate a rapid and successful conclusion of these negotiations, as mandated by Ministers.

8. Finally, I would note that in this negotiation, it has always been and remains clear, that a successful outcome will depend not only on the ability to find balanced compromises between different positions, but also on the ability to develop specific solutions that would be acceptable to all Members. This places a special onus on us to continue to work towards agreement in each area on its own merits as well as in light of overall balance. This process is and remains principally Member-driven, and serves the common systemic goal of improving and clarifying the DSU.

General considerations

9. In preparing this document, I have been guided by a number of considerations. Members' positions in substantive discussions to date, and my assessment of where convergence and balance might be found in light of these discussions, form the primary basis of any proposed texts and approaches.

10. In addition, the following general considerations may provide useful guidance in our work, and I have aimed to take these considerations into account in proposing ways forward. To a large extent, these reflect approaches already suggested and applied by participants in preparing and improving their contributions to the negotiations. They may also constitute helpful guidance for the improved effectiveness of our future work:

(a) limit any drafting changes to what is necessary to achieve the intended purpose (for example, seeking to avoid the inadvertent introduction of new concepts not necessary for the proposed improvement or clarification), and take into consideration the drafting guidelines suggested by several participants to ensure the greatest level of clarity possible (e.g. use of active voice and singular as well as the same term to denote the same concept);

(b) ensure that drafting consistency is maintained throughout the DSU (including internal consistency between unchanged existing DSU text and proposed new or amended text, internal consistency between different parts of proposed new or amended text; and avoiding unnecessary duplications through references where possible); and

(c) bear in mind the procedural coherence of the system (including consideration for the manner in which a clarification or improvement is introduced would work in practice, ensuring that intended clarifications or improvements are not an inadvertent source of further procedural complexities or uncertainties, and attention to the continued overall coherence of the procedures).

11. As we approach the final phase of our work, I believe it would also be necessary to allocate some time to a general review of draft legal text under consideration, in order to: (1) clarify the form in which improvements or clarifications to the DSU should be agreed to; (2) clarify the conditions for giving legal effect to such improvements or clarifications, including the possible need for transitional provisions; and (3) conduct a general review of drafting consistency throughout the DSU, as described under (b) above.

Draft legal text

12. In light of the diverse levels of maturity in the discussions as well as the varying levels of convergence achieved to date on the various proposals, this document does not seek to propose a single unified approach to our future work for all issues, or to propose clean un-bracketed text in all areas of our work. Rather, I have had to adopt a flexible approach taking into account the diverse levels of maturity and convergence reached in the various areas of our work.

13. In some areas, I have found it useful to propose specific draft text (with or without brackets as appropriate), reflecting my assessment, at this stage of the negotiations, of where possible agreement might be sought. Where competing approaches have been under discussion I have attempted to propose a single approach for further consideration where possible. Where relevant, I have also proposed drafting improvements simply to ensure drafting consistency, taking into account the general considerations highlighted above. Where I did not perceive a sufficient level of convergence to allow me to propose clean un-bracketed text, I did not attempt to propose such text at this stage. In such cases, I have simply placed square brackets around the text proposed by Members, sometimes with proposed drafting improvements to facilitate further work. These different approaches reflect my assessment of what would be the approach most likely to lead to a constructive advancement of our work, based on the level of maturity and convergence achieved to date, in each area and overall.

14. The entirety of the proposed draft legal text in Annex 1 is presented under my own responsibility and on the assumption and understanding that all issues must continue to progress in parallel, and that nothing is agreed until everything is agreed. While I suggest that this consolidated draft legal text form the basis and focus of our intensive work in the next phase of the negotiations, it is understood that it is based on Members' proposals.

Thematic overview

15. Annex 2 contains a thematic overview which is intended to reflect my perceptions of the state-of-play on the various issues at this point in time and identify possible ways forward for our future work. It also reflects, where relevant, my own observations in light of the general considerations highlighted above. This overview also serves a transparency purpose, although it is not intended to reflect each and every detail of the discussions to date.

16. For the purposes of this overview, I have grouped my comments around the following thematic categories:

- Third party rights
- Panel composition
- Remand
- Mutually agreed solutions
- Strictly confidential information
- Sequencing
- Post-retaliation
- Transparency and *amicus curiae* briefs
- Timeframes
- Developing country interests, including special and differential treatment
- Flexibility and Member control
- Effective compliance

Annex 1: Consolidated Draft Legal Text

(proposed as a basis for further work)

This text is based on the contributions of Members, and also incorporates some proposals by me. It is presented under my own responsibility, as a basis for further work.

Proposed amendments to the DSU are shown in the sequence of the provisions of the DSU, and only the DSU provisions to which changes are proposed are reflected. Proposed amendments to the DSU are shown first, followed by proposed Decisions by the Dispute Settlement Body (DSB).

Proposed deletions to the current DSU text are reflected in ~~strikeout~~ text. Proposed new text is in **bold**. For clarity, proposed footnotes are identified with letters rather than numbers, and would be renumbered as appropriate if agreed to.

Single square brackets reflect text requiring further work, decision or confirmation. In some cases, square brackets are used to reflect alternative texts for consideration. Italicised text in double square brackets indicates text on which no convergence is apparent at this stage.

Proposed textual changes by the Chairman are shaded in grey. Where proposed text by the Chairman involves deletions to text proposed by Members, this is <u>not</u> expressly reflected in this text.

I. PROPOSED AMENDMENTS TO THE DSU

Article 1

Coverage and Application

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. ***[[Article 8bis shall apply to disputes involving safeguard measures.]]*** To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, ***[[or under one or more covered agreements and Article 8bis]]*** if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 3

General Provisions

6. **Each party [to a mutually agreed solution] with respect** to **a** matter~~s~~ ~~formally~~ raised under the ~~consultation and~~ dispute settlement provisions of the covered agreements shall **notify the detailed terms of such solution** ~~be notified~~ to the DSB and ~~the~~ relevant Councils and Committees~~,~~**. The notification shall be made in writing and submitted within 10 days after reaching the solution.** ~~where a~~**A**ny Member may raise any point relating ~~there~~to **the solution in the DSB and the relevant Councils and Committees**.

Article 4

Consultations

[6*a*. Within 60 days after the date of receipt of the request for consultations by the Member to which the request is made, and every 60 days thereafter, a Member that made the request for consultations shall notify to the DSB as to the status of the consultations until that Member notifies a mutually agreed solution pursuant to Article 3 paragraph 6, requests the establishment of a panel pursuant to Article 6 or notifies to the DSB in writing that it no longer wishes to pursue the matter. This paragraph does not apply to consultations that started before [date to be inserted].]

7. If the consultations fail to settle a dispute within ~~60~~ **[30]** days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the ~~60~~ **[30]**-day period if the consulting parties jointly consider that consultations have failed to settle the dispute. **[This 30-day period shall be extended by up to 30 days upon the request of a developing country Member that is a consulting party.]**

10. During consultations Members ~~should~~ **shall** give special attention to ~~the~~ particular problems and interests of **the** developing country Members.

[10bis. [In a dispute between a developing country Member and a developed country Member, the developing country Member shall be provided every opportunity to present requests to the developed country Member on any matter relating to the holding of the consultations or the settlement of the dispute, taking into account the particular problems and interests of the developing country Member][Where the party complained against is a developing country Member, the complaining party shall accord sympathetic consideration to any request from that Member to give special attention to any particular problems and interests it has identified, in relation to the holding of the consultations or to the settlement of the dispute]. Should the developed country Member reject any parts of such requests, it shall provide the reasons in writing, together with an explanation of how it has given special attention to the particular problems and interests of the developing country Member.]

11. **(a)** Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[4], such Member may notify the consulting Members and the DSB **in writing**, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations.

[4] The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on

Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

(b) Such Member shall be joined in the consultations, ~~provided that~~ **[unless]** the Member to which the request for consultations was addressed ~~agrees~~ **[notifies the applicant Member and the DSB in writing within 7 days after the date of receipt of the request to be joined in the consultations]** that the claim of substantial interest is **[not]** well-founded. ~~In that event they shall so inform the DSB.~~

(c) If ~~the~~ **a** request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 6

Establishment of Panels

1. If the complaining party so requests[a], **the DSB shall establish** a panel ~~shall be established at the latest~~ at the ~~DSB~~ meeting ~~following that~~ at which the request first appears as an item on the DSB's agenda, unless ~~at that meeting~~ the DSB decides by consensus not to establish a panel.[5]

[[a] Where the party complained against is a developing country Member, the complaining party shall accord sympathetic consideration to a request from that Member to postpone the establishment of a panel. Such a request shall be made not less than five days prior to the DSB meeting at which the request for panel establishment appears on the DSB's [proposed] agenda, and the complaining party shall respond to such a request prior to the commencement of that DSB meeting.]

[5] **[I**n **the event that the DSB decides not to establish a panel or the complaining party decides to postpone the establishment of a panel, i]**f the complaining party so requests, a meeting of the DSB shall be convened for ~~this~~ **the** purpose **of [making a subsequent request for panel establishment] [establishing the panel]** within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. **[Where the request for establishment of a panel is made *[[by a developed country Member]]* involving a measure taken by a developing country Member, the *[[developed country]]* Member shall, in addition, give details as to how it has given special attention to the particular problems and interests of the developing country Member as required in Article 4.10 and how it has taken into account the relevant provisions on differential and more favourable treatment for developing country Members in the relevant covered agreements.]**

Article 8

Composition of Panels

2. Panel members should be selected with a view to ensuring the independence of the members, **[expertise to examine the kind of matter at issue in the dispute],** a sufficiently diverse background and a wide spectrum of **[relevant]** experience **[and expertise].**

[[Article 8bis

Accelerated time-frames for disputes on safeguard measures

1. The following accelerated time-frames shall apply to disputes on safeguard measures unless otherwise extended by mutual agreement of the parties to the dispute.

2. If the consultations fail to settle a dispute under Article 4 within 30 days of the request for consultations, any party to such consultations may refer the matter to the Dispute Settlement Body for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

3. The time-frames in the Working Procedures of item 12 of Appendix 3 and in paragraph 4 of Article 16 shall be halved.

4. The accelerated time-frames in this Article shall not apply to a dispute if a developing country party to that dispute requests the application of the standard DSU time-frames.]]

Article 10

Third Parties

2. **(a)** Any Member ~~having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party")~~ **may participate as a third party before a panel by notifying its interest to do so to the DSB and to each party to the dispute [no later than 10 days] after the establishment of the panel.** ~~shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report~~.

(b) Each third party has the right to:

(i) be present at the substantive meetings of the panel with the parties to the dispute preceding the issuance of the interim report to the parties, except for portions of such meetings when information [designated by a Member as strictly confidential in accordance with the procedures referred to in paragraph 3 of Article 18] is discussed;

(ii) make a written submission prior to the first substantive meeting;

(iii) make an oral statement to the panel, and respond to questions at a session of the first substantive meeting set aside for that purpose; and

(iv) respond in writing to questions arising out of such a session.

(c) The panel may grant third parties rights additional to those listed in

paragraph (b) [only upon agreement by][after consulting] the parties to the dispute.

3. (a) **Each party to the dispute shall make available to each third party its [written] submissions to the panel (other than any submission made subsequent to the issuance of the interim report to the parties) at the time such submissions are made, except for information [designated by a Member as strictly confidential in accordance with the procedures referred to in paragraph 3 of Article 18].[[b]]**

[[b] This provision does not preclude third parties from receiving information designated by a Member as strictly confidential it if this is expressly provided for in the specific procedures adopted by the panel in accordance with paragraph 3 of Article 18 for the purposes of that dispute.]

(b) Each third party shall make available its submissions to each party to the dispute and to every other third party at the time such submissions are made.

(c) The panel shall reflect the submissions of third parties in its report**.**

Article 12

Panel Procedures

7. Where the parties to the dispute ~~have~~ fail~~ed~~ to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the ~~report of a~~ panel shall set out **in its report** the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. **[The panel shall not include in its report circulated to the Members any finding, any finding together with its basic rationale, *[[or a basic rationale behind a finding (where there is more than one basic rationale behind the finding),]]* that the parties to the dispute have agreed is not to be included.]** Where ~~a settlement of the matter among~~ the parties to the dispute ~~has been found~~ **have reached a [mutually satisfactory] solution to the matter**, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

10. In the context of consultations involving a measure taken by a developing-country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. **[*[[Where]]* the consulting Member *[[is a developed country, it]]* shall agree to a request for an extension of the periods established in paragraphs 7 and 8 of Article 4 of up to 30 days and 15 days respectively.]** If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall ~~accord~~ **allow** sufficient time for the developing country Member to prepare and present its ~~argumentation~~ **[submissions. In general, the panel should extend the timeframes in Appendix 3 by two weeks for the presentation by the developing country Member respondent of its first written submission and by one additional week for the presentation of written submissions or presentations at each subsequent stage]**. The provisions of ~~paragraph 1 of~~ Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. **The panel shall suspend its work where the parties to the dispute so agree.** In the event of **[**~~such~~**]** a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, ~~paragraph 1 of~~ Article 20, and paragraph 4 of Article 21 shall be extended

by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

3. [In exercising the right to seek information and technical advice, the panel shall not accept or consider information or technical advice provided by any individual or body from whom the panel has not sought it.]

Article 16

Adoption of Panel Reports

1. ~~In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to Members~~.

2. ~~Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered~~.

4. Within 60 days after the date of circulation of a panel report to the Members, **the DSB shall adopt** the report ~~shall be adopted at a DSB meeting~~[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[7] **[The DSB may by consensus decide not to adopt a finding in the report *[[or the basic rationale behind a finding]]*.]** If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

[7] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

Article 17

Appellate Review

Standing Appellate Body

4.**(a)** Only parties to the dispute, not third parties, may appeal a panel report.

(b) **Each third party,** ~~Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10~~ **[and any other Member having notified to the Appellate Body, the DSB and each party to the dispute its interest to do so no later than 5 days after the date of circulation of the notification of appeal referred to in paragraph 5(a)], may participate [as a third participant] in a proceeding before the Appellate Body.**

(c) **Each third [participant] shall have an opportunity to be heard by and to** make **a** written submissions~~s~~ to~~, and be given an opportunity to be heard by,~~ the Appellate Body.

(d) **Each third [participant] shall give its submission to each party to the dispute and to every other third participant. The Appellate Body shall reflect the submissions of third participants in its report.**

(e) **[The Appellate Body shall consider only the submissions of parties and third [participants], and shall not accept or consider any submission beyond those submitted by the parties and the third [participants].]**

5. **(a)** As a general rule, the proceedings shall not exceed **[**~~60~~ **90]** 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~~ **circulate** its report within **[**~~60~~ **90]** 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~~ **circulate** its report. In no case shall the proceedings exceed **[**~~90~~ **120]** days.

(b) **[Following the consideration of submissions and oral arguments, the Appellate Body shall issue an interim report to the parties to the dispute, including both the descriptive sections and the Appellate Body's findings and conclusions. Within a period of time set by the Appellate Body, a party to the dispute may submit a written request for the Appellate Body to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party to the dispute, the Appellate Body shall hold a further meeting with the parties to the dispute on the issues identified in the written comments. If no party to the dispute submits comments within the comment period, the interim report shall be considered the final report and circulated promptly to the Members. The Appellate Body shall include in its final report a discussion of the comments made at the interim review stage.]**

(c) **The Appellate Body shall suspend its work where the parties to the dispute so agree. In the event of such a suspension, the time-frames set out in this paragraph, Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. [The Appellate Body shall resume its work at the request of [either party], unless otherwise agreed between the parties.]**

Procedures for Appellate Review

9. **[The Appellate Body shall draw up** working procedures ~~shall be drawn up by the Appellate Body~~] in consultation with the Chairman of the DSB and the Director-General, and communicate~~d~~ **them** to the Members for their information.

12. **(a)** The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

(b) Where the Appellate Body finds that there is not a sufficient factual basis to complete the analysis with respect to certain issues, it shall in its report provide a detailed description of the [types of] findings that are required to complete the analysis with respect to those issues.

(c) Notwithstanding any issue in respect of which it has found that there was not a sufficient factual basis to complete the analysis, the Appellate Body shall make appropriate findings and recommendations in accordance with Article 19 [with a view to securing a prompt and effective resolution of the dispute].

(d) Nothing in this paragraph or Article 17*bis* affects the adoption of panel and Appellate Body reports and the implementation of the recommendations and rulings of the DSB.

13. **Where the parties to the dispute fail to develop a mutually satisfactory solution [to the matter], the Appellate Body shall submit its findings in the form of a written report to the DSB. In such cases, the Appellate Body shall set out in its report the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.** The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

[The Appellate Body shall not include in its report circulated to the Members any finding, any finding together with its basic rationale, *[[or a basic rationale behind a finding (where there is more than one basic rationale behind the finding),]]* that the parties to the dispute have agreed is not to be included].

[Where the parties to the dispute have reached a [mutually satisfactory] solution to the matter, the report of the Appellate Body shall be confined to a brief description of the case and to reporting that a solution has been reached, and the report of the panel shall be void and of no legal effect. Where the parties to the dispute have reached a solution to the appeal: (a) the report of the Appellate Body shall be confined to a brief description of the case and to reporting that a solution to the appeal has been reached, and (b) if a party to the dispute so requests, the DSB shall adopt the panel report [within 21 days of circulation of the Appellate Body report], unless the DSB decides by consensus not to adopt the report.]

14. **The DSB shall adopt** ~~A~~a**n** Appellate Body report ~~shall be adopted by the DSB and unconditionally accepted by the parties to the dispute~~ unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] **[The DSB may by consensus decide not to adopt a finding in the report *[[or the basic rationale behind a finding.]]*]** This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

[8] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[*Article 17*bis

Referral Procedure

1. Where the Appellate Body has identified certain issues according to paragraph 12(b) of Article 17, [a complaining party] [the party who advanced the particular claim or defence to which the unresolved issue relates] may refer [such] [that] issue[s] to the panel.

2. The referring party shall make the referral before the adoption of the Appellate Body report. It shall do so in writing and shall identify the specific issues it seeks to have addressed by the panel as well as the relevant paragraphs in the Appellate Body report. The referring party shall address the referral to the panel and shall notify the DSB thereof.

3. The panel may examine only those issues with respect to which the Appellate Body has expressly found that there is not a sufficient factual basis to complete the analysis, and that [a party to the dispute][the referring party] has identified in accordance with paragraph 2.

4. The panel shall make such findings and recommendations, in accordance with the [guidance][description] provided by the Appellate Body pursuant to paragraph 12 of Article 17, as will assist the DSB in making its rulings and recommendations.

5. As a general rule, the panel shall circulate its report within 90 days after the date of referral of the matter to it. When the Panel considers that it cannot provide its report within 90 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 provide its report.

6. If a party appeals the report of the panel, Article 17 and Article 17bis apply to Appellate Body proceedings and the adoption of the Appellate Body report.]

