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SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

REPORT BY THE CHAIRMAN, AMBASSADOR COLY SECK

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1 OVERALL ASSESSMENT

1.1 Introduction

1.1. In this document, I report on the activities of the Dispute Settlement Body in Special Session (DSB-SS) during my tenure as its chairperson from May 2017 to July 2019. To provide Members with a single and comprehensive report and facilitate an overall assessment, this document also incorporates the specific results of work undertaken under my predecessor, Chair Dr. Stephen Karau.[1]

1.2. This report initially describes the approach to the negotiations that Chair Karau devised and that I continued and further developed in consultation with participants in the negotiations.[2] The report then provides the state of play on the negotiations. As part of that section, I give an overview of the challenges surrounding the negotiations and a general assessment of the work that was conducted in the DSB-SS since November 2016. I also identify possible ways forward for the consideration of participants. The remainder of the report gives a detailed account of the specific results of work conducted on an issue-by-issue basis. Finally, the annex to this report (Annex 1), compiles the draft legal texts that formed the basis of the work conducted by the DSB-SS under Chair Karau and myself.

1.3. I present this report under my own responsibility. It is without prejudice to Members' final positions on the issues under negotiation.

1.2 Approach to the negotiations

1.4. Chair Karau and I inherited the 12 issues under negotiation in the DSB-SS from our predecessor, Chair Saborío Soto.[3] They were selected after extensive discussions among participants. The issues are: (1) Mutually agreed solutions, (2) Third-party rights, (3) Strictly confidential information, (4) Sequencing, (5) Post-retaliation, (6) Transparency and amicus curiae briefs, (7) Timeframes, (8) Remand, (9) Panel composition, (10) Effective compliance, (11) Developing country interests, and (12) Flexibility and Member control. Issues 1 and 2 were discussed during Chair Karau's tenure, while the other ten issues were considered during mine.

1.5. Following his election and consultations with participants, Chair Karau decided to adopt a somewhat new approach to the DSU negotiations.[4] I continued and subsequently adjusted that approach in consultation with participants. Under this approach, which has come to be known as "sequential focused work", the DSB-SS discussed one of the 12 issues at a time. A fixed period of time was allotted for the discussion of each issue, after which the DSB-SS proceeded to the next issue.[5] The focused work of the DSB-SS commenced in November 2016 and concentrated on those components of an issue that presented a sufficiently strong possibility for convergence or a high level of maturity, whether in terms of draft legal text or conceptual discussion. In determining the level of convergence or maturity, Chair Karau and I were guided initially by reports circulated by our predecessor.[6]

1.6. Following this approach, the DSB-SS held 47 meetings under Chair Karau or my chairmanship. The meetings were open to all Members.[7] For each issue, the DSB-SS held (a) an opening meeting to identify the main points of agreement and disagreement among participants and establish priorities for the focused work and (b) a closing meeting to record the progress made, identify any remaining conceptual gaps or technical work and bring to a close the focused work. In between, the

[1] Chair Karau conducted work on two out of twelve issues under negotiation between November 2016 and May 2017. See TN/DS/29, pp. 3-6.

[2] The term "participants" is used in this report, as in reports by prior chairpersons of the DSB-SS, to refer to those Members that actively participate in the DSU negotiations, which tends to be mainly those Members who from time to time participate in WTO dispute settlement proceedings as parties or third parties.

[3] See TN/DS/25, p. A-3.

[4] See TN/DS/29, para. 2.6.

[5] In response to an interest expressed by some participants in progressing more rapidly, for the last four issues on which the DSB-SS conducted focused work, the work on the different issues proceeded in separate meetings that were scheduled in a manner that enabled parallel progress on all four issues.

[6] See, for instance, TN/DS/28, TN/DS/27, TN/DS/26, TN/DS/25 and JOB/DS/14.

[7] All meeting agendas and accompanying documentation are available to Members as room documents via the documents for meetings search function on the WTO website.

Chair held one or two consultations with participants that were aimed at addressing the priority aspects identified during the opening meeting and exploring possible flexibilities on the part of proponents and other participants that would allow further convergence. This process was often facilitated through questions from the Chair that were circulated in advance. In preparation of the multilateral consultations and closing meetings, the Chair engaged directly with the proponents and other interested participants.

1.7. When participants' positions were sufficiently aligned on a particular issue, prior to the closing meeting the Chair circulated a Chair's text under his own responsibility to identify a possible new baseline draft legal text that could be acceptable to all participants or to identify possible incremental changes to the draft legal text that reflect the discussions during the focused work. When proponents' or participants' positions differed significantly, the Chair circulated a Chair's statement under his own responsibility, recording points that were clarified, or remained to be clarified, in respect of the available draft legal texts and providing his perspective on where participants' positions converge or diverge. Participants were given an opportunity to make comments on the Chair's texts and statements at the closing meetings.

1.3 State of play

1.8. To assess, realistically, what has been achieved to date and what outcomes are within reach of the participants, it is important, in my view, to identify at the outset some of the challenges surrounding these negotiations. Against this background, my report then gives a general assessment of the work undertaken and identifies options for the consideration of participants.