Article 18

Communications ~~with the Panel or Appellate Body~~

1. There shall be no *ex parte* communications with the panel**,** ~~or~~ Appellate Body**, or arbitrator[c],** concerning matters under consideration by the panel**,** ~~or~~ Appellate Body**, or arbitrator**.

[c] For the purposes of this Article, the expression "arbitrator" means any arbitrator under paragraph 3(c) of Article 21, Article 22, or Article 25.

2. [**[Any document[d]] [The written submissions] that a Member provides to a panel, the Appellate Body, or an arbitrator [(other than any submission made subsequent to the issuance of the interim report to the parties)] shall be public except for information designated as strictly confidential information [in accordance with the procedures referred to in paragraph 3].** ~~Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute.~~]

[d] For the purposes of this paragraph, the term "document" does not include a document concerning an interim report or that is purely administrative in nature.]

Nothing in this Understanding ~~shall~~ precludes a **Member** ~~party to a dispute~~ from disclosing statements of its own positions to the public. **[** ~~Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.~~ **[A Member shall not disclose information designated by another Member as strictly confidential information in accordance with the procedures referred to in paragraph 3.]**

A party **[or third party]** to a dispute shall also, upon request of a Member, provide a non-confidential summary of ~~the information contained in~~ its written submissions that could be disclosed to the public. **[A Member submitting strictly confidential information in accordance with the procedures referred to in paragraph 3 shall provide a non-confidential summary of the information within 15 days of the request of another Member].**

3. [Where a party designates any information submitted to the panel or the Appellate Body as "strictly confidential information", such information shall be treated in accordance with the procedures set out in Appendix 5, unless the panel or the Appellate Body decides otherwise after consulting the parties to the dispute. These procedures also apply *mutatis mutandis* to strictly confidential information submitted in the course of arbitrations pursuant to this Understanding or in the course of procedures under Annex V of the Agreement on Subsidies and Countervailing Measures.]

[Each substantive meeting with the parties of a panel, the Appellate Body, or an arbitrator, and each meeting of a panel or arbitrator with an expert, shall be open for the public to observe [g], except for any portion dealing with strictly confidential information [submitted in accordance with the procedures referred to in paragraph 3.]]

[g] The expression "observe" does not require physical presence in the meeting.

Article 21

Surveillance of Implementation of Recommendations and Rulings

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[12] In such arbitration, a guideline for the arbitrator[13] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.[h]

[11] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[12] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[13] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

[[h] In determining these particular circumstances the arbitrator shall take into account the particular problems and interests of developing country Members.]

5. **[(a) After the midpoint of the reasonable period of time, or after the DSB meeting referred to in paragraph 3 where the Member concerned does not [have][need] a reasonable period of time pursuant to paragraph 3, each party to the dispute shall, if requested by another party, accord sympathetic consideration to any request for consultations in good faith with a view to reaching a mutually satisfactory solution regarding the implementation of the recommendations and rulings of the DSB. [The party requesting consultations shall notify its request to the DSB and the relevant Councils and Committees.]**

(b) Where the Member concerned considers that it has fully complied with the recommendations and rulings of the DSB it shall so notify the DSB in writing without delay. The Member concerned shall include with the notification a description of any [relevant] measure it has taken [to comply], the date of entry into force of the measure, and its text, if any.

(c) Where there is disagreement as to the existence or consistency with a covered agreement of **any** measure~~s~~ taken to comply with the recommendations and rulings **of the DSB,** such **disagreement** ~~dispute~~ shall be decided through recourse to **[the procedures provided for under this Understanding,] as modified by this paragraph**. ~~these dispute settlement procedures, including wherever possible resort to the original panel~~

(i) The procedures under this paragraph do not require the complaining party to request consultations under Article 4 before requesting the establishment of a panel.

(ii) The DSB shall establish a panel, upon request by the complaining party, at the first meeting at which the request is made, unless it decides by consensus not to do so. The matter shall be referred to the original panel. If any member of the original panel is not available, unless the parties agree otherwise, the Director-General shall appoint a replacement within 7 days after the date of establishment of the panel, after consulting with the parties to the dispute.]

(iii) The panel shall circulate its report within 90 days after the date of ~~referral of the matter to~~ it**s establishment**. Whe**re**~~n~~ the panel considers that it cannot ~~provide~~ **circulate** its report within this ~~time frame~~ **timeframe**, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will **circulate** ~~submit~~ its report.

(iv) Where the DSB rules that a measure taken to comply does not exist or is inconsistent with a covered agreement, the Member concerned shall not have an additional reasonable period of time to comply with the recommendations and rulings of the DSB.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented **[immediately in the case of compensation or]** within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements. **[Compensation to developing country Members will be monetary unless**

otherwise agreed.[i]

[i] This is without prejudice to the possibility for developed Members to obtain monetary compensation, if so agreed.]

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings **immediately or, where applicable,** within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if **a complaining party** so request~~sed, [and no later than the expiry of the reasonable period of time~~, enter into negotiations with **a complaining party** ~~any party having invoked the dispute settlement procedures~~ **within ten days of such request]**, with a view to developing mutually acceptable compensation.

2 *bis* **A complaining party** ~~If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures]~~ may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements **[only where [no satisfactory compensation has been agreed with that complaining party and]:**

(a) the Member concerned does not inform the DSB, within the timeframe of paragraph 3, first sentence, of Article 21, that it intends to comply with the recommendations and rulings of the DSB;

(b) the Member concerned does not notify the DSB by the expiry of the reasonable period of time[j] **that it has fully complied with the recommendations and rulings of the DSB; or**

[j] Or by the date of the DSB meeting referred to in paragraph 3 of Article 21 where the Member concerned does not have a reasonable period of time pursuant to paragraph 3 of Article 21.

(c) [the][a] complaining party has had recourse to proceedings under paragraph 5 of Article 21, and the DSB has ruled that a measure taken to comply does not exist or is inconsistent with a covered agreement or that the Member concerned has failed to otherwise comply with the recommendations and rulings of the DSB].

[3*bis*. Notwithstanding the provisions contained in paragraph 3, in a dispute between a developing country Member and a developed country Member, the developing country Member shall have the right to seek authorization to suspend concessions or other obligations in any sectors under any covered agreements.]

6. **[(a) Following one of** ~~When~~**]** the situation**[s]** described in paragraph **[**2**bis** ~~occurs~~**]**, the DSB, upon request, shall grant authorization to suspend concessions or other obligations ~~within 30 days of the expiry of the reasonable period of time~~, unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration.

[(b)] Such arbitration shall be carried out by the original panel~~, if members are available, or by an arbitrator[] appointed by the Director-General and~~ **[. If any member of the original panel is not available, unless the parties agree otherwise the Director-General shall appoint a replacement, after consulting with the parties. The arbitration]** shall be completed within 60 days **of the appointment of the arbitrator**[15] ~~after the date of expiry of the reasonable period of time~~.

A complaining party may not suspend c~~C~~oncessions or other obligations ~~shall not be suspended~~ during the course of the arbitration.

[15] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.]

[(b) Where it is demonstrated that the suspension of concessions or other obligations would have negative consequences on the economy of a developing country Member, the DSB may, upon request, authorize a Member or a group of Members to suspend concessions on behalf of the affected Member. The following principles and procedures shall apply to such requests:

(i) Before making such a request, the developing country Member shall refer the matter to arbitration for determination of the level of nullification and impairment, which shall be done [taking into account the legitimate expectations of the developing country Member]. The arbitration shall further take into account the effects of the suspension of concessions upon the economy of the developing country.

(ii) The arbitration shall consider whether the suspension of concessions or other obligations in other sectors by the developing country Member would be [appropriate to effectively encourage the withdrawal of the measure found to be inconsistent with a covered Agreement, taking into account possible effects on that developing country Member].

(iii) Where the DSB grants authorisation to a Member or a group of Members to suspend concessions or other obligations under paragraph 7, the level of suspension for each Member authorized shall be limited to securing [full compensation for the injury to the developing country Member concerned], [the protection of its development interests], and the timely and effective implementation of the recommendations and rulings.

[(c) Where the case is one brought by a developing country Member against a developed-country Member and the situation described in paragraph 2 occurs, and in order to promote the timely and effective implementation of recommendations and rulings, the DSB, upon request, shall grant authorization to the developing country Member and any other Members to suspend concessions or other obligations within 30 days.]]

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment**[, and if no compensation has been [granted][agreed] or compensation has not been granted as agreed, the arbitrator shall, if so requested, additionally determine the level of nullification or impairment suffered during the reasonable period of time**]. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. **[However, within [30] days after the issuance of the decision of the arbitrator, any party may appeal any issue of law covered in the decision and legal interpretation developed by the arbitrator. Paragraphs 1, 5 and 10 to 14 of Article 17 shall apply to such appeals *mutatis mutandis*. If the Appellate Body reverses or modifies the arbitrator's legal findings, the arbitrator shall immediately resume its work to re-examine its decision to ensure its consistency with such findings and conclusions of the Appellate Body. The arbitrator shall, upon request, give**

the parties to the dispute the opportunity to make written and oral representations in respect of the consequences of the findings and conclusions of the Appellate Body for the decision.] The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

[16] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

8. **[(a)]** The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

[However, in those cases where the level of nullification or impairment includes the level of suspension or impairment suffered during the reasonable period of time as described in paragraph 7, the suspension of concessions or other obligations may remain in force thereafter until such time at which the effect of suspension is equivalent to the level of nullification or impairment suffered during the reasonable period of time.]

[(b) Where the DSB has authorized the suspension of concessions or other obligations against a Member and there is a subsequent disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB, the Member concerned may have recourse to the procedures of paragraph 5 of Article 21 as modified by this paragraph. In such a case:

(i) in its request for the establishment of a panel, the Member concerned shall set out the specific measures taken to comply, the text of these measures, and a factual and legal description of how these measures bring the Member into compliance with the recommendations and rulings of the DSB;

(ii) where a Member that has been authorized to suspend concessions or other obligations considers that a measure taken to comply is inconsistent with any other provision of the covered agreements, or that the Member concerned has otherwise not brought itself into compliance with the recommendations and rulings of the DSB, it may submit to the DSB, no later than [xx days] after the establishment of a panel, a notice setting out any additional measure taken to comply and a brief summary of the legal basis for its disagreement with the Member concerned; and

(iii) for the purposes of these proceedings, the word "document" in the terms of reference of the panel under paragraph 1 of Article 7 comprises the request for the establishment of the panel and the notice submitted under subparagraph (ii) [of this provision].

(c) Where, following these proceedings, the DSB:

(i) rules that the measure taken to comply is not inconsistent with

the provisions in question or otherwise brings the Member concerned into compliance with the recommendations and rulings of the DSB, on the request of the Member concerned, the DSB shall withdraw that authorization, unless it decides by consensus not to do so;

(ii) does not rule that the Member concerned is in compliance with the recommendations and rulings of the DSB, notwithstanding paragraph 7 of Article 22, fifth sentence, a party to the dispute may refer the matter to arbitration pursuant to paragraph 6 of Article 22. The Arbitrator may determine a new level of suspension or make findings, as appropriate, under paragraph 3 of Article 22. The Arbitrator shall inform the DSB promptly of its decision. Upon the request of a party to the dispute, the DSB shall modify the authorization to suspend concessions or other obligations consistently with the decision of the Arbitrator, unless the DSB decides by consensus to reject the request.

(d) The existing authorization to suspend concessions or other obligations remains in effect until, pursuant to paragraph (c), the DSB withdraws or modifies that authorization.]

[(b) After the DSB has authorized a complaining party to suspend concessions or other obligations pursuant to paragraph 6 or 7 (in this paragraph referred to as the "authorized party"), the Member concerned may notify the DSB that it has fully removed the inconsistency with a covered agreement, or that it has provided a solution to the nullification or impairment of benefits. Such notification shall be accompanied by:

(i) a detailed description of any measure taken by the Member concerned, its date of entry into force, any text of such measure, and a list of documents that the Member concerned considers relevant for the assessment of implementation; and

(ii) a detailed factual and legal explanation of how the measure taken by the Member concerned has removed any inconsistency with, or provided a solution to any nullification or impairment of benefits under, the covered agreements.

(c) Where an authorized party so requests, the Member concerned shall enter into consultations regarding any matter associated with the notification within 10 days upon receiving such request. The Member concerned shall respond promptly and to the extent reasonably possible to any request by the authorized party for further information or documents regarding the measure it has taken.

(d) The DSB shall, upon request, withdraw the authorized party's authorization to suspend concessions or other obligations, unless the DSB decides by consensus not to do so, where:

(i) the authorized party does not request, within 60 days of the circulation of the notification referred to in paragraph (b),[k] the establishment of a panel under paragraph 7 of Article 21; or

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[k] The Member concerned and the authorized party may agree to extend this 60 day period. Where there is disagreement as to whether the Member concerned has satisfied the requirements of subparagraph (b)(i) and (ii), such

disagreement shall also be resolved through recourse to dispute settlement procedures pursuant to paragraph 7.

(ii) the authorized party has requested the establishment of a panel under paragraph 7 of Article 21 and, as a result of the proceedings, the DSB rules that the measure taken to comply exists and has fully removed the inconsistency with, or has provided a solution to the nullification or impairment of benefits under, the covered agreements.

(e) If, as a result of recourse to the dispute settlement procedures provided for in paragraph 7 of Article 21, the DSB does not rule that the Member concerned has fully removed the inconsistency with, or provided a solution to the nullification or impairment of benefits under, the covered agreements, the complaining party in the dispute under paragraph 7 of Article 21 may request that the DSB modify the authorization for the suspension of concessions or other obligations. However, if the Member concerned objects to the modified level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed in the request for modification, it shall have recourse to arbitration. If, in the absence of the complaining party's request for modification, the Member concerned objects to the level of suspension permitted under the existing authorization, it shall also have recourse to arbitration. The first sentence of paragraph 6(a), the first sentence of paragraph 6(b) as well as paragraph 7 of Article 22 shall apply *mutatis mutandis* to such modification by the DSB and such arbitration. Until the modification by the DSB, the complaining party may only suspend concessions or other obligations in accordance with the existing authorization.]

[(e)] In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

[(f) Upon the request of a party to the dispute, the DSB may at any point withdraw or modify an authorization.]

[In such cases, Members which have been granted the right to suspend concessions or other obligations shall notify the DSB and the relevant WTO bodies of all the measures taken as suspension of concessions or other obligations within three months after the DSB has granted such authorization and thereafter every six months, until such time as the suspension ceases to be applied.]

**[*Article 28*

Dispute Settlement Fund

1. A fund on dispute settlement shall be established to facilitate the effective utilisation of the dispute settlement procedures by developing country Members.[l]**

[l] The Members may decide to set up a Fund specifically for this purpose separate from the other trust funds.

2. Disbursements under the fund shall be made in accordance with criteria to be adopted by the DSB.[m]

[m] Such criteria may include the following requirements: (1) The Dispute Settlement Fund is available to all developing countries for all disputes where they are parties to the dispute as complainants, co-complainants and respondents. (2) Members are free to choose their

own legal representatives. (3) The DSB may adopt other criteria to ensure the effectiveness and functioning of the Dispute Settlement Fund. (4) The use of the fund by developing country Members shall be in accordance with a set of rules that will be formulated for such purposes as approved by the DSB.

3. On the basis of reports of the Committee on Budget, Finance and Administration, the General Council shall review annually the adequacy and utilization of the fund with a view to improving its effectiveness.

4. The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget.[n] To ensure its adequacy, the fund may be additionally funded from extra-budgetary sources, which may include voluntary contributions.

[n] The Members may decide to apportion some amount set aside for technical assistance for the purpose of contributing to the fund. The Members may also decide to set up a Fund specifically for this purpose separate from the other trust funds.

5. In a dispute between a developed and developing country Member, where a developing country Member is unable to access the fund due to lack of resources, the DSB shall award legal costs to the developing country Member in the case where the developed country Member's measures have been found inconsistent with the covered agreements [o].]

[o] Legal costs shall only be awarded on submission of signed and dated receipts by the party requesting their award. The panel may determine if the proposed award is reasonable taking into account the complexity of the matters raised by the dispute. The panel may use as its benchmark the time budget and fee scale of the Advisory Centre on WTO Law.

APPENDIX 3

WORKING PROCEDURES

[2. ~~The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.~~**]**

3. **[**The deliberations of the panel **[**and ~~the documents submitted~~ **written submissions** to it**]** shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. **[**~~Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained it its submissions that could be disclosed to the public~~**.] [**~~Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential.~~ **]]**

3*bis*. [Information designated by a Member as strictly confidential shall be treated in accordance with the procedures [referred to in paragraph 3 of Article 18]]

6. ~~All third parties which have notified their interest in the dispute to the DSB~~ **The panel** shall ~~be~~ invite~~d~~ in writing **each third party** to ~~present their views during a session of~~ **make a written submission to the panel and to be present at** the first substantive meeting of the panel ~~set aside for that purpose~~ **with the parties**. ~~All such third parties may be present during the entirety of this session.~~ **The panel shall give each third party the opportunity to make an oral statement and to respond to questions at a session of that meeting set aside for that purpose, and to respond in writing to questions arising out of such a meeting.**

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first, to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel. **The panel shall invite in writing the third parties to be present at the second and any subsequent**

substantive meetings prior to the issuance of the interim report.

12. Proposed timetable for panel work~~:~~

	Organisational meeting with the parties		**Starting date**
(a)	Receipt of first written submissions of the parties:		
	(1) complaining Party:		~~3-6 weeks~~ **14 days**
	(2) Party complained against:		~~2-3~~ **3-4** weeks
(b)	Date, time and place of first substantive meeting with the parties: third party session:	_____	1-2 weeks
(c)	Receipt of written rebuttals of the parties:	_____	2-3 weeks
(d)	Date, time and place of second substantive meeting with the parties:	_____	1-2 weeks
(e)	Issuance of descriptive part of the report to the parties:	_____	2-4 weeks
(f)	Receipt of comments by the parties on the descriptive part of the report:	_____	2 weeks
(g)	Issuance of the interim report, including the findings and conclusions, to the parties:	_____	2-4 weeks
(h)	Deadline for party to request review of part(s) of report:	_____	1 week
(i)	Period of review by panel, including possible additional meeting with parties:	_____	2 weeks
(j)	Issuance of final report to parties to dispute:	_____	2 weeks
(k)	Circulation of the final report to the Members:	_____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

[APPENDIX 5

PROCEDURES GOVERNING STRICTLY CONFIDENTIAL INFORMATION

I. SCOPE

1. In accordance with [paragraph 3 of Article 18], these procedures apply to all strictly confidential information (SCI) submitted [to a panel or to the Appellate Body. They also apply, *mutatis mutandis*, to SCI submitted in the course of] an arbitration procedure [under this Understanding] or [of] a procedure under Annex V of the

Agreement on Subsidies and Countervailing Measures.

2. "Strictly confidential information" means: specific information, including business confidential information, in any form, that (i) is secret in the sense that it is not generally known or readily accessible to persons, natural or legal, other than those lawfully in control of the information; (ii) has been the subject of reasonable efforts by the person or persons lawfully in control of the information to keep it secret; and (iii) if disclosed would cause or threaten to cause serious prejudice to an essential interest of any individual or entity lawfully in control of the information.

II. RESPONSIBILITY FOR COMPLIANCE

1. Each party is responsible for ensuring that its representatives comply with these procedures to protect SCI submitted by another party. The Secretariat is responsible for ensuring that all other approved persons comply with these procedures.

III. SUBMISSION OF SCI BY A PARTY

1. When submitting information, a party may designate all or any part of that information as SCI provided that such information meets the [definition under paragraph 2]. Each party shall act in good faith and exercise the utmost restraint in exercising its right to designate information as SCI.

2. To the extent possible, SCI should be submitted in an exhibit or annex to a submission. Under no circumstances shall an entire submission or substantial parts of it be designated as SCI.

3. A party that wishes to submit SCI at a panel [or Appellate Body] meeting shall so inform the panel prior to doing so. The panel shall exclude persons who are not approved persons from the meeting while the SCI is submitted and discussed.

4. Where a submission by a party incorporates SCI first submitted by another party, the submission shall identify that information as SCI.

5. If a party objects to the designation as SCI of information submitted by another party, the panel [or the Appellate Body] shall decide if the information meets the [definition under paragraph 2]. If the panel [or the Appellate Body] considers that the information does not meet the [definition], [it] shall decline to consider that information. In such a case, the party submitting the information may, at its discretion:

(a) withdraw the information, in which case the panel and the other parties shall promptly return the information to the party submitting it; or

(b) withdraw the designation of the information as SCI.

6. If a party considers that information submitted by another party should have been designated as SCI because it has made reasonable efforts to keep it secret and it objects to such submission, the panel [or the Appellate Body] shall decide if the information meets the criteria in the definition of SCI in the DSU. If the panel [or the Appellate Body] considers that the information does meet the [definition], [it] shall decline to consider that information. In such a case, the party submitting the information may, at its discretion:

(a) withdraw the information, in which case the panel and the other parties shall promptly return the information to the party submitting it; or

(b) designate the information as SCI.

IV. TREATMENT OF SCI

1. Access to SCI

(a) Only approved persons may have access to SCI.

(b) Documents or other recordings containing SCI (SCI-designated material) shall not be copied in excess of the number of copies required by the approved persons. All copies of SCI shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible.

2. Storage

SCI-designated material shall be stored in a secure location when not in use. A secure location is understood to be a locked storage receptacle or electronic storage facility where SCI may be held so as to afford access only to approved persons.

3. Use and disclosure of SCI

(a) Approved persons shall use SCI only for the purposes of the dispute settlement proceedings and for no other purpose.

(b) No approved person shall disclose SCI, or allow it to be disclosed, to any person except another approved person.

(c) The panel [or the Appellate Body] shall not disclose SCI in its final report as circulated to the Members, but may make statements of conclusion drawn from the SCI.

4. Return or destruction

After the conclusion of the dispute settlement process[p], or the arbitration procedure, within a period fixed by the panel[, the Appellate Body] or the arbitrator, approved persons shall return any SCI-designated material, or certify in writing to the parties that the SCI-designated material has been destroyed, unless the party that first submitted the SCI agrees otherwise. The Secretariat may retain one copy of the SCI-designated material for the archives of the WTO.

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[p] "Conclusion of the dispute settlement process" means the earliest of the following events:

(i) pursuant to paragraph 4 of Article 16, the panel [or Appellate Body] report is adopted by the DSB, or otherwise not adopted by consensus of the DSB;

(ii) pursuant to paragraph 4 of Articles 16 and paragraph 14 of Article 17, the panel report is adopted (with modification, if any) with the report of the Appellate Body;

(iii) when the authority for establishment of the panel lapses pursuant to Article 12.12; or

(iv) pursuant to Article 3.6, a mutually agreed solution is notified by the DSB.

V. DESIGNATION OF APPROVED PERSONS

1. Panel members, Appellate Body members and designated Secretariat employees and experts appointed by a panel are approved persons and may have access to SCI.

2. A party may designate as an approved person anyone who is a party's representative, being employees, legal counsel or other advisors or consultants of that party, but in no circumstances may include anyone who could reasonably be expected to

benefit from the receipt of the SCI.

3. Each party shall submit to the other party or parties and the panel a list of its representatives who need access to SCI submitted by the other party. Each party shall limit the number of persons on its list, taking into account its administrative and political structures. The Director-General shall, in the same manner, submit to the parties and the panel a list of the employees of the Secretariat who need access to SCI in the dispute. The parties or the Director-General may submit amendments to their lists at any time.

4. Unless a party objects to the designation of any of the persons on the lists submitted under paragraph (1), the panel[or the Appellate Body] shall designate those persons as approved persons. If a party objects to the designation of any of the persons on the lists submitted, the panel [or the Appellate Body] shall decide on the objection promptly, having regard to any potential harm arising from the designation. It is within the panel's discretion whether to accept or deny the objection. If the panel [or the Appellate Body] denies the objection, the SCI of another party may not be disclosed to any person who was the subject of the objection until the party submitting the SCI has had a reasonable opportunity to withdraw the SCI. In that event, the panel [or the Appellate Body] and the other parties shall promptly return any document or other recording containing the SCI to the party submitting it.

VI. ADDITIONAL OR ALTERNATIVE PROCEDURES

1. Following consultations with the parties, and third parties as required, the panel [or the Appellate Body] may waive any part of these procedures or apply any other procedures that it considers necessary to ensure the protection of SCI.]

II. PROPOSED DSB DECISIONS

[PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

Decision by the Dispute Settlement Body

The Dispute Settlement Body directs the Secretariat to maintain the documents referenced in paragraph 2 of Article 18 in a central location and to make these documents available to the public, except for [strictly] confidential information [designated as such by a Member in accordance with the procedures referred to in paragraph 3 of Article 18].

A final report issued by a panel to the parties is an unrestricted document, except for any [strictly] confidential information, as defined in [paragraph 3 of] Article 18. Any interim report considered final by operation of the last sentence of paragraph 2 of Article 15 is unrestricted when considered final.

This decision is without prejudice to the practice concerning the date of circulation of the report.[q]]

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[q] That practice was established on a trial basis and under that practice a document is deemed to be circulated on the "date printed on the WTO document to be circulated with the assurance of the Secretariat that the date printed on the document was the date on which this document was effectively put in the pigeon holes of delegations in all three working languages." (WT/DSB/M/2).

[FLEXIBILITY AND MEMBER-CONTROL

Decision by the Dispute Settlement Body

A Member proposing that a finding, *[[or basic rationale behind a finding]],* in a panel or Appellate Body report should not be adopted by the Dispute Settlement Body shall submit the proposal in writing to the Dispute Settlement Body no later than 3 days (or the WTO working day following the 3rd day if the 3rd day is a non-working day for the WTO) after the issuance of the airgram convening the meeting at which the report is proposed to be considered.[r] The Member shall specify in the proposal the finding *[[, or the basic rationale behind a finding,]]* at issue and give a brief description of the reason not to adopt.]

[r] In the case of a panel report, the Member shall submit the proposal no later than 3 days (or the WTO working day following the 3rd day if the 3rd day is a non-working day for the WTO) after the issuance of the airgram convening either: (1) the meeting at which the panel report is proposed to be considered if no party has filed a notice of appeal; or (2) the meeting at which the panel report together with the Appellate Body report is proposed to be considered if a party has filed a notice of appeal.

[WORKING PRACTICES CONCERNING PANEL COMPOSITION

Decision by the Dispute Settlement Body

The Dispute Settlement Body (DSB),

***Desiring* to enhance the process by which panels are composed under Article 8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);**

***Resolved* to expedite this process and enhance its transparency;**

***Recalling* the need to compose panels of well-qualified individuals and to ensure their independence;**

Hereby *decides* as follows:

1. This Decision establishes rules on the composition of panels pursuant to Article 8 of the DSU for the parties, the Director-General and the Secretariat.

2. The DSB may review these rules, as necessary, in order to further improve them in the light of the experience gained, by revising the present Decision or adopting other Decisions.

3. The following procedure shall apply where a panel has been established and needs to be composed, without prejudice to the parties' right to agree on any or all panelists.

4. After the establishment of the panel, the Secretariat shall ask each party to indicate any particular selection criteria (such as qualifications or experience) it wishes the panelists to have. The Secretariat shall present to the parties a single list of persons known to the Secretariat who meet [at least one] [any of] the requested criteria[s], to the utmost extent possible. This list should normally comprise the names of between 12 and 20 persons, together with their curricula vitae, unless the parties agree otherwise.

[s] Where the parties request several or different criteria, the list should comprise persons who meet one or more of these criteria.

5. Each party[t] may reject one of those nominations where the list comprises no more than 10 persons, two where it comprises between 11 and 20 persons and three where it comprises more than 20 persons. The parties may otherwise object to the Secretariat's nominations to the list only in the event of a conflict of interest as referred to in the Rules of Conduct. In such cases, the party concerned must substantiate its reasons and provide the corresponding evidence. The Secretariat shall not take into account objections of other nature. Each party shall then provide to the Secretariat a ranking in order of preference of all the proposed names, except of the rejected nominations and those withdrawn from the list based on the Secretariat's decision that there is a conflict of interest.

[t] Where there are multiple complainants and a single panel is established under paragraph 1 of Article 9 or several panels are composed of the same persons under paragraph 3 of Article 9, the complainants shall exercise the right of rejection by dividing the available rejections among themselves, unless the complainants agree otherwise.

6. The Secretariat shall ascertain which nominations received the highest[u] combined preference by adding the results of the ranking of the respondent and that of the complainant.[v] The Secretariat shall then verify whether these persons are available and whether the parties agree on the resulting panel composition as well as on the member of the panel who shall serve as chairman.

[u] Among nominations with equal combined preference, the person(s) with the lowest degree of divergence between the parties' rankings shall receive priority. Where this is the case for more nominations than are needed to compose the panel, the Secretariat shall draw by lot the needed number of persons from among those nominations.

[v] Where there are multiple complainants and a single panel is established under paragraph 1 of Article 9 or several panels are composed of the same persons under paragraph 3 of Article 9, the Secretariat shall, before proceeding to this addition, merge the results of the rankings of all complainants into a single ranking by calculating an average for each nomination.

7. [In exceptional circumstances, and at the joint request of the parties, the Secretariat may present an expanded, second list of nominations, in order to repeat the steps set out in paragraphs 5 and 6.]

8. In accordance with paragraph 10 of Article 8 of the DSU, when a dispute is between a developing country Member and a developed country Member and the developing country Member so requests, [this Decision shall be applied in such a manner that at least one panelist shall be from a developing country Member. To this end,] as necessary, the developing country citizen obtaining the highest combined preference shall be chosen.[w]

[w] Among nominations with equal combined preference, the person(s) with the lowest degree of divergence between the parties' rankings shall receive priority. Where this is the case for more nominations than are needed to compose the panel, the Secretariat shall draw by lot the needed number of persons from among those nominations.

9. Where the parties do not agree on the panel's composition within 20 days after the date of the establishment of a panel and either party requests that the Director-General compose the panel in accordance with paragraph 7 of Article 8 of the DSU, the Director-General shall determine the composition of the panel by appointing, from the nominations proposed by the Secretariat, except the nominations rejected in accordance with paragraph 5, the panelists whom the Director-General considers most appropriate, after consulting with the parties to the dispute.]

[ADDITIONAL GUIDANCE FOR WTO ADJUDICATIVE BODIES

Decision by the Dispute Settlement Body

A. PARAMETERS CONCERNING THE USE OF PUBLIC INTERNATIONAL LAW

Areas in which public international law plays a role in WTO dispute settlement

Members recognize that public international law plays an important role in WTO dispute settlement. In particular, there are three important means through which public international law plays a role.

First, the Marrakesh Agreement Establishing the World Trade Organization is itself public international law.

Second, in Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") Members recognize with respect to the covered agreements that the WTO dispute settlement system serves "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The WTO Appellate Body recognized that this description in Article 3.2 of the role of the WTO dispute settlement system "reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[x]

[x] ***United States - Standards for Conventional and Reformulated Gasoline (WT/DS2/AB/R), page 17.]]***

Those customary rules of interpretation of public international law are reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties, including as stated in Article 31(3)(c) any relevant rules of international law (i.e., rules relevant to treaty interpretation) applicable in the relations between the parties.

I[t is useful to note that i]n the commentary of the International Law Commission concerning Articles 31 and 32 of the Vienna Convention, the Commission observed that it is not possible to identify principles of international law that apply in all instances. Rather, this must be examined on a case-by-case basis. The Commission stated:

> **"Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts .... Thus it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given**

> **case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science."[y]**
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> **[y] Report of the International Law Commission on its eighteenth session, 4 May to 19 July 1966 (A/6309/Rev.1). Articles 31 and 32 were at that time Articles 27 and 28.**

It is also important to identify the sources from which the rules relevant to treaty interpretation are obtained. An international instrument that is not in force embodies relevant international rules only to the extent that it reflects principles of customary international law. An international instrument that is in force, in addition to possibly reflecting principles of customary international law, may also embody relevant international rules as between the parties to that instrument, but not to non-parties.

Third, the covered agreements include numerous references to other public international law. Some examples include Article XV:4 of the General Agreement on Tariffs and Trade 1994 (referring to the Articles of Agreement of the International Monetary Fund) and Article 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (referring to the Paris Convention, Berne Convention, Rome Convention and Treaty on Intellectual Property in Respect of Integrated Circuits).

Limitations on the use of public international law in WTO dispute settlement

[Recognizing that international dispute settlement fora vary regarding the breadth of their adjudicatory authority,] WTO dispute settlement under the DSU is focused on the adjudication of rights and obligations under specified agreements. These "covered agreements" are listed in Appendix 1 of the DSU. While other international law might properly play a role in WTO dispute settlement fora, it is not the function of WTO dispute settlement to adjudicate rights and obligations beyond those in the covered agreements.

Consideration of procedural approaches of other adjudicative bodies

In addition, Members recognize that each WTO adjudicative body is tasked with managing its own proceedings, including developing its own working procedures. It is natural that in managing its proceedings, a body may wish to consider how other adjudicative bodies have approached similar procedural issues, including other international adjudicative bodies as well as those in an individual Member. Ultimately, however, such consideration is a question of the body exercising its discretion as to how to manage its proceedings; such consideration is not a question of interpreting a covered agreement in accordance with public international law.

B. PARAMETERS CONCERNING THE INTERPRETIVE APPROACH TO USE IN WTO DISPUTE SETTLEMENT

WTO adjudicative bodies are constrained from adding to or diminishing the covered agreements

Articles 3.2 and 19.2 of the DSU provide that recommendations and rulings of the DSB "cannot add to or diminish the rights and obligations provided in the covered agreements." This means that WTO adjudicative bodies must take care that [any interpretive approach they may use] results neither in supplementing nor in reducing the rights and obligations of Members under the covered agreements.

The covered agreements reflect differing negotiating objectives and positions

The covered agreements are the result of negotiations among sovereign nations and autonomous customs territories. Negotiations inherently entail a number of compromises. [Agreement by participants on particular terms in a covered agreement does not mean that all WTO Members have agreed on the same underlying approach or rationale for those terms.] Some participants may have wanted stronger rules or disciplines that went further in a particular area, while other participants may not have wanted rules as strong or disciplines that went as far. It is for this reason that the text of the covered agreements is the best representation of the expectations of WTO Members.

[The differences in approach and perspective also mean that, w]hen interpreting a provision of a covered agreement, while other provisions of the covered agreements may serve as useful context, [it is not possible to deduce from the existence of certain provisions that WTO Members have agreed on a particular underlying policy and that this policy may be used as a guideline to interpret other provisions. In other words,] it is not appropriate to extrapolate from the fact that Members have agreed to move in a particular direction in one provision and conclude that therefore Members must have intended another provision to move equally in the same direction. It often may be possible to reach agreement only on one particular obligation or discipline while being unable to reach agreement on any obligation or discipline even in a related area.

The covered agreements embody [constructive] ambiguity

Customary international law rules of treaty interpretation, reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties, recognize that an examination in accordance with the general rule reflected in Article 31 of the Vienna Convention may result in a meaning that is ambiguous, and that resort to the supplementary means of interpretation in Article 32 may be necessary[z]. [Typically such analysis will permit a determination of the meaning of the terms of the treaty, although there is no guarantee that recourse to supplementary means of interpretation will always resolve that ambiguity.]

[z] See for example Article 32(a) of the VCLT.

[Sometimes that ambiguity is deliberate. In some circumstances, reaching agreement on the terms of the covered agreements may have necessitated the use of constructive ambiguity in a provision of a covered agreement where the negotiators leave unresolved particular issues by agreeing on language that does not resolve the issue and is capable of more than one interpretation. Constructive ambiguity can serve as a placeholder marking an area where negotiators accept that it may be appropriate to agree on disciplines but where further negotiation is necessary before those disciplines can be specified.

WTO adjudicative bodies are not called to determine if ambiguity is deliberate.] Ambiguity is ascertained from an examination of the text. WTO adjudicative bodies will determine whether the meaning of a text is ambiguous after applying the customary rules of interpretation and in light of the evidence and argument presented by the parties to the dispute. There is no separate requirement to establish the intent behind or reason for the ambiguity.

Gap-filling

[In light of the nature of the covered agreements, there are at least two ways in which "gaps" in a covered agreement could be unacceptably filled, other than through negotiation.

> **First would be to read into the text of a covered agreement an obligation or right that is not present in the text, for example by extrapolating from a different provision.[aa]]**
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> _____
>
> **[aa Some commentators would give as an example of extrapolation a situation where a treaty interpreter argues that "if the negotiators agreed on x in this provision over here, then they must have intended to agree on y in this other provision."]**
>
> **Second would be to resolve ambiguity in the text of a covered agreement in a manner that supplements or diminishes rights and obligations under the covered agreement.**

Neither type of "gap-filling" is an appropriate function for WTO adjudicative bodies. Rather, the function of WTO adjudicative bodies is to resolve disputes over obligations undertaken, not to substitute for negotiators and re-write, reduce or supplement the agreed text.]

[With respect to the first type of gap-filling], there have been several instances in which the Appellate Body has found that a panel has gone beyond the terms of a covered agreement and imputed obligations that were not present in the text. The Appellate Body has correctly found that this is cause for overturning panel findings. It is important to respect the limits of the agreement negotiated. A Member signing a covered agreement indicates by its signature that it is agreeing to the text of that agreement. The Member is not indicating its acceptance to go beyond the text of that agreement.