1.3.1 Challenges surrounding the negotiations

1.9. The participants in these negotiations, which were commenced in November 2001, have had to contend with challenges long before Chair Karau and I set out to conduct sequential focused work on the 12 issues. These challenges continue unabated and arise in the form of (a) low expectations, (b) a limited willingness on the part of proponents to compromise, and (c) the negotiating group's lack of confidence in itself.

1.10. Participants in recent years have tended to hold low expectations as to the chances of successfully concluding the DSU negotiations. The negotiations have not benefited from the kind of collective political will and engagement needed to drive them towards a conclusion, which undoubtedly reflects the fact that for much of its history the DSU has been widely seen as operating effectively and efficiently.[8]

1.11. In the absence of a collective political will to promptly complete the DSU negotiations, proponents have in some cases sought to establish linkages across unrelated issues. While such approaches are common in multilateral trade negotiations, this has also limited the ability for the various proposals to be considered on the basis of their individual merits. This tendency to link unrelated issues is what Chair Karau and I tried to counteract by conducting sequential focused work on the 12 issues. Both Chairs considered that this approach would facilitate consideration of each individual issue on its own merits.

1.12. The prolonged lack of results in the negotiations has contributed in my view to a lack of confidence on the part of the negotiating group in its ability to deliver outcomes. This sentiment has provoked periodic expressions of frustration with the process and made it difficult at times for my predecessor and me to get participants to engage actively in text-based work and explore compromise solutions with proponents. Chair Karau and I have therefore persistently reminded the participants of the value of pursuing incremental outcomes.[9] A success, even if minor, would boost the negotiating group's confidence and would likely create the conditions for further outcomes down the road.

1.13. In addition to these long-standing challenges, new ones have arisen since the DSB-SS embarked on its focused work in late 2016. One of these is the lack of strategic alignment among

[8] The DSU negotiations were not part of the single undertaking approach adopted for the Doha Round. They could thus have been concluded before any conclusion of the Doha Round.

[9] See, for instance, TN/DS/29, p. 7, and TN/DS/30, p. 2.

participants, which has affected the level of engagement of some participants. Although Chair Karau in consultation with participants decided to continue working with the 12 issues[10], certain participants have continued to express doubt about the chosen negotiating agenda. According to those participants, several of the 12 issues are no longer relevant, or are less relevant than other issues that came to the fore in recent years. Participants adhering to this view consider that new issues would stimulate greater engagement and interest in concluding the negotiations.[11]

1.14. Another new challenge is the dynamic negotiating environment. Four aspects are worth highlighting in this regard. First, the dynamics in the negotiating group itself have changed. New active participants have emerged, either because they recently acceded to the WTO or because they recently became active users of the dispute settlement mechanism. Their positions did not always coincide with well-known positions of other participants.

1.15. Second, issues arising in recent WTO dispute settlement proceedings or recent rulings by WTO adjudicators have in some instances had a negative bearing on proponents' or other participants' willingness to compromise. Moreover, solutions found through dispute settlement practice have led some participants to question the continuing need to pursue solutions through the DSU negotiations. However, even as some participants provided updated positions on specific issues during the focused work, some (though not all) proponents displayed limited interest in exploring possible compromise solutions in response, apparently because of a belief that their proposals had enjoyed informal support during a prior stage of the negotiations.

1.16. Third, a concern raised by some Members in the recent WTO reform debate has spilled over to the DSU negotiations. This notably affected the discussions of any proposals before the DSB-SS relating to special and differential treatment for all Members self-designating as developing countries.

1.17. Fourth, within the context of DSU reform itself, Members' priorities have shifted of late towards reforming the Appellate Body in response to criticism expressed by certain Members. Dedicated discussions on the issues raised in this area are currently being held in a facilitator-led process under the auspices of the General Council, reflecting Members' sense of urgency. As part of those dedicated discussions, several Members proposed amendments to the DSU or DSB decisions. These discussions have, understandably, diverted attention away from the DSB-SS. In this regard, I note that while the 12 issues that have been the recent focus in the DSU negotiations, do not, for the most part, directly intersect with issues that have been under discussion in the more recent General Council consultative process, there are aspects of issues within the DSU negotiations that have also featured to some degree in the facilitator-led process.

1.3.2 General assessment

1.18. Turning to my general assessment of the focused work conducted by the DSB-SS, I note at the outset that my observations are based on (a) my earlier comments and Chair's texts or statements on the 12 issues and (b) the participants' comments on my Chair's texts or statements. They are all compiled in section 2 below.[12] I invite the participants and other Members to take note also of those comments, Chair's texts and Chair's statements, as they contain detailed information and analysis.

1.19. The next point of note is that the DSB-SS has successfully fulfilled the task that it set for itself under Chair Karau. It recently completed its focused work on 10 of the 12 issues. For the other 2 issues, Effective compliance as well as Flexibility and Member control, the DSB-SS conducted substantive work on certain components. To the extent that other components of those issues were not discussed, this was at the specific request of the proponent(s). The DSB-SS has thus reached an important milestone.

[10] See TN/DS/29, para. 2.5.
[11] See also TN/DS/30, para. 3.3.
[12] All of my earlier comments and Chair's texts or statements were submitted to the participants as and when the DSB-SS completed its focused work on each issue.