Similarly, prior reports of WTO adjudicative bodies are not covered agreements. They do not themselves represent agreed text. Accordingly, it is not appropriate to treat or interpret a prior report as though it is agreement text or to use a prior report to add to or diminish rights and obligations under a covered agreement.

[With respect to the second type of gap-filling,] where the application of the customary rules of treaty interpretation leaves the meaning of a provision ambiguous, e.g., there may be two plausible meanings, a WTO adjudicative body should not use that language as the basis for validating a claim or a defense where that validation would require foreclosing one of those meanings.

[WTO Members have agreed that the WTO dispute settlement system is not to add to or diminish the rights and obligations under the covered agreements. They have not agreed to delegate to WTO adjudicative bodies the task of filling in gaps in the covered agreements.]

C. PARAMETERS CONCERNING 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.[bb] 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.[cc]

[bb] 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.

[cc] *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.

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"[dd] taken by a Member.

[dd] Article 4.2 of the DSU.

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

[ee] Article 4.2 of the DSU.

[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."[ff] 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.[gg] 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 Member.[hh]**

[ff] **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.**

[gg] **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*.)**

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

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

[ii] **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.**

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

(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.]]

Annex 2: Thematic Overview

This overview is intended to reflect my perception of the state-of-play on the various issues at this point in time, based on recent discussions, and to identify possible ways forward for our future work. This overview also reflects, where relevant, my own observations in light of the general considerations highlighted in my introductory comments. It does not pretend, however, to reflect each and every detail of the discussions to date. For the sake of clarity of presentation, the issues are grouped around broad themes.

Third party rights

Recent discussions on third-party rights have been based on various legal drafting proposals, addressing third party rights in consultations (JOB(05)/19/Rev.1, JOB(06)/89, JOB(06)/175 and JOB(06)/224/Rev.1), in panel proceedings and at the appellate stage (JOB(05)/19/Rev.1 and TN/DS/W/92).

In respect of *consultations*, there seems to be broad support for the proposal that responses to third party requests to be joined in consultations be notified to the applicant Member and to the DSB in writing and within a specific deadline, although there remains some discussion as to exactly what this timeframe should be, taking into account the overall timeline for consultations.[4] No clear convergence has emerged in favour of proposed modifications of the manner in which requests would be addressed either for the defendant to allow all or no Members' requests to be joined, or for a request to be denied only where both parties oppose it. A number of Members have highlighted the need to preserve the current flexibility and control for the parties at the consultations phase.

As to *panel proceedings*, there is broad support for enhancing third party rights at the panel stage to a level comparable to what has been granted on a case-by-case basis as extended third party rights by panels to date, and for the possibility of granting further enhanced third party rights on a case-by-case basis. The question remains open whether such case-specific enhanced third-party rights at the panel stage should be granted subject to an agreement of the parties or best left to the discretion of the panel after having consulted the parties. Several Members have expressed a preference for preserving the current flexibility for the panel to decide whether to grant such additional rights or not in light of the circumstances of the case.

A proposal to allow Members to become third parties for the first time at *the appellate stage* of a dispute has received support from a significant number of Members. There remains, however, some concern that this may create excessive additional burdens for appellate proceedings, in particular for AB hearings. Various improvements have been proposed to clarify the language defining the rights of third participants at the appellate stage, taking into account preferred drafting guidelines as well as the corresponding language in Article 10 in relation to the panel stage.

In light of the above, I have proposed in Annex 1 some possible text. I am aware that on some aspects, this proposed text goes beyond our current level of convergence. This is reflected through square brackets. Nonetheless, I believe that in light of the level of maturity reached on these issues overall, and taking into account the various elements of discussions to date, these texts can constitute a sound basis for our further work, which I suggest should focus on achieving convergence on the above-identified main outstanding issues. In addition, I perceive a close link between

[4] With respect to the timeframe for requests and responses, it must also be borne in mind that if the overall timeframe for consultations is reduced to 30 days (see section on timeframes), then the timeframes for requests to be joined and for responding to such requests would presumably need to be adjusted accordingly. This could mean periods as short as 5 and 3,5 days respectively, which may not be practicable in all cases.

discussions on third party rights for Members and certain aspects of transparency, which could be further explored in our negotiations.

Panel composition

Two proposals have been under discussion that relate to panel composition: JOB(05)/144/Rev.1, suggesting the creation of a panel roster and an improved procedure for panel composition, and TN/DS/W/89, that would explicitly define the expertise expected of panelists.

A number of Members have expressed concern that the establishment of a panel roster could entail significant procedural burdens, and that flexibility was needed to select panelists with appropriate experience and expertise for each dispute. In the course of recent discussions, suggestions were made to focus on the part of the proposal relating to the panel composition procedure and improve the current practices to select panelists under Article 8 of the DSU. Further to these discussions, the proponent has been working with interested delegations towards improving the part of its proposal relating to the actual panel composition process. The text contained in Annex 1 reflects these efforts. I propose that we pursue our work on the basis of this text, focusing in the first instance on a clarification of how the proposed mechanism would function.

With respect to the proposal to define the expertise expected of panelists, recent discussions suggest that a number of Members agree that expertise relevant to the issues under consideration in the specific case is already, in practice, part of the considerations deemed pertinent to panelist selection. Some drafting improvements are suggested in Annex 1 to take into account comments made in these discussions, in order to clarify the description of the required expertise.

Remand

Recent discussions on the possibility of introducing a remand procedure in the DSU have been based on a joint drafting proposal contained in JOB(04)/52/Rev.1, and, more recently, on an informal working document reflecting further joint work of interested delegations.

There is some common understanding among participants as to what essential features a remand mechanism could entail, if adopted. The purpose of such mechanism would be to allow the panel to make additional findings, under an accelerated timeframe, in respect of issues for which the Appellate Body has found that it is unable to complete its legal analysis for lack of sufficient relevant factual determinations (or information) in the panel's original report (or record). The Appellate Body would identify the existence of such situation and give guidance to the panel as to how to address it, but it would be for a party to the dispute to initiate the referral procedure in order to have such issues remanded.

While significant progress has been made towards clarifying the possible modalities for remand, there are Members sceptical about the possibility of devising legal text to address remand without raising new concerns (e.g., extended timeframes and impact on implementation). My sense is that any agreement on this issue remains subject to confirming modalities and corresponding legal text such as to satisfy all Members that the integration of remand in the system would create only minimal disruption to existing procedures.

Key outstanding issues that have emerged in the discussions include: (i) whether both parties, or only the complainant, might have a legitimate interest in pursuing remand; (ii) the definition of the circumstances that could give rise to remand; and (iii) the implications of a remand procedure on overall timeframes in the dispute and on the implementation of completed rulings.

Most recently, some additional steps have been taken towards clarifying and achieving greater convergence on these issues, as a result of a joint effort among interested delegations. There appears to be support for *defining the situations giving rise to remand with reference to the current practice of the Appellate Body in respect of situations in which it cannot complete the analysis*, even if there remains some discussion as to how best to reflect this through legal text. There also appears to be support for the *remand procedure not to delay the adoption of the reports and the implementation of any completed rulings*.

The draft legal text I have proposed as basis for further work in Annex 1 is based on the recent informal working document incorporating these elements. With respect to the identification of *which party may have the initiative of remand*, I believe that further work would be required and this is reflected in the proposed draft text. The text also contains some language intended to take into account the general considerations highlighted in my introductory comments, including drafting consistency.

Mutually agreed solutions

The proponents have recently combined their respective draft legal texts into a revised proposal (JOB(08)/40), which is the basis for the draft legal text I have included in Annex 1. In addition, I have proposed some adjustments to reflect drafting suggestions made in the course of discussions.

Strictly confidential information

Discussions relating to strictly confidential information (SCI) have been based on JOB(06)/56.

Overall, there seems to be wide support for the objective of the proposal, which is to enhance the protection of information, such as business confidential information, that is not readily available and requires special protection, in order to be presented in WTO dispute settlement proceedings. For this purpose, the proposal would build on the existing practice of panels and the Appellate Body to clarify the modalities for the protection of strictly confidential information submitted in the course of dispute settlement proceedings. There has only been limited recent discussion, however, of the operational details of the proposal.

Several Members have stressed the need to preserve flexibility to adapt the procedures on a case-by-case basis by allowing for the adoption of more detailed procedures in individual cases as necessary. The proposal tries to address this concern by reserving the possibility for adjudicators to depart from the proposed standard procedures after consulting the parties.

There has been some discussion of the preferred legal form for the clarification of SCI procedures. Some Members noted that providing for protection of SCI in the DSU itself would contribute to enhancing the confidence of holders of confidential information in the system's ability to protect such information. The proposal tries to address this concern, too, by proposing drafting changes to Article 18 of the DSU and by suggesting the insertion of a new Appendix to the DSU, which would contain most of the detailed provisions on SCI being proposed.

It was noted by some Members that the proposed text did not address the question of access to SCI for third parties, or of SCI submitted by a third party. More generally, the protection of SCI has linkages to all DSU provisions and proposals addressing the confidentiality or publicity of information, submissions or hearings, including Articles 10, 18, and the proposed Appendix 5. In consideration of this, I have proposed draft language in these provisions aiming to ensure consistency of treatment among different parts of the proposed draft legal text in Annex 1.

In light of the above, I propose that our future work on this issue focus on confirming the legal form through which the protection of SCI could be organized, pursuing a discussion of the operational details of the proposed procedures and ensuring consistency between any provisions to protect SCI and other relevant existing and proposed provisions in the DSU.

Sequencing

Recent discussions on sequencing have been based primarily on JOB(05)/71/Rev.1 and JOB(04)/52/Rev.1, which proposed alternative approaches to addressing this issue. Most recently, a number of interested delegations, including the proponents, worked jointly towards achieving greater convergence. As a result of these efforts, an informal working document setting out a possible single approach to this issue was presented recently and seems to have received a significant level of support.

Discussions prior to the presentation of this more recent text suggested that there was generally support for *clarifying the possibility for consultations prior to initiating compliance panel proceedings*, although some Members expressed concern as to how constraining any requirement to enter into consultations should be in this context. There also appears to be some support for *improved notification to the DSB of measures taken to comply*, although some Members expressed doubts as to whether the proposed notification should play a role in triggering retaliation proceedings. Discussions have also addressed the question of *which party should have the possibility of initiating compliance proceedings*. Several Members expressed concerns as to the implications of the respondent party initiating such proceedings for the panel's terms of reference.

The recent working document proposes that (1) consultations would be possible, but not required, prior to the establishment of a compliance panel; (2) compliance panel proceedings would be initiated by the complaining party; and (3) the initiation of retaliation proceedings would be possible only after one of certain listed events has occurred, including a prior determination of non-compliance through compliance proceedings. To the extent that this text reflects further convergence, among proponents at least, towards a single approach incorporating these elements, this represents significant progress.

This working document also contains other aspects, including the possibility of an appeal of legal issues arising from arbitral decisions under Article 22.6, which has not been previously considered. This point, as well as others, will require further discussion.

In light of the above, I propose that we pursue our work on the basis of the overall approach reflected in this working document (as described above), with the understanding that not all Members are persuaded, at this stage, that such a solution to the sequencing issue is necessarily desirable, and that a number of specific aspects still require further discussion. For this purpose, Annex 1 essentially reproduces the recent non-attributable text, with certain additional drafting suggestions intended to clarify the text in line with the general considerations outlined in my introductory comments.

Specific issues warranting further consideration could include a clarification of the proposed triggering events for the initiation of retaliation proceedings, the relationship between the events triggering the negotiation of compensation and those triggering the initiation of proceedings for the suspension of concessions or other obligations[5], and the relationship between negotiation of compensation and the initiation of retaliation proceedings. In light of the concerns expressed as to the potential timeframe implications of this proposal, I propose that we also consider this question in the

[5] This particular issue also has linkages to the proposal for initiation of compensation negotiations before the expiry of the reasonable period of time (see the section on effective compliance below).

light of potential time-savings in other phases of the proceedings (see the section on timeframes below).

Post-retaliation

There has been little recent discussion of this issue, which is generally perceived to have linkages to the "sequencing" issue. Specifically, it has been assumed that the approach to be adopted on sequencing could usefully inform and guide the approach to be followed on post-retaliation. As originally on "sequencing", two alternative approaches have been proposed in respect of post-retaliation (in JOB(04)/52/Rev.1, and JOB(05)/47/Rev.1/Corr.1 in English and French, and JOB(05)/47/Rev.1 in Spanish). Both proposals would aim to introduce a procedure to determine whether compliance has been achieved, when the Member concerned considers that it has complied after an authorization to retaliate has been granted to a successful complainant.

Issues raised in discussions to date have included the determination of the party that could initiate such proceedings, the nature of recommendations and rulings arising from such proceedings (an issue that was noted by some Members to relate perhaps more generally to compliance proceedings rather than post-retaliation *per se*), and the question of what implications partial compliance might have in this context.

I propose that we resume work on this issue taking into account the recent work on sequencing. In particular, I propose that we seek, to the greatest extent possible, consistency and parallelism between compliance proceedings under Article 21.5 and procedures to determine compliance in the context of "post-retaliation". In light of this, and taking into account the proposed approach reflected in the draft legal text on sequencing in Annex 1, there could be an assumption that the complainant would initiate proceedings for the determination of compliance at this stage also, and that consultations would not be required in this context either.

Transparency and *amicus curiae* briefs

Publicity of hearings and submissions and timely access to panel reports

Proposals to open panel and Appellate Body hearings to public observation, to make access to submissions public and to ensure timely access to panel reports have been discussed on the basis of TN/DS/W/86.

A number of Members have expressed support for enhanced transparency through *opening panel and Appellate Body hearings* to the public, and suggested that such openness could contribute to greater public confidence in the dispute settlement process. Others, while not necessarily opposed to transparency as such, continue to have reservations as to whether the proposed systematic opening of meetings would be beneficial or appropriate. Specifically, concern has been expressed in relation to the preservation of the intergovernmental character of dispute settlement proceedings, the protection of confidential information, as well as practical modalities and potential budgetary implications. It has also been noted that not even Members who are third parties currently have the right to attend the entirety of panel meetings and that balance should be maintained between enhancing external transparency and the rights of Members in the context of WTO dispute settlement.

In the course of discussions, it was confirmed that the protection of strictly confidential information should be ensured, and that the practical modalities for opening would not necessarily involve physical presence of observers in the room. The discussions also suggested that a range of modalities may be available to address this issue, not necessarily limited to systematic complete opening or entirely closed meetings. Recent practice under the current rules, where the agreement of the parties has been taken into account in deciding to open hearings in a variety of formats in specific

cases, has also been referred to and may be informative in this respect. These elements should facilitate our further work towards identifying possible ways to narrow down remaining differences of view on this issue.

With respect to the question of *access to submissions*, a significant number of Members have expressed support for making submissions to the panels and the Appellate Body public. Some Members remain unconvinced that this would be desirable. Here again, some useful clarifications have emerged from the discussions. In particular, it has been clarified that the protection of strictly confidential information would be ensured. Also, it was suggested that the Member making the submission would not be required to take any particular steps to ensure the publicity of its submission, and that this could be done through a central registry mechanism maintained by the Secretariat.

It was also noted by some Members that the DSU already foresees, in Article 18.2, the presentation, upon request of a Member, of a non-confidential version of the information contained in submissions to a panel or the Appellate Body, so that the principle of access to a non-confidential version of submissions is already present in the DSU, albeit without specific details as to when and how such versions might be requested and obtained. It has further been noted that, among those Members who currently already make their own submissions public, the practice varies as to the exact timing and modalities of such access.

Overall, these elements suggest that there may be a range of possible modalities that should be explored in more detail to pursue this issue, not necessarily limited to immediate and complete access or complete confidentiality of submissions. These considerations should guide our further work towards narrowing differences of view on this issue.

Finally, support has been expressed by some Members for allowing an early release of the panel's final report in its original language without affecting the official circulation of the report in the three working languages and the legal consequences attached to this circulation. Concern has also been expressed, however, that this may prejudice those Members whose working language is not that of the report. To address this concern, it has been suggested that only the findings and conclusions of the report might be released. The issue of timely access to final reports of panels has also been noted to be closely related, in practice, to the time required for the translation of panel reports, which can be considerable. This, in turn, is closely related to the length of the reports themselves, including any annexes.

Amicus curiae briefs

On *amicus curiae* briefs, some progress has been made towards clarifying the concerns underlying Members' respective positions. There seems to be a shared view that *amicus curiae* briefs should not create an undue burden for the Members involved in the relevant dispute. For some Members, this would be ensured through the introduction of a general prohibition on unsolicited briefs, which they argue would be in line with the intergovernmental nature of WTO dispute settlement. For others, regulating the timing of *amicus* briefs, their length and the procedures to address the admissibility and contents of *amicus* briefs would ensure that appropriate guarantees are in place to manage such briefs. Those Members also argue that this would be an improvement on the current *ad hoc* practice of WTO adjudicators concerning unsolicited *amicus* briefs, and that it could enhance the image of the WTO and its dispute settlement system.

Any further consideration of the possibility of regulating the submission of *amicus* briefs in a manner that would adequately address the concerns of all Members would require consideration of specific draft legal text. Any Members interested in regulating the acceptance and consideration of amicus briefs are therefore encouraged to develop draft language to that effect, addressing issues such as: (i) the timing and procedure for submitting *amicus* briefs; (ii) the maximum length of *amicus*

briefs; (iii) the procedure and preconditions for adjudicators addressing the admissibility and, once considered admissible, the content of *amicus* briefs; and (iv) the implications of such procedures for Members involved in the relevant dispute.

Further work on this issue would also need to take into account the concern expressed by several Members that non-Members should not have more opportunities to participate in the proceedings than Members themselves. Indeed, some Members have observed that this issue relates to access to the dispute settlement system, rather than to transparency *per se*.

Timeframes

The possibility of shortening timeframes at specific stages of the proceedings has been discussed on the basis of JOB(07)/66. In addition, JOB(06)/222, JOB(06)/222/Add.1 contains various proposals to provide additional time for developing country defendants at various stages.

In relation to the *length of consultations*, there has been support for shortening the minimum consultation period before a panel can be requested to 30 days, provided that sufficient flexibility is retained for the current timeframes (60 days) to be maintained when the responding party is a developing country Member. Discussions on the proposal for a further extension of 30 days in such cases suggest that a number of Members have reservations to the notion that such extension would apply only where the complaining party is a developed country Member. It was observed that the resource constraints that the proposal seeks to address would be the same for the developing country defendant regardless of the status of the complainant. Some Members also questioned on what basis it was assumed that an additional 30 days would always be an appropriate extension.