1.20. The focused work conducted by the DSB-SS since November 2016 has in my view been useful and indeed necessary. As amply documented in section 2 below, this work has allowed the DSB-SS to make progress on several fronts. In particular, the focused work enabled the DSB-SS:

- to either improve or clarify most of the existing draft legal texts;
- to uncover the need for further conceptual or text-based work;
- to update the participants' understanding of each other's positions bearing in mind the changed negotiating environment[13];
- to gain a better appreciation of where there currently is substantial convergence among the participants and where there is not; and
- to bring on board new active participants and become aware of their positions.

1.21. The focused work has also thrown into relief that in respect of some issues, or their components, the participants are now further apart than was assumed to be the case during prior stages of the negotiations. It also became clear in the case of several issues that there is broad convergence among the participants in respect of one or more, but not all, components of those issues.

1.22. In my assessment, a majority of the participants remain committed to the DSU negotiations and interested in achieving outcomes. However, based on what I have said about the challenges surrounding these negotiations, it is open to doubt that most participants would be prepared to go over the 12 issues again at some point in the future. In that sense, the DSU negotiations have in my view reached, not just a milestone, but a critical juncture.

1.3.3 Specific outcome of the focused work on Strictly confidential information

1.23. I am pleased to inform Members that the focused work of the DSB-SS has already produced one specific outcome. This concerns the proposed DSB decision on Strictly confidential information (SCI). According to that proposal, the WTO Secretariat would be directed "to make publicly available on the WTO website any procedures adopted by a panel, the Appellate Body or an arbitrator for the protection of [strictly confidential information]".[14] One Member expressed the view that some of what the proposed DSB decision intended to achieve could be implemented even without a DSB decision. I encouraged the WTO Secretariat to look into this.

1.24. Thanks to the Secretariat's efforts, it is now possible to search for all published SCI procedures on the WTO website via the "Find disputes documents" page.[15] I trust that Members will find this useful. I wish to underline, however, that this initiative does not address all aspects of the proposed DSB decision and is without prejudice to the views of the proponent and other participants.

1.4 Possible ways forward

1.25. The DSU negotiations are, and can only be, participant-driven. Moreover, a decision to approve any amendments to the DSU can be made only by consensus.[16] However, depending on their nature, negotiating outcomes can be adopted not only by the Ministerial Conference or the General Council, but also the DSB. Bearing these elements in mind, I propose below for the consideration of participants a range of possible ways forward. It is useful to distinguish in this context between working towards (a) a comprehensive outcome or (b) one or more incremental outcomes.

1.4.1 Comprehensive outcome

1.26. Despite the challenges identified in section 1.3.1 above, I am convinced that a comprehensive, and hence ambitious, outcome covering all 12 issues remains a possibility, although it would obviously require a degree of political will that has not been evident to date. Also, as is demonstrated

[13] The last time that a Chair of the DSB-SS circulated a comprehensive assessment was in 2015. See TN/DS/27.

[14] See the Proposed DSB Decision on page 21 below.

[15] Go to https://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm, and under "Select a type of document", select "Procedures for the protection of business/strictly confidential information".

[16] Article X:8 of the Marrakesh Agreement Establishing the World Trade Organization.

by my Chair's texts and statements on the various issues in section 2 below, it could be difficult to reach a consensus on a package that includes every component of every issue. Furthermore, to achieve a comprehensive outcome, participants would need to commence a horizontal process in these negotiations. As I reported previously[17], many Members in fact expressed an interest in having such an opportunity for horizontal negotiation across all issues after completion of the focused work of the DSB-SS.

1.27. My overall assessment of the state of play is that a comprehensive outcome would require more work directed at further clarifying certain aspects of the draft legal texts and resolving the conceptual issues that were uncovered during the focused work. A comprehensive outcome would also require more flexibility on the part of certain proponents or other participants.

1.28. Based on the focused work conducted by the DSB-SS and as elaborated in detail in the relevant parts of section 2 below, I consider that the following issues, or related components of these issues, could benefit from more work[18]:

a. Remand;

b. Effective compliance;

c. Developing country interests (in particular the component concerning the creation of a DSB Fund and the award of legal costs); and

d. Flexibility and Member control.

1.29. In a similar vein, the focused work conducted by the DSB-SS and the detailed explanations in the relevant parts of section 2 below lead me to consider that greater flexibility either from the proponent(s) or other participants, or both, would be necessary to bring about the necessary convergence. This applies notably to the following issues or some of their components[19]:

a. Sequencing;

b. Post-retaliation;

c. Transparency and *amicus curiae* briefs;

d. Remand;

e. Panel composition; and

f. Developing country interests.

1.30. Regarding Sequencing, a large majority of participants appear to be favourably disposed towards the draft legal text that is now before the DSB-SS. One participant has signalled fundamental concerns, however. In the light of this, I have engaged directly with the proponents and the concerned participant to explore specific conceptual adjustments to the proposal that would lessen the latter participant's concerns about delays that may occur with mandatory sequencing before a complaining party can obtain the DSB's authorization to suspend concessions or other obligations. My efforts did not meet with success. It is worth noting also another concern was expressed about the draft legal text on Sequencing. This relates to the possibility that a responding party might make a claim of compliance prematurely, or as a litigation tactic, with the result that the complaining party would be barred from requesting authorization to suspend concessions or other obligations until after it has brought, and prevailed in, proceedings under Article 21.5 of the DSU. Subsequently, during focused work on Post-retaliation, similar concerns were raised by other participants in respect of one of the draft legal texts on that issue.[20]

[17] See TN/DS/30, para. 3.3.
[18] Issues are listed in the order in which they appear in section 2 below.
[19] Issues are listed in the order in which they appear in section 2 below.
[20] See the Chair's statement on Post-retaliation on page 28 below, third paragraph.

1.31. For Post-retaliation and Remand, an obvious remaining roadblock is that for each of these issues there still are two competing draft legal texts. As Chair, I have explored middle ground solutions directly with the different proponents with a view to achieving a single, consolidated draft legal text. Ultimately, however, no breakthrough was achieved.

1.32. Regarding Transparency and *amicus curiae* briefs, divergent preferences among the participants persist. During the focused work on this issue, I therefore put before all participants a possible middle-ground solution concerning the *amicus curiae* briefs component.[21] This did not assist in narrowing the divide, with notably participants in favour of greater transparency expressing hesitation.[22] As far as the transparency component is concerned, one of my predecessors had already suggested a possible compromise solution.[23]

1.33. Turning to Panel composition, the proponent highlighted that the draft legal text that emerged at the end of the focused work on this issue already incorporates various comments received from participants and Chairs. To address any remaining concerns relating to perceived uncertainties associated with the proposed procedures on the composition of panels, participants could consider exploring an opt-in mechanism as a first step. This could allow Members to gather experience with, and gain confidence in, the proposed procedures.

1.34. Regarding Developing country interests, my sense is that developed country Members are in principle open to working with the proponents towards a solution to their concerns about Geneva as the default venue for consultations held under Article 4 of the DSU. In the light of the concerns expressed during the focused work about the binding obligation envisaged in the draft legal text, it could be explored whether the proposed obligation could be circumscribed (e.g. by imposing an obligation to accept a request from a developing country Member only where the request is that consultations be held via secure videoconferencing) or appropriately softened (e.g. by using "shall endeavour" language).

1.4.2 Incremental outcome(s)

1.35. Under a different and less ambitious approach, participants could pursue one or more incremental, or partial, outcomes covering a subset of the 12 issues. This could be done following a process of horizontal negotiation covering all 12 issues. Or it could be done in lieu of a comprehensive horizontal process.

1.36. An incremental outcome could take the form of an amendment to the DSU or a DSB decision. While a DSU amendment would typically produce a legally binding and enforceable rule, a DSB decision would normally contain rules that are non-binding or not directly enforceable through WTO dispute settlement. Adopting a DSB decision is procedurally straightforward and hence quicker than approving and bringing into force a DSU amendment. Moreover, a DSB decision could be pursued as an interim incremental outcome. If participants' experience with implementing a DSB decision is positive, this may provide impetus for converting some or all of the contents of a DSB decision into an amendment to the DSU.[24]

1.4.2.1 Amendment(s) to the DSU

1.37. The focused work conducted by the DSB-SS has in my view confirmed that an incremental outcome in the form of one or more amendments to the DSU would be within reach of participants. More specifically, and as further explained in the relevant parts of section 2 below, there appears to be substantial convergence among participants regarding a number of components of issues that contemplate amendments to the DSU, including, but not limited to, the following:[25]

[21] See RD/TN/DSB/34.
[22] See paragraph 2.99 below.
[23] See TN/DS/27, paras. 3.20-3.21.
[24] For a case in point, see the 2003 General Council decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health ("TRIPS waiver", document WT/L/540 and Corr.1), which in 2005 was converted into a full-fledged amendment to the TRIPS Agreement (document WT/L/641).
[25] Issues are listed in the order in which they appear in section 2 below. For some other proposed amendments to the DSU that in one form or another could be within reach, see paragraph 1.42below.

a. Third-party rights: The component concerning enhanced third-party rights at the panel stage, as reflected in Chair Karau's text and further discussed in section 2.2 below (draft Article 10.2(b) and 10.3(a)-(c));

b. Strictly confidential information: The proposed new draft Article 18.3 of the DSU, as reflected in my Chair's text and further discussed in section 2.3 below;

c. Sequencing: The component concerning clarifications of, and improvements to, Article 21.5 of the DSU, as reflected in my Chair's text and further discussed in section 2.4 below;

d. Timeframes: The component concerning establishment of panels at the first request (with a possibility for the responding party to request a postponement from the complaining party), as reflected in my Chair's text and further discussed in section 2.7 below (draft Article 6.1 of the DSU); and

e. Flexibility and Member control: The component concerning panelist expertise, as reflected in my Chair's text on Panel composition and further discussed in section 2.12 below (draft Article 8.2 of the DSU).