With respect to *panel establishment*, support has also been expressed for establishing panels at the first meeting at which the request is considered, provided that sufficient flexibility is preserved to defer the establishment in cases where the respondent is a developing country Member.

Support has also been expressed for a revision of the *timeframe for the presentation of* first *submissions* under Appendix 3, although it was suggested that the proposed period for the complainant to present its first submission could be somewhat longer than proposed. A separate proposal to provide for additional time for developing country Members for the presentation of their submissions has also been discussed. Questions arose in relation to the definition of the benchmarks against which such additional time would be counted.

As regards the *timeframe for the adoption of panel reports*, there is a proposal to place adoption of panel reports on the same basis as Appellate Body reports by allowing for panel reports to be proposed for adoption immediately upon their circulation. This would require doing away with the 20-day deadline set out in regard to panel reports in Article 16.1 of the DSU. Under the proposal, the deletion of the first paragraph of the Article 16 of the DSU would also involve deleting the second paragraph of Article 16 as a consequential change.

In the discussions, the proponent indicated that the time-saving resulting from this portion of the proposal would be relatively limited but it might be still useful to put the adoption of panel and Appellate Body reports on the on the same footing. Some Members indicated that this issue might be closely related to the proposal for timely access to final reports. While I don't perceive major objections to the proposal concerning the timeframe for the adoption of panel reports, I would suggest that we explore further any linkages with the proposal on timely access to final reports and with other timesaving proposals generally, as suggested below.

The draft legal text reflected in Annex 1 on these issues contains some specific drafting proposals intended to facilitate further progress, based on discussions to date. However, I would like

to suggest that in our further work on these issues, we consider these various proposals not only individually and separately as we have essentially done so far, but that we also aim to approach them in a more comprehensive manner. In particular, I propose that we consider these proposals in light of their combined effect among themselves and also in light of their combined effect with other proposals that have timeframe implications (for example, a shortening of the minimum duration for consultations may have a significant impact on the timeframes within which requests to be joined in consultations and responses to such requests can be made meaningfully, which has an impact on proposals relating to the conditions for joining in consultations).

More generally, it would also be useful to assess the relative merits of time-savings or extensions of timeframes at various stages in light of their overall cost or contribution to the prompt and effective resolution of disputes. In this exercise, we will need also to take into account the fact that various other proposals may have incidental implications on the timeframe for the completion of dispute settlement proceedings.

A proposal to shorten the overall timeframes for the settlement of *disputes relating to safeguard measures* has also been discussed. Some Members acknowledged that safeguards concerned fairly traded goods and in that respect differed from other trade remedies, and that their short duration created challenges for the effective resolution of disputes. However, a number of Members also questioned whether there would be a basis for singling out such measures, and on what basis it was assumed that it would be possible to treat them more expeditiously than other measures whose WTO-consistency is challenged.

Developing country interests, including special and differential treatment

A number of proposals are under discussion that address issues related to developing country interests, including but not limited to special and differential treatment (S and D). A number of these proposals by developing countries, including some S and D proposals, are addressed in other parts of this document, as they also relate to other specific issues, such as effective compliance, mutually agreed solutions, third party rights, timeframes, or *amicus curiae* briefs. Only proposals that have not been addressed in other sections are reflected in this section.

A number of developing countries have identified access to dispute settlement, and more specifically, resource constraints faced in accessing the system, as a significant concern. Proposals to create a *Dispute Settlement Fund for developing countries* and to introduce *litigation costs* for developing country Members having prevailed in a dispute seek to address these concerns. Most recently, the proponents have presented informal text combining elements of both proposals, such that litigation costs would be awarded where access to the Fund would not be possible.

Since there has been no opportunity yet to consider the possible combination of the two proposed mechanisms and the exact manner in which they may interact, I propose that our further work focus on a consideration of this recent text, which is reflect in Annex 1.

Earlier discussions of both proposals separately suggest that a number of considerations would need to be taken into account in further work on these issues, that would remain pertinent also in the context of a combined approach. In particular, discussions to date suggest that progress on this issue would require a further elaboration of the following aspects:

– who the beneficiaries of such support would be, in light of the concern expressed that the situations of individual developing countries in respect of human and financial resources available for dispute settlement may vary considerably;

– the relationship of the combined proposal with existing solutions, i.e. technical assistance and dispute settlement assistance provided by the WTO Secretariat, and assistance by the ACWL, and its added value compared to these solutions; and

– the operational details of both mechanisms, including budgetary implications.

Several proposals seek to ensure that adequate consideration will be given to *developing country interests in consultations*. This is proposed to be done by strengthening the existing special and differential treatment provision in the DSU (Article 4.10), and also by defining further requirements to be followed during the consultations and in any subsequent panel request.

In discussions of these proposals, a number of Members sought clarification as to what exactly the proposed additional requirements entailed and what sort of situations they intended to cover. Clarification was also sought of the intended legal implications, in any subsequent panel proceedings, of such requirements. Also, several Members questioned why these requirements would only apply where the complainant would be a developed country Member, in light of the fact that the interests of the developing country defendant being addressed though the proposals would be the same whatever the status of the complaining party.

Further work on these proposals could aim to explore how the account to be taken of developing country interests in consultations might be clarified in a manner that addresses these concerns. Some draft legal text is proposed in Annex 1 to try to address some of these aspects.

Another proposal is intended to ensure that arbitrators determining the *reasonable period of time* for implementation under Article 21.3(c) take into account the particular problems and interests of developing countries. The proponents have clarified that the intent of this proposal is to codify existing practice, to ensure that due consideration would be given where necessary to developing country interests, especially where, as respondents, they may need additional time to comply. While other Members appeared to agree that in practice, arbitrators under Article 21.3(c) already took into account such interests and did not question the legitimacy of such practice, some Members sought further clarification of the intent of the proposal, if it would simply confirm existing practice.

Flexibility and Member control

A number of proposals have been under consideration under the common heading of flexibility and Member control (in TN/DS/W/82, TN/DS/W/82/Add.1, TN/DS/W/82/Add.1/Corr.1, TN/DS/W/82/Add.2 and TN/DS/W/89).

In respect of proposals to allow the parties to *jointly seek the deletion of parts of panel or Appellate Body reports* that they deem unnecessary for the resolution of the dispute or to allow Members to *adopt only partially such reports*, a significant number of Members have expressed concerns as to how these may affect the adjudicators' determinations and the outcome of a case, as well as the integrity of reports, in particular under deletion by mutual agreement. At this stage, positions seem to remain quite far apart on these issues. Further work could therefore seek to clarify the extent to which the objective of either proposal might be achieved, while taking into account the concerns expressed by other Members.

In respect of the proposed introduction of an *interim review at the appellate stage* comparable to that currently existing at the panel stage, a number of Members appeared to agree that this proposal could lead to improvements in the quality of the reports, and the concerns expressed have centered mostly on the implications of the proposal on timeframes (an additional 30 days at most) as well as the potential implications of the parties having exclusive access to the pre-interim version of the

report. Further work on this issue could therefore focus on addressing such implications so as to provide sufficient assurances that the benefits would outweigh any potential downsides.

There appears to be broad support for introducing the *suspension of panel or Appellate Body proceedings upon joint request of the parties*. In consideration of the specific questions that have arisen on the operational details of these proposals, in particular in relation to the conditions for resumption, I have made some drafting proposals in Annex 1 for the consideration of Members.

With respect to the possibility of providing additional *guidance to adjudicators* on the use of public international law, the interpretive approach to be followed, and the measures under review, it has been clarified that the intent would be for the DSB to adopt such guidelines in a decision that would not have the legal status of treaty text.

Overall, there does not appear to be a common understanding emerging from discussions so far, as to exactly how additional guidance might be provided to adjudicators on these various issues. While some Members have acknowledged the relevance of the issues the proposal seeks to address, several Members have also expressed doubts as to whether such guidance to adjudicators would be appropriate or feasible, in particular in light of the potential for either replicating provisions already contained in the DSU or being overly prescriptive, while not necessarily being able to capture all the intended situations. Further work on these issues could therefore focus in the first instance on streamlining the issues and the relevant draft text, with a view to clarifying what might form a core basis of commonly agreed notions in respect of which some guidance could be provided.

In this context, consideration could be given to the following aspects, which have been raised in the discussions:

- In respect of the proposed guidance on the use of public international law, the contours and relevance to WTO dispute settlement of customary rules of international law, and of non-WTO sources of public international law more generally, was discussed. It was also asked to what intent the proposed guidelines were intended to modify, rather than confirm, the existing practice.

- In respect of the proposed guidance on the interpretative approach to be followed, it was also asked whether it is implied in the proposed text that various interpretive approaches, other than that prescribed in Article 3.2 of the DSU, might be acceptable, what exactly the reference to "constructive" ambiguity was intended to reflect and how various forms of ambiguity might be distinguished from each other and from mere imprecision, and whether it was implied that in case of ambiguity, the adjudicator might not complete the interpretation of the relevant provision. Clarifications were also requested about "gap-filling" and how it was to be distinguished from ambiguity or from a party's disagreement with a legitimate application of the customary rules of interpretation.

- In respect of the proposed guidance on measures under review, it was observed that the section entitled "order of analysis" seemed in fact to deal with "advisory opinions", and questioned whether the chosen specific examples adequately reflect all relevant situations and whether the proposed language on expired measures might imply new limitations on Members' ability to challenge certain measures.

Effective compliance

Several proposals seek to promote prompt and effective compliance by strengthening the remedies available under Article 22 of the DSU.

The proposal to introduce *collective enforcement of recommendations in cases involving developing country respondents* has not been discussed in great detail yet – at least recently. Some useful clarifications have been provided in initial discussions, but further understanding of the underlying concepts as well as the proposed modalities of the proposal would be needed for a fuller assessment of the proposal. In particular, clarification of the concepts of "legitimate expectations of the developing country Member" and "effects of the suspension of concessions upon the economy of the developing country" would be important, as well as a clarification of the exact sequence of events that would arise under this proposed procedure.

In relation to *compensation and suspension of concessions or other obligations to cover nullification or impairment of benefits suffered during the reasonable period of time*, initial discussions of this proposal revealed questions as to various operational aspects, that could also be further explored. Such questions include the intended relationship between a successful negotiation of compensation and any subsequent request for retaliation, and the modalities though which retaliation would be calculated and applied, where relevant, in relation to the reasonable period of time for implementation. In addition, drafting consistency with proposals on "sequencing" to the extent that they affect the same provisions (i.e. the definition of the circumstances in which remedies can be sought), should be further clarified as necessary.

Finally, a proposal has been under consideration to make *cross-retaliation available to developing country defendants* without requiring specific justification as to why same-sector or same-agreement retaliation is not practicable or effective. In discussions of this proposal, several Members recognized the possible challenges for smaller economies of retaliating effectively against larger trading partners. It was also commented, however, that this concern was not limited to developing country defendants, and that it could arise also where the other party was a developing country Member. In light of these discussions, further work on this proposal could focus on exploring how these considerations might be taken into account in clarifying the situations in which cross-retaliation might be facilitated, should Members agree that this would be desirable as such in certain cases.

Overall, a number of Members have expressed sympathy for the underlying objective common to all these proposals, namely to promote prompt and effective compliance with recommendations and rulings of the DSB. However, in light of the fact that the details of some of these proposals have not yet been fully explored, further work is still required in order to clarify the extent to which this can be achieved through one of the above proposals or a combination thereof, taking into account both the operational and underlying conceptual aspects of the proposals.

APPENDIX B:

**INFORMAL DSB SPECIAL SESSION MEETINGS (MAY 2010 TO APRIL 2011)
CHAIRMAN'S SUMMARIES OF RECENT WORK**

The text below reflects the summaries of the work conducted in the DSU negotiations between May 2010 and April 2011, as presented by the Chairman at informal meetings of the DSB Special Session at the conclusion of each negotiating week. These summaries are presented by the Chairman under his own responsibility and without prejudice to the views of any participant.

A. WEEK OF 17-21 MAY 2010

1. Post-retaliation

1. We started with a discussion on post-retaliation, which we could not cover in our earlier discussions based on the draft legal text circulated in July 2008.[6]

2. We explored the extent to which there might be parallelism between "pre-retaliation" compliance proceedings and proceedings at the post-retaliation stage. We discussed whether the original complainant or the original respondent should initiate post-retaliation compliance proceedings, and how the burden of proof would work in practice under the two scenarios.

3. Unfortunately, we could not bridge the gap between these positions, even though one original proponent of post-retaliation indicated that they would look into what is supposed to happen under the second sentence of footnote (k) to Article 22.8(d)(i) of the draft text contained in the July 2008 text[7].

2. Sequencing

4. The discussions in the small groups addressed the following aspects of sequencing:

1. the initiation of compliance proceedings in the context of sequencing;

2. the definition of events that can trigger a request for an authorization to suspend concessions or other obligations (Article 22.2bis);

3. the relationship between negotiation of compensation and the initiation of retaliation proceedings;

4. improving the notification of measures taken to comply (Article 21.5(b)); and

5. the time implications of sequencing.

5. The discussions addressed technical issues relating to these five aspects of sequencing as reflected in the July 2008 text.[8] Some participants raised the idea of adjusting specific portions of the draft legal text as a result of the discussions, and I encouraged delegations to continue working among themselves on these matters so as to bridge the remaining gaps on sequencing.

[6] See Appendix A, at pp A-17 and A-18.
[7] See Appendix A, at pp A-18 and A-19.
[8] See Appendix A, at p A-13 and A-14.

B. WEEK OF 21-25 JUNE 2010

1. Effective compliance

6. With respect to "collective" or "group" retaliation, our aim this week was to clarify some aspects of the African Group proposal, which is reproduced at Article 22.6, subparagraphs (b) and (c), in the July 2008 text.[9] The discussion helped in clarifying the intentions of the proponent, and to identify possible areas of overlap and areas where further clarification was required in the text of the proposal to distinguish it, where necessary, from other provisions. The proponents undertook to review the relevant language to address these points. In particular, they will review Article 22.6 subparagraphs (c) and (b)(ii), and try to find some language to reflect the objectives pursued by these provisions. The proponents will revise the terms of subparagraph (b)(iii) in light of the level of suspension as defined in Article 22.4 and referred to in subparagraph (b)(i). Further, the proponents will come back with a flowchart of its proposal and with responses to the questions raised on its proposal. We will return to these matters in due course.

7. Subsequently, we had a more general discussion of the principle underlying the proposal, i.e. the possibility for a group of Members to retaliate "on behalf" of a successful complaining developing country Member who would not be in a position to apply the suspension itself without causing harm to its own economy. While there was some sympathy for the concerns being addressed through the proposal, a number of Members are still not persuaded whether the proposal could properly address these concerns. In particular, it was noted that it would be true generally for all Members that they risk causing themselves economic harm in applying retaliatory measures, and this alone would not distinguish situations in which the suspension might be so harmful as to justify recourse to collective retaliation as described in the proposal. It was suggested that the proponents specify the types of situations at issue.

8. It was also questioned whether the "group" approach could address the proponents' concerns, since other Members were likely to also suffer from the imposition of retaliatory measures and thus have limited incentive to join in a "group" to impose retaliation with regard to a dispute that they were not part of. At the same time, it was highlighted that compliance is a systemic issue of general interest to the entire Membership. Several Members explained the limitations faced in imposing retaliatory measures and why they believe the field needs to be levelled in this context. A number of questions also remain as to how the proposed mechanism would work in practice.

9. On cross-retaliation,[10] the discussion in this phase has only started and we could not complete it for lack of time. The principle of cross-retaliation already exists under Article 22.3, and we discussed why cross-retaliation should be facilitated for a developing country against only developed countries. We will come back to this subject at the next session.

10. As regards monetary compensation,[11] delegations seemed to share the view that compensation is voluntary and constitutes a temporary remedy pending full implementation, and that this would not be changed under the proposal. Several delegations were of the view that monetary compensation is already possible under the current DSU as it has been used in some cases, but some flexibility is needed under the proposal because monetary compensation may not be the preferred option in all cases. The proponent expressed its willingness to consider more flexible draft language if other Members need more flexibility.

[9] See Appendix A, at page A-16.
[10] See Appendix A, at page A-14.
[11] See Appendix A, at page A-14.

11. The discussion demonstrated that further work is necessary on whether it would be desirable to spell out in the DSU that monetary compensation is a preferred, or even the default, option, and if so how strong this preference should be. We also need to work further on whether monetary compensation should be the preferred option only for developing countries or rather for all Members.

12. On the proposal for suspension of concessions covering the reasonable period of time for implementation (or "RPT"), we have only started our discussion, and will need to revert to it.

13. Korea and Ecuador circulated non-papers on effective compliance, and we briefly discussed these among the proponents of effective compliance as well as with the wider group of interested delegations. Ecuador and Korea indicated willingness to discuss their non-papers with any interested delegations.

2. Sequencing

14. On sequencing, we only had time for the two aspects we could not discuss in the week of 17 May, namely (i) the role of consultations in compliance proceedings (Article 21.5(a) and (c)(i)); and (ii) the possibility of appealing legal issues arising from Article 22.6 arbitral decisions (Article 22.7).[12]

15. On the issue of appeals of Article 22.6 arbitral decisions, there was a detailed discussion on the rationale of the proposal. The proponents identified the main objectives as enhancing legal certainty and securing the predictability of legal findings in arbitrations. Some delegations asked questions concerning: (i) the type and extent of legal issues that would be reviewable by the Appellate Body; (ii) whether what is perceived by some delegations as a sometimes fuzzy borderline between legal and factual issues could not create problems; and (iii) whether Members should not try to achieve the intended legal certainty by directly providing clearer guidance to arbitrators rather than by introducing the possibility of appealing arbitral decisions. The time implications of an appeal were also raised. Some participants expressed a preference for the current flexibility of arbitrators in addressing legal issues, and indicated that they perceive an appeal as too rigid an approach.

16. In addition to these more conceptual issues, we discussed specific technical aspects of appeals of Article 22.6 arbitral decisions. One proponent clarified that third parties would not have the right to participate in appeal proceedings dealing with an Article 22.6 arbitral decision. There was also some discussion as to whether the reference in Article 22.7 to specific paragraphs of Article 17, and the use of the term "*mutatis mutandis*", appropriately achieve the intended objective. One proponent considered this an "elegant" solution, while another participant wondered about the need to look at issues addressed in paragraphs 6 and 7 of Article 17, which are not explicitly referenced by the proposed language in Article 22.7.

17. Further, a question was raised about how the possibility of multiple arbitrations would relate to the phrase in Article 22.7 which provides that "[t]he parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration."

18. We also discussed how the word "immediately" in Article 22.7 relates to the possible DSB adoption of the Appellate Body report. In this regard, one proponent confirmed that there is no intention of changing the current practice of Article 22.6 arbitral decisions becoming final without formal DSB adoption. One proponent indicated that not only legal but also factual issues could be raised in the continued arbitration that would follow an eventual appeal.

[12] See Appendix A, at pp A-13 and A-14.

19. As regards the role of consultations in compliance proceedings, there was general support in the extended small group for consultations being possible, but not required, prior to the establishment of a compliance panel, and an understanding that Article 21.5(c)(i) properly reflects this. Further, there was general support, given the reference in Article 21.5(c)(i) to Article 4, for third party participation being possible if such consultations are requested.

20. At the same time, the proponents foresee no third party participation in the context of consultations under Article 21.5(a). As regards this latter provision, the rationale for the parties engaging in consultations during the RPT was discussed. One delegation expressed its concern that consultations during the rather short RPT are not always viable for the implementing party, although it was recognized that there might be situations in which the implementing party might find consultations during the RPT helpful in designing the right implementing measure. In any event, delegations emphasized the freedom of the implementing party to choose the implementing measure. Also, there was general support for the principle of having to accord sympathetic consideration to consultation requests during the RPT, provided that the implementing party retains the right to decline such requests, if it considers such consultations unhelpful. The question remains whether "shall" is the right word to reflect this general principle, or whether, as one delegation argued, using "may" or "could" might be more appropriate.

21. Finally, we briefly discussed the time implications of sequencing, which remains a major concern for at least one delegation. Proponents and other interested participants said that they intend to work together "as soon as possible" to try to clarify and address these concerns.

C. WEEK OF 20-24 SEPTEMBER 2010

1. Effective compliance

22. With respect to "effective compliance", we had detailed discussions on the question of whether the calculation of the level of nullification or impairment for the purposes of an authorization to retaliate should cover the period of the RPT, or not.

23. In considering this question, delegations expressed different views on what the legal situation is under the current DSU rules and procedures. Specifically, some delegations considered that, under the current rules, the right to take retaliatory measures was prospective in nature and arises only as of the authorization granted by the DSB, such that it cannot "go backwards" to cover nullification or impairment suffered from the end of the RPT. Other delegations were of the view that under the current rules, Members become accountable for their violations as of the end of the RPT and that therefore the calculation of the level of nullification or impairment may properly include nullification or impairment suffered as of the end of the RPT. It was mentioned that practice to date provided no clear answer to this question, and that the issue was currently under litigation.

24. It was also noted that, whatever the views might be about the state-of-play under the current rules, the proposal contained in the July 2008 text[13] sought to modify the situation, so that it would be possible to account not only for nullification or impairment suffered from the end of the RPT, but also for nullification suffered during the RPT. A number of delegations expressed concern that this proposal may change the nature and role of the RPT, which is currently understood as a period in relation to which no remedy can be sought. Some delegations also pointed to possible difficulties in assessing the level of nullification or impairment in relation to a period in which, by hypothesis, the situation was fluid and subject to changes as the Member concerned explores the means to come into compliance.

[13] See Appendix A, p. A-16.

25. Some delegations highlighted that the question to be addressed was what would best achieve the objective of inducing compliance, rather than whether the proposal involved "retrospective" or "prospective" remedies. Other delegations observed that this objective needed to be balanced with other principles. It is clear that this question will require further work and I encouraged delegations to continue to discuss and explore this issue among themselves.

26. We then also considered Korea's proposal to clarify that the reference period to be used by the arbitrator acting under Article 22.6 would be the year of the end of the RPT. A number of delegations expressed support for the objective of clarifying this question, but also suggested that more flexibility may be needed in order to allow the arbitrator to adopt a different approach if the circumstances of the case required it. Korea expressed readiness to review the language of its proposal in light of these comments.

27. We then turned to the proposal by Ecuador, that arbitrators under Article 22.6 of the DSU take into account the impact of the measures on the economy of developing country complainants seeking to suspend obligations against developed country Members. Questions were raised about what the notion of "impact on the economy" would encompass, and how this would relate to, or differ from, the concept of nullification or impairment in general. Ecuador clarified that its intention was to give operational content to Article 21.8, and that the impact on the economy was to be taken into account as part of, rather than in addition to, the determination of the level of nullification or impairment. Questions were also raised about how the proposal would work in practice. Ecuador provided a number of clarifications and expressed readiness to continue to discuss with participants.

28. We did not have sufficient time, in the consultations, to discuss the final item on our agenda on "effective compliance", namely the notification of retaliatory measures. We will also need to revert to the question of the relationship between compensation and retaliation.

2. Sequencing

29. As we all know, sequencing is a complex issue, and the work conducted on various aspects of the text has shown that a number of clarifications are still required at the technical level. We made significant progress in this respect in May and June, clarifying a number of aspects, which I already reported on at the time. At the same time, recent discussions suggested that there are still questions as to the overall architecture of the procedures.

30. Nonetheless, as I mentioned to the group of delegations in the consultations, it seems to me that there is in fact a significant degree of common ground that we can build upon, so the first thing I sought to do in the consultation this week was to try clarify the degree of convergence among delegations on core issues, without prejudice to any views on specific draft legal text or the details of the procedures. Specifically, I asked delegations if it would be correct to assume that the agree that a suitable solution to "sequencing" would – or could – involve the following elements:

- Some form of notification of measures taken to comply by the end of the RPT (without prejudice to the exact form or scope of such notification, which we have discussed under Article 21.5(b));

- In the event that no such notification is made, the possibility of proceeding directly to proceedings under Article 22 towards an authorization to retaliate;

- In the event of a disagreement over the existence or consistency of measures taken to comply, the complaining party could initiate compliance proceedings under Article 21.5, and an authorization to retaliate can be given only after the completion of such compliance proceedings;

- Where compliance proceedings have been initiated, a determination of non-compliance would precede a determination of the level of nullification or impairment.

31. Participants agreed that these would be, in their view, core elements to be part of a solution to sequencing. Some delegations highlighted related issues to be addressed, which we then took up in the context of a more detailed discussion. I think if we keep these basic elements clear in our minds, it may help us significantly to address the detail of the procedures with the right focus.

32. We then turned to a consideration of specific issues relating, first of all to "sequencing" proper. In this respect, we considered the question of the scope and formulation of the notification of measures taken to comply under Article 21.5(b), and delegations agreed to consider further the draft text on this issue.

33. We also confirmed certain clarifications to the drafting of Article 22.2*bis*, which had been presented earlier. We further agreed that the question of the relationship between compensation and retaliation would be discussed in the context of "effective compliance".

34. We also discussed a footnote to the chapeau of Article 21.5(c) that would read as follows: "This does not preclude the use of other dispute settlement procedures, such as the establishment of a new panel or Article 25 arbitration". Clarifications were provided to the effect that if a new panel proceeding was sought, this would not give direct access to procedures under Article 22, while in the event of an Article 25 arbitration, parties might choose how to address this question.

35. With respect to compliance proceedings under Article 21.5, it appeared that further clarification of the language with respect to the composition of the panel would be useful.

36. With respect to arbitral proceedings under Article 22.6, we returned to the question of whether it should be possible to appeal issues of law arising from arbitral awards. It was clarified that such appeals would relate only to issues of law, and that any further factual findings that may be required as a result of the appellate findings would be examined by the arbitrator. There was also some discussion of the standard of review to be applied by the Appellate Body in the context of appeals of Article 22.6 awards. There was also some discussion of the question of why an appeal would be required at this stage, and whether, if the main legal issues would probably be clarified over the first few appeals, there was a risk of subsequent appeals being mainly "strategic". Further discussion will be required to explore further the details and clarify the level of support for this proposal. We also had some discussion of the question of third party participation in Article 22.6 arbitrations.

37. Finally, we discussed the question of time-savings in relation to sequencing. Australia explained that it has been working on trying to map out how its proposal would operate, in conjunction with sequencing, to save time in the duration of proceedings compared to current DSU timeframes. Participants were appreciative of Australia's efforts to clarify the extent of potential time-savings arising from the proposals. However, this is still work in progress, and my understanding is that Australia intends to continue to work with other delegations to refine its thinking in this respect.

D. WEEK OF 1-5 NOVEMBER 2010

1. Effective compliance

38. This week, we continued our discussion on certain outstanding aspects of effective compliance, namely:

- the notification of measures taken pursuant to an authorization to suspend concessions or other obligations;

- the negotiation of compensation; and

- the relationship between compensation and retaliation.

39. On the notification of measures taken pursuant to an authorization to suspend obligations, Mexico presented revised draft texts to reflect comments of other delegations. The discussion of these revised texts suggested that delegations welcomed the simplifications they contained. There was some discussion of the manner in which the notification would be recorded, and Mexico committed to working further with interested delegations on this aspect to reach a formulation acceptable to all.

40. We also started to discuss this week various issues relating to the negotiation of compensation. In particular, in this context, we considered:

- the time at which compensation negotiations may be initiated, in light of the proposal under Article 22.1 that negotiation of compensation could take place "immediately", in other words during the RTP, rather than waiting for the end of the RPT;

- the relationship between compensation and retaliation, including whether an absence of agreed compensation should always be a prerequisite to an authorization to retaliate. This issue is reflected in the grey-shaded text in the chapeau of Article 22.2bis.

41. We were only able to initiate the discussion of this second issue, but I think it was clear that it required further thinking. In particular, it seemed that, although it is understood that compensation and retaliation are alternative remedies under the DSU, there may be situations in which compensation is granted covering only part of the rulings, or on a temporary basis, so that it should remain possible to seek to suspend concession for the remaining aspects. The current proposed draft language may not entirely reflect this dimension, so there was an understanding that interested delegations would need to further work on this.

2. Sequencing

42. On sequencing, I held consultations focusing on three specific issues on which earlier discussions suggested a need to work further on the language of the draft legal text.[14]

43. First, we discussed the formulation of the proposed notification of implementation measures under Article 21.5(b). In this context, participants agreed that the intention was to require the Member concerned to notify any measures it had taken and that it believed brought it into compliance with the recommendations and rulings, without prejudice to how a compliance panel might ultimately define the "measures taken to comply" in that case. A proposal was made to modify the draft legal text, to require notification by the Member concerned of "measures that it considers achieve compliance". Participants found this proposed redraft useful and expressed readiness to consider it.

44. We also considered further the proposed introduction of a footnote to Article 21.5 (c), which would preserve the possibility of resorting to other procedures than Article 21.5, in case of disagreement about compliance. The text of the proposed footnote, which is not in the Chairman's text but existed in a previous version of this proposal, reads as follows "[t]his does not preclude the

[14] See Appendix A, at pp A-13 and A-14.

use of other dispute settlement procedures, such as the establishment of a new panel or Article 25 arbitration". The discussion confirmed that participants supported the introduction of such a footnote, provided that it was made clear what its implications are, with respect to the possibility of subsequently seeking an authorization to retaliate. It was agreed that this could be clarified as necessary through additional language either in that footnote itself or in another footnote under Article 22, where reference is made to proceedings under Article 21.5. Participants agreed to work further on such language.

45. Finally, we also discussed the drafting of the language on the establishment and composition of compliance panels under Article 21.5. Some discussion arose as to whether a compliance panel needs to be established afresh or whether a "referral" of the matter to the original panel is technically possible. Notwithstanding some uncertainties as to the status of the original panel at that stage of the proceedings, it seems, from the discussion, that participants agreed on the following key aspects:

- A compliance panel can be "established" (as is suggested in the current draft legal text);

- regardless of the manner in which this is to be expressed, it should be made clear that the persons who served on the original panel would also wherever possible serve on the compliance panel;

- if one or more of the original panelists is not available, the Director-General may be asked to appoint a replacement within a relatively short timeframe, unless the parties agree otherwise.

46. Beyond this, there is some discussion as to the extent to which the panel composition procedures under Article 8 would remain applicable, to the extent that Article 21.5 would not provide otherwise. It was also suggested that a procedure should be devised for the replacement of a panelist in the course of the proceedings. The July 2008 text reflects these elements to some extent. But some further clarification is required, and participants agreed to work further on this.

47. Looking back at the series of meetings we have had on sequencing since last spring, I think we have broadly covered all aspects of "sequencing", including the "sequencing" issue itself, issues relating to compliance proceedings under Article 21.5, and also aspects relating to proceedings under Article 22.6. I think overall, we have made some useful progress in all of these areas.

48. In particular, you will recall that we have been able to clarify that, without prejudice to delegations' views as to the need to address "sequencing", there is a broad common understanding as to what the core elements of a solution to "sequencing" proper could include.

49. With respect to compliance proceedings, my overall sense is that, subject to clarification of the language on panel composition (as discussed earlier), there is a high level of clarity as to what the potential clarifications or improvements would be.

50. Where there is perhaps less clarity, it seems, is on the question of the possible introduction of an appeal of arbitral decisions under Article 22.6, as a number of delegations raised some concerns as to the implications of such appeals.

51. In addition, we have been able to clarify over our successive meetings certain aspects of the draft legal text itself. As our discussions this week have shown, some further work may be required to fine-tune this. Our discussion of the timeframe implications of sequencing has also suggested that there are possibilities for significant time-savings to be achieved, to seek to compensate for any perceived lengthening of the proceedings that may arise from a multilateral solution to sequencing.

3. Time savings

52. Unfortunately, we did not have sufficient time to discuss "time-savings". Given the important linkages of this issue to sequencing, we will need to revert to it.

E. WEEK OF 17-21 JANUARY 2011

1. Time-savings

53. With respect to time-savings, we had a useful discussion, reviewing all aspects of the proposals on the basis of a summary table prepared by Australia explaining the various time-savings resulting from its proposal.

54. We discussed the possible shortening of the minimum timeframe for consultations under Article 4 of the DSU to 30 days, with a possibility of automatic extension at the request of a developing country Member defendant.[15] In previous discussions, a number of participants had supported the proposal to shorten the minimum period for consultations, but a number of participants also observed that it would be important for developing country Members to have additional time. This concern is reflected in the proposal, which foresees an additional period of 30 days to be automatically accorded to developing country Members upon request. As in our earlier discussions, questions were asked as to how this would work in practice, and what would happen if there was a disagreement between the parties as to the development status of the party seeking an extension. In addition, the question remains open, as to what the relationship is between this proposal and the related proposal under Article 12.10, under which an extension of the consultations period would be available in cases involving a measure taken by a developing country Member. The proponents have committed to working together to clarify this.

55. We also discussed the possibility of panel establishment at the first meeting at which the request appears on the DSB's agenda, to avoid the need to consider the item twice.[16] Under this proposal, "sympathetic consideration" would need to be given to requests to postpone the establishment to allow the possibility of additional time for developing country respondents if necessary. Comparable issues arise, in relation to this proposal, as with respect to the previous one: here also there is a need to balance the interests of the complaining and responding Members, including developing country Members.

56. We also discussed the timetable for panel proceedings. As in previous discussions, there appears to be support for clarifying the starting point of the indicative timetable in Appendix 3.[17] Some discussion arose, however, as to whether this should be the organizational meeting, as per the proposal, or some other point such as the adoption of the timetable by the panel. With respect to the timing of submissions, the discussion confirmed the support for shortening the indicative timeframe for the submission of the complainant's first submission, while slightly lengthening the indicative timeframe for the respondent's first submission. We did not consider, in this context, the relationship between this proposal and the separate proposal for additional time to be given for developing countries for the preparation of their submissions. In this respect, further clarification may be necessary, and the proponents are intending to work together on this.

57. The proposal to suppress the 20-day period before panel reports can be considered for adoption was also discussed.[18] The discussion focused on whether this would allow sufficient time

[15] See Appendix A, at page A-5.
[16] See Appendix A, at page A-6.
[17] See Appendix A, at page A-20.
[18] See Appendix A, at page 9

for consideration of the report by Members, including the parties in the event that an appeal is considered. It was noted that this proposal should be seen in the light of the proposal for timely access to panel reports, on which convergence has already been achieved in our previous discussions, and also in light of recent changes in the Appellate Body Working Procedures concerning the timing of the appellant's submission.

58. Finally, under "time-savings", we also briefly considered the proposal for accelerated procedure for safeguards disputes. In this respect, past discussions had suggested that, while there was sympathy for the rationale underlying the proposal, there were also doubts about the possibility of accelerating these types of proceedings, as compared to others, and whether the DSU would be the right legal instrument to address this matter. I did not get the sense, from discussions this week, that positions on this aspect of the proposal have changed significantly since our last discussions.

2. Sequencing

59. You will recall that we had already discussed most aspects of sequencing recently. As I noted in November, I think the work over the past few months has allowed us to secure a solid common understanding as to what a solution to "sequencing" would involve. Also, a number of specific clarifications and improvements had been proposed and discussed, hopefully taking us closer to a "clean" text on this issue, without prejudice to delegations' ultimate position on the need to address "sequencing". As requested by some delegations in November, this work continued this week.

60. Specifically, I had identified the following issues for discussion:

1. follow up on specific drafting improvements proposed at the last meeting in relation to Article 21.5;

2. consider the specific draft legal text of Article 21.5(a) and Article 22.6(b), with the objective of "cleaning up" the grey-shaded and square-bracketed texts in those paragraphs;

3. revert to the discussion of some of the more substantive issues that some participants have expressed interest in discussing further, and specifically, appeals of Article 22.6 arbitral awards;

4. and, time permitting, taking stock of the timesaving aspects of sequencing.

61. Ultimately, we were only able to focus on the first two items. Our work in this respect was facilitated by the fact that we were able to work on the basis of a revised working document. This paper was prepared by Canada to facilitate discussions and take stock of the progress made over the past few months. On the basis of that document, we considered a number of improvements to the draft legal text[19], which have emerged from recent discussions.

62. In this respect, the following improvements have been suggested:

- an improved formulation of the notification of implementation measures under Article 21.5(b), the objective being that the Member concerned should provide sufficient information for the complainant to be in a position to assess whether compliance has been achieved;

[19] See Appendix A, at pages A-13 and A-14.

- the introduction of a footnote to Article 21.5 (c), which would preserve the possibility of resorting to other procedures than Article 21.5 in case of disagreement about compliance, and of a second footnote to clarify the implications of choosing such an alternative course on access to retaliation under Article 22;

- improved language on the establishment and composition of compliance panels under Article 21.5, to express clearly that the DSB would establish the compliance panel, and that the persons serving on the compliance panel should be those who served on the original panel.

63. We also initiated a discussion of some of the other specific aspects of the draft text, but did not complete that discussion. I encouraged interested delegations to meet with the proponents between now and our March meetings, so that the text can progress as much as possible towards a clean draft text by then. If we could have convergence around a single formulation for each piece of text, that would already be significant progress.

64. Finally, on sequencing, I would also like to note that Australia presented to the group a table outlining the potential time-savings associated with the sequencing proposal in combination with its own time-savings proposals. The combined figures suggested a potential for significant gains in the overall timeframes under the DSU. I hope that this can contribute to facilitating a resolution of the issue of sequencing.