1.4.2.2 DSB decision(s)

1.38. As mentioned, a possible incremental outcome could also take the form of a DSB decision. This type of outcome likewise appears to me eminently achievable in the light of the focused work conducted by the DSB-SS. In my assessment, there is a genuine and realistic prospect of participants achieving an outcome in the form of a DSB decision covering certain aspects of the following issues, or components of issues:[26]

a. Mutually agreed solutions;

b. Third-party rights: The components concerning third-party participation at the consultations stage and notification of third-party interest at the panel stage;

c. Sequencing: The component concerning notification of measures taken by the complaining party following authorization to suspend concessions or other obligations;

d. Developing country interests: The component concerning advance notice of questions at the consultations stage; and

e. Transparency and *amicus curiae* briefs: The component concerning early derestriction of final panel reports in their original language.

1.39. The proposals identified in items (a), (b), (c) and (d) immediately above have in common that they would establish deadlines where the DSU specifies none. The proposed deadlines seek to reduce uncertainty and procedural inefficiencies. They relate to the expected timing of notification of mutually agreed solutions (item (a)), responses to requests to be joined in consultations (item (b)), notification of third-party interest at the panel stage (item (b)), notification of retaliatory measures (item (c)), and submission of questions in advance of consultations (idem (d)). As further elaborated in the relevant parts of section 2 below, it is this aspect of the relevant items, i.e. the proposal to establish a specific deadline, that enjoys broad support among participants, and a DSB decision could potentially focus on that aspect.[27]

1.40. The proposal identified in item (e) does not establish a new deadline *per se*, but seeks to give Members and the general public prompter access to final panel reports in their original language, without affecting applicable DSU deadlines for adoption of circulated panel reports or appeal. The proposal thus enhances transparency. This connects it to the proposals identified in items (a)-(d), since those proposals also foster transparency by establishing deadlines. As indicated in section

[26] Except for the last one, issues are listed in the order in which they appear in section 2 below.

[27] As explained in the relevant parts of section 2 below, there is not necessarily a similarly high level of support among participants for other aspects of the relevant items.

2.6.1 below, the proposal identified in item (e) likewise has broad support among participants in view of its practical benefits.

1.41. It is important to make clear that all but one of the proposals identified in items (a)-(e) above are for amendments of the DSU. Participants could consequently pursue incremental outcomes of that type. However, in this subsection I am concerned with identifying, against the background of the recently conducted focused work of the DSB-SS, a possible interim incremental outcome in the form a DSB decision that could be deliverable in the short term.[28] As noted above, besides its intrinsic value, such an outcome could serve to enhance the negotiating group's self-confidence and provide a stepping stone for further progress.

1.42. I also underline that there are other components of issues in respect of which the proponent proposes a DSB decision. This includes Panel composition, *Amicus curiae* briefs, Flexibility and Member control, and Strictly confidential information. The combination of components as outlined in items (a) to (e) above is but one option in this regard that reflects my assessment of the level of participant support for the relevant aspect of the components. This particular combination also has a unifying theme, which revolves around reducing procedural uncertainty through deadlines and providing greater transparency, and it thematically fits with an already adopted DSB decision on agreed "Working Practices Concerning Dispute Settlement Procedures".[29]

1.5 Concluding observation

1.43. In concluding my overview of the state of play and possible ways forward, I wish to express my sincere thanks to proponents and other participants alike for their participation in DSB-SS meetings and Chair consultations and their thoughtful contributions to the extensive focused work undertaken since November 2016. I greatly appreciate the support extended by participant officials, both in capitals and Geneva, to this long-term work project of the DSB-SS. It appears to me all the more important, therefore, that the time and effort that participants have invested in this project is rewarded with concrete outcomes.

1.44. While the DSB-SS has made significant headway since November 2017 in deepening participants' understanding of the issues and clarifying and improving the draft legal texts, the sobering reality is that this negotiating group has been at work for almost eighteen years and thus far no agreed outcome can be credited to it. I therefore encourage the group, once again, to redouble its efforts to concentrate on what is doable and be open to delivering results through incremental steps. In my view, the outcome reached at MC10 in Nairobi on one of the three pillars of the agricultural negotiations affords a timely and inspirational example that this group could follow with confidence in view of all the technical work that has now been accomplished.

2 SPECIFIC RESULTS OF THE FOCUSED WORK CONDUCTED ON THE 12 ISSUES

2.1. This section contains, for each of the 12 issues, the Chair's text or statement that the Chair circulated to Members under his own responsibility in advance of the closing meeting on each issue. The Chair's text or statement was accompanied in each case by explanatory comments from the Chair. These are also reproduced below. Additionally, Members provided comments on the Chair's text or statement, which are likewise summarized below for each issue.

[28] During the 2017 stock-taking exercise of the DSB-SS, some participants expressed interest in exploring outcomes in the form decisions or recommendations of the DSB (rather than amendments to the DSU), because "this could lead to concrete results in the shorter term" (TN/DS/30, para. 3.4). It is also worth noting that in the context of the dedicated discussions in the General Council on the functioning of the Appellate Body, several Members proposed, not amendments to the DSU, but General Council or DSB decisions. See, for instance, WT/GC/W/767/Rev.1, WT/GC/W/768/Rev.1, WT/GC/W/769.

[29] See WT/DSB/6. This DSB decision covers (a) the "date of circulation" in the DSU, (b) communications under the DSU, (c) time-periods under the DSU and other covered agreements, and (d) notifications of requests for consultations.