3. Effective compliance

65. I also held some further consultations on "effective compliance" this week, which I would like to briefly report on.

66. We first briefly took stock of work on:

- the proposal on retaliation by a group of Members on behalf of a prevailing developing country complainant;

- the proposal on facilitated cross-retaliation for developing countries; and

- the proposal on calculating the level of nullification or impairment for developing country complainants;

67. On "group retaliation", unfortunately the proponent was not able to be present, so we were not able to follow up on our discussion of last June on this issue. However, I think it will be important that we come back to this issue, engaging in discussion both the proponents and other delegations. In this respect, it was important that other proponents of related issues reiterated their willingness to work further with the proponents of "group retaliation" on the promotion of "effective compliance".

68. With respect to cross-retaliation, the proponents informed the group of their ongoing work and promised to report on their progress by our next meetings in March.

69. With respect to the calculation of the level of nullification or impairment for developing country complainants, Ecuador has informed us that they are working on a document in response to some of the comments raised on their proposal, and they hope to be able to present this at our March meetings.

70. We also discussed Korea's non-paper, and Korea shared with the group an updated version of its text, reflecting further work and taking into account comments received on the earlier version of the text. This text contains two elements:

- a reference period for calculating the level of nullification or impairment, which is proposed to be the year in which the reasonable period of time for implementation, or RPT, ended, unless the circumstances require otherwise.

- a starting point for the calculation of the level of nullification or impairment, which Korea proposes to be the end of the reasonable period of time for implementation.

71. With respect to the starting point for the calculation of the level of nullification or impairment, the discussion confirmed that the views of participants still diverge as to the period of nullification or impairment for which the responding Member should be "accountable" through retaliation. There are essentially three positions on this:

- only the period starting from the authorization to suspend concessions should be accounted for; or

- the period from the end of the RPT should also be counted; or

- the entire period from the *beginning* of the RPT should be accounted for.

72. The discussions confirmed differences of view on this issue, both in terms of what is currently provided for under the existing DSU rules, and as to what would be desirable. Some delegations consider that a calculation that would take into account a period prior to the authorization would constitute a retrospective remedy not compatible with the nature of retaliation remedy under the DSU, while others consider that end of the RTP constitutes the point in time as of which compliance is expected, so that, if compliance has not been achieved by then, a remedy starting from that time is appropriate, and would not be "retrospective".

73. With respect to the reference period, the improvements proposed to the text, which foresee additional flexibility to adopt a period of reference other that the year in which the RPT ended, were welcomed by participants. It was noted in that context that further clarification may be desirable as to who, of the parties or the arbitrator, had control over the choice of reference period.

74. We also discussed the notification of measures taken pursuant to an authorization to suspend concessions or other obligations. Efforts were made to find language that would provide the right level of precision as to what exactly is to be notified, how it should be notified, and when. As to the "how", there appears to be convergence on the idea of a written notification to the DSB. As to the timing of the notification, there also appears to be convergence on a notification no later than 28 days after the action has taken place. What is still in discussion is the exact contents of the notification. There seems to be a common view that the notification will be most useful if it includes information about the actual action taken to suspend obligations, and not just about the fact that some action has been taken to suspend concessions, but the exact language needs to be clarified further. This is still work in progress, and the proponent has committed to continuing to work on this issue with interested delegations.

75. Finally, we reverted to the relationship between compensation and retaliation under Article 22 of the DSU. In this context, we considered the proposed language under Article 22.2*bis*.[20] The discussion confirmed that the general assumption was that compensation and retaliation were

[20] See Appendix A, at pages A-14 and A-15.

alternative remedies, and that a Member could not seek suspension of concessions after having obtained compensation for the same nullification or impairment. But the proposed language raised some concerns, in that it does not clarify a timeframe for the possible negotiation of compensation and also did not seem to account for situations of partial compensation. Interested delegations agreed to consider further this issue, in order to determine whether this question should be addressed, and if so, how.

4. Post-retaliation

76. The final issue that was addressed this week is post-retaliation. As you may recall, the July 2008 text reproduces two alternative post-retaliation proposals in Article 22.8(b).[21] I think that our first objective should therefore be to move towards a single text as the basis of further work.

77. For this purpose, I first met with the proponents of post-retaliation and encouraged them to work together to clarify, among themselves, the main points of convergence and divergence between their proposals. Happily, they were able to identify many more points of convergence than points of divergence.

78. On that basis, the proponents identified the following points of convergence:

- Agree to have explicit rules on post-retaliation situations;
- Agree to use procedures already existing under DSU (21.5, 22.6) with some modifications;
- First step is to be taken by the member concerned (original defendant);
    - Initial responsibility to demonstrate compliance to rest on the Member concerned;
    - Member concerned has to substantiate its claim on compliance (comprehensive notification or first written submission before 21.5 panel);
    - Level of detail to be provided by Member concerned is greater in post-retaliation than sequencing;
- Complaining party has to rebut claims on compliance to justify maintenance of sanctions;
- If there is disagreement on compliance, proceedings 21.5 apply;
- If there is no disagreement on compliance, no 21.5 but go straight to DSB for removal of authorisation;
- Existing authorisation to suspend concessions will continue to be effective until withdrawn or modified by DSB [sanctions remain pending litigation];
- What happens following 21.5 proceedings:
    - Full compliance: adoption of report by DSB; authorisation is withdrawn
    - no full compliance: adoption of report by DSB; possible 22.6 arbitration; authorisation may be modified or may remain the same.

79. In addition, the proponents identified the following points of divergence:

[21] See Appendix A, at pages A-17 and A-18.

- Who requests the establishment of 21.5 panel (and therefore bears the initial burden of proof);
- Definition of the scope/jurisdiction of 21.5 panel: how, when, by whom;
- How to motivate the member concerned to put everything on the table early.

80. I then held consultations in which the proponents shared these points with other interested delegations. At this point, the discussion has focused on the points of convergence, rather than the points of divergence. I think it is fair to say that at a purely conceptual level there appears to be support for the proponents' general points of convergence, but of course the specific mechanisms and drafting language to reflect them needs to be further clarified and unified.

81. I intend to revert to post-retaliation at our next meetings. In the meantime, I have encouraged the proponents to continue to work together on this issue, taking into account the discussions this week. I also urged other interested delegations to approach the proponents with any comments they might have.

F. WEEK OF 7-11 MARCH 2011

1. Post Retaliation

82. At our January meetings, the two groups of proponents jointly developed a list of eight points of convergence and three points of divergence.[22] I mentioned in January that there appeared to be support among the delegations participating in that discussion for the eight points of convergence identified by the proponents, although specific technical questions remained outstanding.

83. This week, we considered further these points of convergence, with the goal of securing confirmation of level of common understanding and providing a clear basis for the proponents to work out some common language toward a single text.

84. Participants confirmed the objective of having explicit rules on post-retaliation to address the question of how a disagreement as to the existence or consistency of measures taken to comply might be resolved where retaliation has been authorized, and how the authorization may be terminated.

85. Participants also supported the use of procedures already existing under DSU Article 21.5 (compliance proceedings) and Article 22.6 (procedures concerning the level and form of retaliation) as "building blocks". Some participants noted in this context the parallelism between sequencing and post retaliation. Participants sought clarification on the relationship with sequencing and any timing implications. It was observed in response that, in light of the parallelism between the two, if timing implications were successfully addressed in sequencing, then they would also be addressed in this context. In response to a question as to what particular "modifications" to these existing rules would be necessary in the post-retaliation context, it was also clarified that the procedures under Articles 21.5 and 22.6 themselves would not be affected.

86. Participants agreed that the Member concerned (the original respondent that is facing the retaliation) should bear initial responsibility to assert and demonstrate compliance. However, proponents disagree as to the manner in which it must substantiate its claim of compliance. This is reflected in the respective texts of the proposals. Under one proposal, the Member concerned must substantiate its claim of compliance through comprehensive notification. The other proposal provides for substantiation through a first written submission in a 21.5 proceeding.

[22] See paras. 78 and 79 above.

87. Some participants questioned whether there was a need for a second notification requirement – with a different level of information – different from what is already proposed for an Article 21.5 compliance proceeding. In one respect, there was recognition that a complaining Member has already gone through compliance proceedings and the process to impose sanctions, and that it must evaluate the information, hold consultations and formulate the relevant request under a 60-day timeframe. However, the question was also raised as to what additional information might be provided other than notice of a repealed measure or a replacement measure. In addition, it was observed that although a 60-day timeframe does not exist at the 21.5 phase, nevertheless similar pressure arises from stakeholders' interests. Some participants noted the benefits of having as simple a process as possible to avoid placing additional burdens on the parties. This question of the form and content of the notification or information to be submitted by the Member concerned seems to be the aspect in respect of which the views diverge the most, and I asked the proponents to take into consideration the comments made.

88. Delegations also agreed that the complaining party has to rebut claims on compliance to justify continuing sanctions. If there is disagreement on compliance, Article 21.5 proceedings should apply. However, if there is no disagreement on compliance – such as if parties reach a mutually agreed solution – then delegations supported the view that Article 21.5 proceedings would not be required. Instead, the Member concerned could request the DSB to remove authorisation without having to wait 60 days to notify compliance to the DSB. It was noted that current language in paragraphs 22(a) and (c) of the proposals does not seem to address situations in which a mutually agreed solution has been reached, and there may therefore be a need to address this.

89. Delegations also agreed that existing authorisations to suspend concessions would continue to be effective as long as there has not been a determination by the DSB or agreement by the parties that compliance has been achieved in part or in full. Again, the question arose as to whether the situation of a mutually agreed solution needs to be addressed specifically. With respect to a possible modification of the authorized level of suspension, it was suggested that either partial compliance or further incompliance might arise, which would entitle a complaining Member to adjust the level of suspension.

90. Finally, participants converged on the potential outcome of the proceedings, where a 21.5 proceeding has taken place. Thus, in the event full compliance is achieved, the DSB may adopt the report(s) and the authorisation is withdrawn. If there is not full compliance, the report(s) may still be adopted by the DSB but the possibility would remain for an Article 22.6 arbitration, and the authorisation may be modified or may remain the same. There were no comments on this final point, which I took to mean that this dual path appeared to be acceptable.

91. The points of convergence identified by proponents, and the discussion reflected above, suggests that the two proposals in fact share many features in common. I therefore noted that there are a number of aspects that proponents could work on together, to find common legal text. In particular, it seems that the language concerning the following aspects at least could be harmonized, to the extent possible:

- the description of the initial information to be provided by the responding Member;
- the procedure for adoption of the 21.5 compliance reports,
- the procedures for a possible modification of the level of suspension, including recourse by either party to Article 22.6 arbitration;
- the procedure for the withdrawal or modification of the authorization by the DSB, and
- as necessary, the introduction of a reference to mutually agreed solutions.

92. We also discussed participants' views on points of divergence, in the hope of clarifying the direction we would need to take to reach an agreement.

93. We first discussed which party should request the establishment of an Article 21.5 panel, and therefore, which party bears the initial burden of proof. I noted my view that we had a useful discussion, which clarified the implications of both options, as well as the concerns of some participants as to how each one would operate in practice. There was extensive discussion of the procedural implications of the proposed initiation of Article 21.5 proceedings by the responding Member, rather than by the complainant. The proponents of that approach explained that, in their view, at that stage of the proceedings where the responding Member has already been found not to have complied with the rulings, it should be required to bear the burden of demonstrating that it has now brought itself into compliance.

94. Participants also observed that the potential outcome of proceedings at this stage of the proceedings differed from "initial" Article 21.5 procedures, in that the procedure may lead to termination, rather than initiation, of retaliation measures. Hence, the onus was on the responding party to initiate this change. Some participants observed, however, that even if the potential consequences of the rulings differed, the task of a "post-retaliation" Article 21.5 panel is essentially the same as that of a regular 21.5 panel, that is, to determine the existence of any inconsistency.

95. Clarification was sought as to whether, in the event that the Member concerned initiates a compliance proceeding, a complaining party could decide not to file a notice but instead bring a new compliance proceeding. Conversely, it was suggested that, at the time of initiation of the compliance proceedings by the respondent, it may not be clear whether there is in fact a disagreement on compliance. Proponents of requiring the complaining party to initiate compliance proceedings took the view that their proposal provided a simpler solution and was compatible with the existing approach in 21.5 proceedings. Some participants agreed that this approach seemed more consistent with the process that is otherwise adopted throughout the DSU.

96. In discussing procedural differences between the two approaches, participants focused on the respective burdens that the complaining and responding Member should bear, at this stage of the proceedings, to demonstrate compliance or lack thereof. It was suggested that the complainant should not have to bear the burden to prove the existence of a legal measure at this stage. However, the view was also expressed that the burden would inevitably end up on the complaining party to prove continued inconsistency, if it were to disagree with the respondent's assertion of compliance.

97. If the responding Member were to come forward with evidence of a measure to comply, the question arose whether that Member would have to prove that its measure to comply is consistent with every provision of the covered agreements to demonstrate the absence of inconsistency. Some participants questioned the value of having the Member concerned set out extensive information about efforts taken to comply, emphasizing the importance of focusing on where remaining disagreement exists. In this context, it was also observed that the complaining party needed to have the ability to frame the scope of the dispute. With respect to the burden of proof, reference was made to the rulings of the Appellate Body in *US – Continued Suspension*, which addressed the possibility of initiation of Article 21.5 proceedings by the responding Member in a post-retaliation situation, and the implications of such an approach in terms of allocation of burden of proof. Questions also touched on particular procedural aspects, including whether a co-complainant that has not received authorization to suspend would need to bring its own proceeding.

98. We also discussed the second and third points of divergence. Proponents in favour of having the complaining party initiate compliance proceedings recalled their view that their proposal most closely follows the standard rules in Articles 6 and 7 of the DSU. They also emphasized that the request for establishment of an Article 21.5 panel defines the scope of the Panel's terms of reference,

and the complaining party would need to, and is in a far better position to set out those elements of disagreement. Proponents also expressed the need, when thinking of ways to design new procedures, to make provisions as clear as possible. In this respect, they submit that the other proposal allows responsibility to be shifted to the complainant too easily, or to provide incomplete information in the notification that would not make it possible to resolve the matter in a 21.5 proceeding. It was asked whether further pressure is put on this by the requirement to notify a request within 60 days. It was accepted this may be a technical issue only.

99. Proponents in favour of having the respondent initiate compliance proceedings submitted that nothing in the current rules would prevent a respondent from seeking an Article 21.5 panel. They emphasized their preference for placing the onus on the respondent to come forward in a post-retaliation situation, considering it more appropriate for the party seeking change from status quo to take the first legal step. This group further submitted that the complainant, which already gone through the various stages, should not be led into a process where the authorization can be removed by virtue simply of the respondent asserting compliance. They also questioned whether the notification proposed in the other proposal could be considered to have enforceable legal consequences. The question was raised how this notification would be different from the notification that might be foreseen were two parties have no disagreement, and thus proceed directly to the DSB to withdraw the authorization to retaliate.

100. Following this discussion, some participants offered their view that the first two points of divergence are largely related, and that there was slight convergence on the third point, namely that both sides would likely agree that the complaining party should not be caught off guard. Some participants asked whether the effectiveness of a panel proceeding would depend on who precisely brings the case. The point was also raised whether the burden of proof could not be shared, depending on whether the issue concerned the existence of a measure to bring into conformity, or instead, whether such a measure was otherwise in violation of a WTO provision. Overall, I suggested more discussion is needed.

2. Effective compliance

101. I invited participants to report on any progress made in respect of group retaliation on behalf of a prevailing developing country complainant, on facilitated cross-retaliation for developing countries, and on calculating the level of nullification or impairment for developing country complainants.[23] The proponents informed me of their recent consultations together and their ongoing work towards developing some common views that could be reflected in a joint textual contribution. In addition, Korea and Mexico reported on their ongoing work on their respective proposals.

102. Later in the week, Korea mentioned it would soon circulate a new paper to the larger group based on recent discussions. Mexico also presented revised text under Article 22, addressing the notification of retaliatory measures, containing two options for draft legal text describing the type of measure that would be subject to a notification requirement. The objective was explained as enhancing transparency. Mexico advised that this text had been discussed among small groups of both developing and developed countries and represented a substantive agreement, even if the views were not finalized as to how to reflect this in legal text. Participants asked for clarification on differences between the two options. I encouraged delegations to submit the result of their work in the form of legal text, and to engage also with other interested delegations.

[23] See Appendix A, at pages A-14 and A-15.

3. Third Party Participation

103. Certain delegations that have recently worked on third party participation as "Friends of Third Parties", presented a non-paper, which proposes changes to Articles 4, 10, 21.5 and 22 of the July 2008 text as well as Appendix 3.[24]

104. Participants first addressed third party rights in consultations, under Article 4.11 of the DSU. Under this proposal, the current Chair's text proposes that any requesting Member may be joined in consultations by notifying its interest in writing unless the Member to which the request for consultation was addressed notifies the applicant Member and DSB in writing within 7 days after receipt of such a request that a claim of a substantial trade interest is not founded. The non-paper newly proposes that Members be allowed to join consultations as third parties that have a "substantial interest", as opposed to a "substantial trade interest", thus allowing participation where systemic, but no trade-related interests exist. It also proposes that the request would be accepted unless all parties to consultations agree to reject it.

105. Participants discussed what impact would arise from allowing third party participation where a "substantial interest" rather than a "substantial trade interest" exists. Proponents to the new proposal submitted that the "substantial trade interest" language in the current proposal of the July 2008 text was too restrictive, preventing participation by Members with a systemic interest in proceedings. In their view, there are currently no clear guidelines in respect of "substantial trade interest" either. In addition, in their view, the inclusion of the word "trade" may create expectations to participate that cannot be met.

106. Other participants offered that it is not clear what systemic interests may exist at this stage of proceedings. Some delegations expressed the view that removing the term "trade" might create less clarity as to what interest is required to join, which could lead to less consistent application in practice. There was some discussion, in this respect, of how a party could reject a request based on a substantial or systemic interest. Several participants took the view that the true value of the consultations phase is to resolve disputes amicably, which may be impeded by enlarging third party participation. It was also suggested that, in practice, the proposal removes the criteria by which a responding Member is obliged to allow the participation of a Member, thus making it easier to reject a request. It was suggested that a requirement of "substantial trade interest" may give an objective standard in determining whether third party interest exists. Finally, delegations asked whether the removal of the term "trade" would create pressure for members to request to participate in all consultation proceedings out of "systemic" interest in dispute settlement, even where a substantial trade interest does not exist.

107. It was also observed that the change would result in the same language in Articles 4 and 10 of the DSU, which could result in incongruous interpretation. In other words, participation may be rejected in the consultation due to the alleged determination that there is no "substantial interest", but later, participation would be granted in panel proceedings under Article 10, on the basis of such "substantial interest".