2.1 Mutually agreed solutions

2.1.1 Comments from the Chair on his text on Mutually agreed solutions

2.2. The Chair's text below on Mutually agreed solutions was circulated in advance of the DSB-SS meeting of 1 December 2016 and presented under Chair Karau's own responsibility. It is without prejudice to Members' final positions. Focused work on Mutually agreed solutions was conducted on the basis of the most recent draft legal text on MAS.

2.3. It emerged during the discussions that the text still raised concerns for some Members. First, some Members had reservations about the option of each party to the dispute making a separate notification. These Members expressed the view that the content of the notification should be agreed by the parties. In their view, if and when a mutually agreed solution could be found, the parties should have no difficulties agreeing on making a joint notification about the terms of that solution. Other Members, however, submitted that there could be circumstances under which a party to a mutually agreed solution would wish to separately notify its terms and potentially at a greater level of detail than the other party. For this reason, many Members also did not support a proposal to qualify the draft text by adding that the parties should agree on the level of detail to be provided in notifications.

2.4. Second, it was noted that the term "a matter" as opposed to "the matter" in the first sentence of the draft text could be read to imply a requirement to notify also partial solutions to a dispute. One Member considered that such a requirement might dissuade parties from reaching a mutually agreed solution.

2.5. In addition, the question was raised in which factual situations parties would be required to notify a solution under Article 3.6 of the DSU. In response, it was observed that the draft text under discussion did not seek to clarify Article 3.6 in this respect.

2.6. These remaining points of difference notwithstanding, there was general confirmation of interest in increasing the transparency of the terms of mutually agreed solutions through a requirement to notify their terms "in detail".

2.7. Moreover, there was general convergence among Members that it was useful to clarify that each of the parties to a mutually agreed solution has the obligation to notify it, notwithstanding different views as to the possibility of separate notifications.

2.8. Similarly, there was general convergence on the desirability of setting a fixed deadline for notifying mutually agreed solutions. Several developing country Members indicated, however, that the 14-day deadline set out in the most recent draft text was too short. This concern met with broad support, and there was general willingness to extend the deadline. A few Members indicated, however, that any extension of the deadline should be limited and that it would raise a concern if parties were given more than a month to notify a mutually agreed solution.

2.9. Certain drafting and consistency points were also discussed. A few Members supported inserting in the most recent draft text a reference to "consultation" provisions as well as dispute settlement provisions. No Member raised any concern in this respect.

2.10. Taking account of the views expressed by Members, on 29 November 2016 I circulated an updated Chair's text for Members' consideration on a without prejudice basis. That text introduced two new proposed changes beyond those already present in the most recent draft text: (i) insertion of a reference to "consultation" provisions to clarify that solutions mutually agreed at that stage of dispute settlement are covered, and (ii) extension of the new deadline for notifying mutually agreed solutions from 14 days to 30 days.

2.1.2 Comments from Members on the Chair's text

2.11. Members did not indicate specific concerns about the changes reflected in the Chair's text. Several Members that spoke expressed support for increasing transparency of mutually agreed solutions and said that they could join the text if there is a consensus. One Member indicated that

it is important, however, to retain some degree of flexibility in notification, so as not to discourage mutually agreed solutions.

2.12. A different Member stated that there is value in clarifying the notification of mutually agreed solutions as currently provided for in Article 3.6 of the DSU, in particular who has the obligation to notify and when. That Member proposed using the phrase "the matter" rather than "a matter", noting that Articles 3.4 and 12.7 of the DSU also used "the matter". Another Member considered that referring to "a matter" indicates that a partial solution would be subject to notification, and would warrant further discussion.

2.13. One Member stated that addition of "consultation and" and "each party" are improvements to the current text of Article 3.6. With respect to "each party", several Members indicated that providing for the possibility of having separate notifications from the parties, and with potentially different levels of detail, would cause some concerns.

2.14. One Member indicated that providing for a deadline for notifying mutually agreed solutions adds real value to Article 3.6 and would make that provision operational. In that Member's view, addition of a deadline would be a sufficient improvement. Another Member considered that the 30-day period for notification is appropriate and that providing for the notification period in number of days is preferable to indicating it in weeks.

2.15. An additional Member stated that the words "in detail", as envisaged in the underlying draft legal text, serves the purpose of prompting more information, but is not overly prescriptive. Another Member stated that it still has concerns about adding that phrase.

2.1.3 Chair's text[30]

> Where the parties to a dispute reach a mutually agreed solution with respect to a matter raised under the **consultation and** dispute settlement provisions of the covered agreements, each party shall notify the solution to the DSB and relevant Councils and Committees. The parties shall submit jointly or, if a party so prefers, separately, the notification in writing within ~~14~~ **30** days after reaching the solution and shall set out in detail the terms of the solution. Any Member may raise any point relating to the solution in the DSB and the relevant Councils and Committees.

[30] Chair Karau's proposed deletions of current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**.

2.2 Third-party rights

2.2.1 Comments from the Chair on his text on Third-party rights

2.16. The Chair's text below on selected components of Third-party rights was circulated in advance of the DSB-SS meeting of 22 February 2017 and presented under Chair Karau's own responsibility. It is without prejudice to Members' final positions.

2.17. Based on my prior consultations with Members and my assessment of work under my predecessor, I determined that the negotiating group would conduct focused work on three components of the issue of Third-party rights: (i) the right to join in consultations as third parties, (ii) enhanced third-party rights in panel proceedings, and (iii) the timing of the notification of interest to participate in panel proceedings as a third party.

2.18. Focused work on the issue of Third-party rights was conducted on the basis of the previously available draft legal text on Third-party rights[31] as well as with reference to new proposals submitted in the course of the focused work on Third-party rights.[32]

2.19. Taking account of the views expressed by Members in the course of our focused work, on 15 February 2017 I circulated a Chair's text for Members' consideration on a without prejudice basis. That text identifies a possible common baseline reflecting the progress and convergence that was achieved during the focused work on the three components. I indicated to Members that this text should not be taken as representing a conclusion by the Chair that further improvements in respect of these components would not be possible. Provisions regarding protection of certain confidential information submitted to a panel by the parties were placed in square brackets, as this was reserved for future work on the issue of Strictly confidential information.

Third-party participation at the consultations stage

2.20. It became clear from the negotiating group's focused work on this component that the most recent draft legal text raised concerns for some Members. In particular, several Members were concerned about automatic acceptance of Members as third parties in consultations in the absence of timely rejection by the Member to which the request for consultations was addressed (the responding party). In these Members' view, automatic acceptance after expiry of a strict deadline could raise practical difficulties for the responding party, and it could undermine a key function of consultations, which is to help the parties to settle their dispute.

2.21. At the same time, there was broad convergence among Members on three points. First, there was broad agreement that it would be useful to specify an explicit time-period within which the responding party should respond to a Member's request to be joined in consultations. In this regard, Members discussed what length of time would be appropriate to provide responses, taking account of any administrative constraints that some Members may face. There was also discussion of the suggestion by a few Members that the draft text refer to a "reasonable" time-period rather than specify a number of days. Some Members suggested that any explicit time-period should start to run from the date of the applicant Member's request, but other Members preferred that the date by which a response should be provided be calculated by reference to the date of consultations. Second, although a few Members preferred a binding deadline, there was broad support for a soft (indicative) deadline. Third, while a few Members considered it sufficient that responses be provided only in cases of acceptances, many participants considered that responses should be provided in writing and for both acceptances and rejections.

2.22. The text that I circulated on third-party rights in consultations would enhance transparency by introducing a soft (indicative) deadline for responding parties to provide written information on their acceptances and rejections of requests made by other Members to be joined in consultations. The deadline is expressed as a number of days counted from the date of consultations, that takes into account the 10-day deadline (within which applicant Members must make requests to be joined

[31] As contained in JOB/DS/14, pp. 3 and 5-6. Articles 4.11 and 10 of the DSU contain the current provisions of the DSU that are relevant to the three components of Third-party rights on which the negotiating group conducted focused work.

[32] As contained in JOB/DS/21/Rev.1, and JOB/DS/22. See Annex 1 below, sections 2.2 and 2.3.

in consultations) in Article 4.11 of the DSU and the 30-day deadline (within which a responding party must enter into consultations) in Article 4.3 of the DSU.

2.23. At the closing meeting, several Members stated that the Chair's text reflected Members' convergence and constituted an improvement over the existing Article 4.11 of the DSU. Some Members indicated that they broadly agreed with the text as proposed. Other Members raised points of drafting. Specifically, some Members were concerned that the draft text could be read to suggest that notification of responses to the DSB was no longer obligatory. A few Members raised a concern that the draft text may not unambiguously indicate that a failure by the responding party to respond within the deadline does not give the applicant Member the right be joined in the consultations.

Notification of third-party interest at the panel stage

2.24. During the negotiating group's focused work on notifications of third-party interest, there was broad convergence on codifying the current practice of requesting Member to notify their interest in participating as third parties within 10 days of panel establishment. Members broadly supported the idea of specifying a time-period within which a Member could secure its participation as a third party at the panel stage without requiring the parties' or panel's agreement. While one developing country Member preferred a longer deadline, other Members considered the 10-day period to be sufficient given that the establishment of panels comes well after the circulation by the WTO of a request for establishment of a panel and a request for consultations.

2.25. Many Members considered, however, that it was necessary to also provide for some flexibility in connection with any deadline that would be specified, including because of the situation of developing country Members, such that a Member could in certain circumstances participate as a third party even if it did not notify its interest within 10 days. However, there remained significant points of difference among Members in this respect. Several Members indicated that any flexibility should not interfere unduly with the composition of panels or the conduct of panel proceedings. For some Members, any flexibility should therefore be subject to the parties' agreement, whereas other Members considered that the panel should decide after consulting the parties, possibly based on criteria to be included in the DSU, whether a Member having notified its interest outside the 10 day-period could participate as a third party. Another Member suggested that the panel be given a decision-making role in such cases only if the parties disagree over whether another Member could participate as a third party.