108. Participants next discussed the implications of allowing third party participation at the consultations phase, except where the consulting parties jointly agree that the request is not well-founded. Proponents to the non-paper clarified that their proposals under 4(11)(a) and (b) are intended in tandem. They consider that this change would provide greater balance to third party participation by removing the condition that allows a responding party to reject participation unilaterally, potentially out of concern that a third party would not offer a favourable support or

[24] See Appendix A, at pages A5-6, -A7-8, A-13-14 and 17.

interpretation of legal matters at issue. Proponents consider their proposal results in greater transparency as well.

109. Other delegations reiterated their view that the proposed modifications to Article 4(11)(b) might distract from the main purpose of consultations by requiring the parties to reach agreement in deciding to allow for participation of particular parties, taking away from the bilateral objectives. Concern was also expressed that this proposed change would lead Members to hesitate to make requests under Article XXII of GATT 1994, doing so only if they think it more parties will join in support of them.

110. We next discussed third party rights in panel proceedings. The July 2008 text proposes to extend "standard" third party rights to a level comparable to what has in the past been granted on a case-by-case basis as enhanced third party rights under current rules. Proponents of the non-paper proposed further enhancement of the "standard" third party rights beyond what is proposed in the July 2008 text. They submitted that these modifications would improve effectiveness of participation, in particular by allowing third parties to address issues that arise in the later stages of proceedings, after the first meeting, through oral and written submissions as well as questions to the parties and other third parties. They consider that enhanced participation rights provide more elements to further the debate before the panel.

111. Certain delegations expressed support for a precise enumeration of third party rights to improve predictability in proceedings. However, participants expressed concern for "blurring the lines" between third parties and main parties. Delegations also expressed concerns with practical effects of increased involvement on parties, the Secretariat and the panel. Several delegations suggested that the July 2008 text provided better balance between the rights of parties and third parties. As far as the specific additional rights envisaged in the proposal are concerned, some participants indicated that they were more comfortable with allowance for participation at the second meeting on a case-by-case basis. One participant offered that limits could be imposed on the level of participation at the second meeting. However, questions were raised as to what consequences may arise for the proceedings if third parties failed to comply with such limitation.

112. Some participants also questioned how changes in point (c), which would allow the granting of additional rights with the agreement of the parties and at the discretion of the panel, would work in practice. It was asked what further additional rights could be envisioned. One participant was of the view that the text of (c) functioned like a "cap" that provides balance to parties by working like a "safety valve". Proponents submitted that the proposed changes in 2(b) and (c) are intended to work in tandem, and would have to be reconsidered, if the enumerated rights in (b) were not ensured through the text.

113. We next considered participation of third parties in Article 21.5 proceedings. Under Article 21.5(c), the July 2008 text proposes that complaining parties not be required to request consultations pursuant to Article 4 before requesting establishment of a panel under Article 21.5, but no reference was proposed to third party rights at this stage. The non-paper proposes to reflect that Article 4 shall apply in the event that consultations are requested. The proponents explained that their intention is to clarify that if there are consultations in a 21.5 proceeding, Article 4 would apply in respect of third party participation. Some delegations asked whether, if Article 4 were to apply, those portions of Article 4 that go beyond third party rights would also apply. Questions arose also as to whether the July 2008 text did not already make clear, implicitly, that Article 4 would apply. The issue of the 10-day requirement to notify interest to participate as a third party was also raised, and participants agreed to hold discussions on this requirement.

114. Overall, I noted that additional work was needed in light of the different view and elements that arose. I suggested that delegations consult with each other to advance the discussion.

4. Sequencing

115. Although sequencing was not on the agenda for discussion this week, Canada, on behalf of the proponents and other delegations, submitted a revised draft legal text reflecting convergence among the proponents of sequencing and other delegations having participated in the consultations on this issue. I welcomed the progress made in completing the technical work and achieving clean draft legal text on this topic, that brings us very close to an understanding on this issue.

G. WEEK OF 4-8 APRIL 2011

1. Third Parties

116. In March, the "Friends of Third Parties" presented a non-paper that proposed several changes that build on and extend the third party rights addressed in the July 2008 text.[25] Our discussion of this topic at the time was limited to changes proposed mainly in Articles 4.11 and 10 of the DSU. This week, we continued our discussion, focusing on Articles 17.4, 21.5 and 22.6 of the DSU.

117. Under Article 17.4 of the DSU, the July 2008 text[26] proposed that any Member that notifies its interest to participate as a third party in the Appellate Body proceedings – and not solely third parties to the original panel proceeding – should be permitted to do so, as long as such Member notified its interest within 5 days of notification of the appeal. Participation would include being heard and making a written submission.

118. Though not specifically proposing amendments to the July 2008 text, proponents of enhanced third party participation emphasized the importance of giving an opportunity for Members to join as a third participant at the appellate stage. Proponents consider that questions of law before the Appellate Body are of systemic interest. They also consider that allowing participation would ensure fairness for all Members. Failure to meet the deadline to state interest at the panel stage, or the determination of a substantial interest only following the completion of the panel proceeding, were identified as reasons that third participants should be able to join for the first time at the appellate stage. It was suggested that the ability to join at a later stage would be helpful to Members with resource constraints who may not perceive an interest at the outset, because they are not aware of issues that may arise in the course of panel proceedings. Such issues may include the particular defences raised or terms of reference issues. Proponents, however, did not anticipate that many Members would rush to join, that had not already done so at the panel stage, due to resource constraints and other factors.

119. Some participants expressed concern that the proposed changes would lead to increased participation, which would compromise already tight timetables and the rights of main parties. Some delegations did not agree that the Appellate Body would adjust its working procedures to address increased third party participation, the result being that participation by main parties would be affected. Other delegations did not envision substantial delays, and noted that page limits or time limits may also be applied to address such concerns.

120. Some delegations also expressed concern that the triggering threshold language in Article 17.4(d) – namely, the use of "interest" and not "substantial interest" -- would lead too overly broad participation. Proponents however, cautioned against creating a requirement to demonstrate a continuing "interest" in order to participate at this phase, which would, in their view, lead to unnecessary new work for the Appellate Body.

[25] See Appendix A, at pages A-5-6, A-7-8, A-13-14 and A-17.
[26] See Appendix A, at page A-12.

121. Under Article 21.5(c) of the DSU, the July 2008 text[27] proposes that complaining parties not be required to request consultations pursuant to Article 4 of the DSU before requesting establishment of a panel under Article 21.5, but no specific reference was proposed to third party rights at this stage. The non-paper proposes to reflect that Article 4 shall apply in the event that consultations are requested.

122. Questions arose as to whether the July 2008 text did not already make clear – implicitly, that Article 4 would apply in the event of consultations under this provision. Delegations also expressed concern as to whether the proposal under Article 21.5 would foreclose parties from holding informal consultations, if it were their choice to do so.

123. Proponents clarified that the focus was on third party participation, and that drafting could be adjusted to reflect this focus. Proponents noted that language would depend on the ultimate formulation of other proposals concerning Article 21.5.

124. Proponents emphasized the objective was to clarify that, in the event a member requests formal consultations under an Article 21.5 proceeding, be it through Article XXII or Article XXIII of GATT 1994, the rules pertaining to third parties under Article 4 of the DSU would apply. Proponents clarified that their intent was not to eliminate the possibility of informal consultations. Some participants suggested that the current proposed text at least implied only two options, either consultations in accordance with Article 4, or none at all.

125. Under Article 22.6 of the DSU, the July 2008 text does not propose changes that would affect the rights of third parties. The "Friends'" non-paper proposes that participation of third parties be explicitly addressed under Article 22, and that any Member may participate as a third party by notifying it interest to the DSB and each party within 10 days after referral of the matter to arbitration. Article 10 would apply *mutatis mutandis*. Proponents consider there is sufficient reason for allowing Members to join as third parties, including the question of the determination of the date from which calculation of the level of impairment begins.

126. Participants first sought clarification of, whether third parties are allowed or not under present practice, and who decides such participation. Delegations seemed to agree that the arbitrator determines participation. Overall, delegations expressed an interest in having clarity as to third party participation at this stage.

127. A number of participants considered that an Article 22.6 arbitration procedure is essentially a bilateral process and is fact-specific. Those participants expressed interest in maintaining flexibility in such proceedings. Participants also indicated concern for timetables, and complications for including additional third party participants where no systemic interest may exist. It was noted that in previous Article 22.6 proceedings, Members were allowed to participate as third parties because the same measures were under challenge and there was an immediate interest in the outcome of a parallel proceeding.

128. Overall, I took note of the discussion on third party participation and asked proponents to continue to work with other delegations in the interest of reaching convergence on issues.

2. Post Retaliation

129. This week I met with the proponents of post-retaliation to take stock of the work conducted since our last meetings. You will recall that in our recent meetings, we addressed the eight points of convergence and divergence reached by proponents and I had encouraged proponents to work

[27] See Appendix A, at page A-14.

together towards common language on a number of aspects, without prejudice to their respective views on the overall structure of the text under their two approaches.

130. Proponents of the two proposals indicated that they had found encouragement from the discussions in the small group meetings. Both sides agreed that the fundamental point of divergence remains the question of who initiates compliance proceedings. Both sides also expressed interest in using the current momentum to achieve progress in the coming weeks, taking into account the concerns of the other proponents as well as the comments heard last month from other participants. Both sides also indicated they had consulted with other delegations to understand areas in need of improvement, and that they intended to continue to do this.

131. I took note of the fundamental difference in the two proposals in respect of the initiation of Article 21.5 proceedings in the post-retaliation context. I noted again that the July 2008 text[28] has two texts, and that a single text is needed. I encouraged proponents to take into account what other delegations have said in trying to bridge the gaps. I also encouraged proponents to meet in the coming weeks, either together, with my assistance, or with other delegations, to further their work and try to eliminate their divergences.

3. Effective compliance

132. This week, I also met with delegations to discuss new developments in effective compliance. In March, proponents of issues relating to effective compliance had indicated that they were working together towards developing some common views that could be reflected in a joint textual contribution. This week, they indicated they are still in the process of working together, as well as with other delegations, to clarify what the important issues are. I took note and encouraged proponents to continue working together and to streamline their proposals.

133. We also had the opportunity to consider new text presented by Korea on instances where a Member might achieve full compliance prior to the authorization of the suspension of concessions or the actual suspension of concessions. Under this proposal, if compliance were achieved and accepted by the complaining party prior to the suspension of concessions, then concessions shall not be suspended. It was indicated that a Member could notify its compliance in a meeting of the DSB.

134. The expressed goal of this proposal is to induce compliance and facilitate implementation in a prospective manner in accordance with the principles set forth in the DSU. The importance of maintaining the reasonable period of time for implementation was emphasized. This time is considered fundamental to give Members a chance to implement DSB rulings.

135. A number of participants sought clarification on the timing aspects of this proposal and its implications for the initiation of the post-retaliation phase, and instances of partial implementation. In addition, some delegations expressed concern with how the proposal would apply.

136. One participant expressed concern that the effect of this proposal would allow a respondent to utilize additional time to avoid bringing its measure into compliance. It was submitted that that time for Article 21.5 and 22.6 proceedings is much larger than the typical period for implementation, leaving it unclear how this proposal would help compliance. In response, it was indicated that Members are understood to act in good faith in complying with their obligations. However, it was noted that Members may sometimes be unable to comply for reasons other than bad faith.

137. I encouraged delegations to continue their work, bearing mind whether Members think there is a problem with compliance, rather than focusing on text at this point. The question was raised

[28] See Appendix A, at pages A-14 - 19.

whether the problem of compliance affects different Members differently. I expressed my view that questions of effective compliance do not relate to developing countries only, and therefore encouraged delegations to participate broadly in an open dialogue. Delegations expressed their interest in continuing to work on the issue.

138. In addition, in the context of discussing developments in proposals on effective compliance, Mexico offered further revisions to its proposed text on the notification of retaliation measures.

139. Delegations sought clarification on whether the proposed notification was intended to cover situations where a member publishes a request for comments on a proposed list of retaliatory measures, or simply the final list of measures. Delegations spoke in favour of transparency but cautioned against imposing an excessive burden on Members to translate and publish information that would not be necessary. It was suggested that the notification could perhaps be no different than what is required in other areas, such as a one-page pro forma notification. Delegations discussed in detail what precise information must be notified. Some delegations proposed that agreement on notification could be achieved by narrowing down to the minimum necessary what a Member would need to notify, i.e. the measures that suspend or modify concessions or other obligations in particular sectors.

140. I took note of the discussion and encouraged delegations to continue their work towards clarifying the terms of a notification of retaliatory measures.

4. Flexibility and Member Control

141. We discussed proposals in the July 2008 text on flexibility and Member-control.[29] Proposals in this area focus on suspension of proceedings, interim review at the appellate stage, partial deletion and partial adoption of reports, panel expertise, and interpretative guidance parameters. This week, we held discussions on suspension of panel and appellate proceedings and interim review at the appellate stage.

142. On the suspension of panel and Appellate Body proceedings, found in Articles 12.12 and 17.5(c) of the July 2008 text respectively, delegations indicated general support for suspension when agreed upon by the parties, and focused on technical aspects of the proposal. Discussion focused on the initiation of suspensions, the permissible duration of suspensions and resumption of proceedings.

143. With respect to the suspension of panel proceedings at the joint request of the parties (Article 12.12 of the DSU), participants in the small group meetings converged in support of the possibility of suspending panel proceedings by agreement of the parties, as proposed, and on language to that effect. It was understood that suspension at the discretion of the panel upon request of the complaining party, as currently foreseen in Article 12.12, would also remain possible. Participants considered that parties to a dispute may reach agreement to suspend a panel proceeding, and may also agree to the duration of suspension and the particular mechanism to resume proceedings. However, delegations did not consider that the proposed language of Article 12.12 made this clear.

144. Participants in small group meetings also considered whether the conditions in which suspended panel proceedings may resume should be clarified, and agreed that it would be useful to insert language in Article 12.12 to clarify that suspended proceedings may be resumed at the request of either party. In this context, it was also considered that the language proposed in the July 2008 text under Article 17.5(c), concerning the resumption of suspended Appellate Body proceedings, could serve as basis for this, omitting the portion of text "unless otherwise agreed by the parties".

[29] See Appendix A, pp.A-8, A-9, A-10, A-25 and A-27.

145. Participants in the small group meetings also agreed that a 12-month limit should be imposed on the length of suspension, to be understood as 12 consecutive months. To that effect, participants agreed to clarify that the 12 months referred to in the text should be "12 consecutive months". It was recognized that suspension could in fact extend beyond a total of 12 months, so long as parties communicated to the panel their interest in resuming the proceeding and suspending anew.

146. In further consultations with the broader group of interested delegations, some participants sought more clarity as to the parallel function of the first and second sentences of Article 12.12, and whether it would be necessary to clarify whether the work of a panel would resume at the conclusion of 12 months. In this respect, some participants noted the current formulation of the text in the DSU, and that the present proposal does not seek to change how panels might resume in the event that the suspension has been requested by the complainant. Some participants also took note of the fact that this provision as it is currently drafted seems to function well in practice.

147. I noted that I found the discussions on suspension of panel proceedings to be very useful, and hoped that delegations could come to agreement on a draft legal text.

148. We next turned briefly to the suspension of appellate proceedings. In this regard, I noted that a number of delegations in the small group meetings had considered favourably the objectives of the proposal. However, certain of these delegations had concerns concerning how suspension would work in appellate proceedings. In particular, delegations expressed concern that the current proposed draft does not include a finite limit to the duration of the suspension, which could lead to uncertainty and unpredictably for Members and for the workload of the Appellate Body. A 12-month limit similar to that proposed for panel proceedings was suggested. In addition, the view was expressed that a definitive timeline could provide a milestone for members to proceed. Proponents felt that the Appellate Body would not have issues with uncertainty, and has shown flexibility in adjusting its workload in previous cases.

149. Overall, delegations took note of the difference between the panel and Appellate Body proceedings, and took the view that parallel mechanisms for the suspension of panel and appellate proceedings would not necessarily make sense for the system, in light of this difference. In particular, questions were raised as to what would happen with the status of the panel report, if the parties did not resume proceedings, and what would happen to timeframes set out in Article 16.4 of the DSU and in the Appellate Body's working procedures. If a definitive timeframe were included, participants also asked what would happen in the case parties did not terminate the suspension to resume proceedings. Would the authority of the Appellate Body lapse, or would the Appellate Body resume its work?

150. Although these questions remain open, I noted that there appears to be sympathy for suspension of proceedings being available in the context of Appellate Body proceedings. I also took note of a desire for a degree of parallelism between the panel and appellate stage, and for predictability in the system. A number of delegations expressed a clear interest in a definitive time limit for a suspension. As an alternative to a hard limit to the length of suspension, I suggested that a requirement could be included for parties to set out in an agreement a finite duration for the suspension, or a mechanism for resumption of proceedings. I suggested that we continue discussion on this topic in the next negotiating week.

151. We next discussed the possibility of an interim review at the Appellate Body stage. This proposal is addressed in Article 17.5(a) and (b) of the July 2008 text.[30] The proponents have suggested 30 days as a reasonable timeframe for such review, and suggest that it could help avoid errors of fact or law in the Appellate Body, and could also help provide clarifications on Appellate Body findings, which would help with implementation and compliance. Due to the definitive nature

[30] See Appendix A, at page A-10.

of Appellate Body reports, proponents consider that interim review is even more important at the appellate stage. Proponents also expressed the view that an interim review would provide a much more favourable manner than issuance of corrigenda to address potential mistakes or issues in Appellate Body reports.

152. In general, delegations expressed support for having high quality Appellate Body reports. However, some delegations expressed concern with whether the inclusion of interim review at the appellate stage would undermine the integrity of appeals. If one of the focuses of an interim review stage is to correct minor errors, it was asked whether incorporating such a review at the appellate stage is worth it in light of potential disadvantages, including notably, the effect on timeframes. In addition, participants expressed concern that the interim review stage might serve as an early preview that could be subject to abuse, with parties perhaps inclined to withdraw their appeals if they were not satisfied with the findings of the Appellate Body.

153. Delegations also expressed concern at whether the proposed 30-day timeframe would provide sufficient time for the parties. Concern was also expressed as to whether interim review at that stage could open the door to having parties review legal issues in the Appellate Body report. The risk of leaks was also raised. In addition, certain delegations expressed concern with the additional cost that would arise from adding another step in the process. It was not clear to these delegations that such cost would not exceed the potential benefits.

154. I took note of the discussions, and suggested that more work needed to be done on this last issue. I also took note of comments by delegations, including, *inter alia*, concerns about legitimacy of the Appellate Body, effects on timeframes, and the question of costs in relation to benefits. I also noted the suggestion for perhaps a narrower scope for limited comments, which might alleviate concerns that a party was simply trying to re-litigate its case. I suggested we continue discussion on this topic, and on remaining proposals on flexibility and Member-control, in the coming negotiating weeks in May.