2.26. The text that I circulated on notifications of third-party interest would enhance clarity by codifying the current practice based on the statement made by the Chair of the GATT Council at the Council's meeting of 21 June 1994. At the GATT Council meeting of 21 June 1994, the Council agreed with a proposal by the Chair to agree to the following practices, without prejudice to the rights of contracting parties under established dispute settlement procedures: "Delegations in a position to do so, should indicate their intention to participate as a third party in a panel proceeding at the Council session which establishes the panel. Others who wish to indicate a third-party interest should do so within the next ten days".[33]

2.27. At the closing meeting, no Member raised concerns about providing greater clarity by codifying the existing practice of requesting notification of third-party interest within 10 days after panel establishment. One Member suggested that, as in the GATT Council Chair's statement, it could be made explicit that third-party notifications can be made at the DSB meeting establishing a panel or subsequently in writing. A developing country Member continued to prefer a longer time-period. Moreover, several Members reaffirmed their interest in explicitly clarifying what happens if a Member fails to notify its interest within the 10-day soft (indicative) deadline (e.g. whether participation as a third party is subject to the parties' agreement or whether the panel should decide after consulting the parties).

Enhanced third-party rights at the panel stage

2.28. During the negotiating group's focused work on Third-party rights at the panel stage, there was general convergence around the possibility of enhancing third-party rights to include the right to receive all written submissions of the parties and to be present at all substantive meetings of a

[33] See Statement by the Chairman of the Council, GATT document C/COM/3; Minutes of GATT Council meeting of 21 June 1994, GATT document C/M/273, p. 15.

panel with the parties. While there was no specific objection to third parties having such enhanced access to panel proceedings, one Member considered that proposals previously discussed by the negotiating group on public transparency, including with regard to the opening of substantive panel meetings for public observation and publication of the parties' written submission, would provide the same degree of access to third parties and all other Members. In addition, there was broad convergence around making explicit third parties' right to respond to questions from the panel.

2.29. A group of Members also made a new proposal that would build upon the above-mentioned enhanced third-party rights. Under the proposal, third parties would continue to have the opportunity to make an oral statement at the first substantive meeting of a panel, but would provide their written submissions at a later stage of the panel proceedings. Specifically, third parties would make a written submission after receiving the written rebuttals of the parties, but prior to the second substantive meeting of the panel. The proponents explained that this was intended to maintain the same number of opportunities for active third-party participation, while allowing third parties to participate more meaningfully at a later stage of the panel proceedings.

2.30. However, several Members raised concerns about providing any additional opportunities for active third-party participation, or about allowing the same opportunities for active participation later in panel proceedings, citing burdens that this could place on the parties to the dispute or the possibility of new arguments being raised by third parties at a very late stage in the proceedings. Several Members also stressed the importance of maintaining the balance between the rights and interests of the parties and those of third parties. At the same time, other Members recognized the value of active third-party participation and considered that there were potential advantages in allowing third parties to actively participate after the first substantive meeting of a panel.

2.31. The text that I circulated on enhanced third-party rights at the panel stage would increase clarity by codifying certain aspects of established dispute settlement practice at the panel stage. It would further improve access for third parties at the panel stage by increasing the opportunities for observation of substantive panel meetings and receipt of written submissions of the parties.

2.32. At the closing meeting, there was general support for the suggested draft text. At the same time, one Member reiterated its view that existing proposals on public transparency would make it unnecessary to provide for the right of third parties to be present at all substantive meetings of a panel with the parties and to receive all written submissions of the parties. Another Member stated that the text could raise a possible concern because it brought the rights of third parties close to those of parties.

Enhanced third-party rights at the appellate review stage

2.33. Although this was not one of the components of the issue of Third-party rights on which the negotiation group conducted focused work, at the request of several Members the group under "other business" discussed the participation of Members as third participants on appeal.

2.34. According to these Members, it was important to provide for the possibility for Members to join as third participants at the appellate review stage even if they were not third parties at the panel stage. They noted that the issues discussed on appeal could be partly different, and there could be legitimate reasons for not participating at the panel stage, such as recent accession of the Member.

2.35. Many Members supported this proposal. Other Members raised concerns, however. One Member indicated that this should be contemplated only as a transparency-enhancing measure, and the participation of additional Members should therefore be limited to receiving documents and passively observing the hearing. Another Member considered that this would be appropriate only if the parties agreed to additional third participants. Other Members were not in favour, submitting that new third participants would increase the workload of the parties and that the parties would need to address what could be new arguments for the first time during the Appellate Body hearing.

2.36. As this was not one of the components selected for focused work and there was limited convergence, I did not circulate a Chair's text on this component for Members' consideration.

2.2.2 Comments from Members on the Chair's text

2.37. Several Members that spoke, including proponents, expressed appreciation and agreement with the Chair's pragmatic and result-oriented approach, which aimed to identify a common baseline reflecting incremental progress. Several Members stated that the Chair's text reflects accurately the state of the negotiations on this issue and agreed with the Chair's assessment in terms of broad convergence on possible incremental improvements among a majority of Members. Several Members stated that the Chair's text reflects an improvement to the current text of the DSU and that they agree with many of its aspects. A couple of Members indicated an interest in exploring further improvements beyond those reflected in the Chair's text.

2.38. Reflected below are comments by Members on specific aspects of the Chair's text.

Third-party participation at the consultations stage

2.39. One Member expressed a preference for using the phrase "the Member requesting to be joined in consultations" rather than "the applicant Member".

2.40. One Member reiterated its concern that the text leaves room for ambiguity in that it appears to provide for the possibility for automaticity in joining consultations, and that it therefore needs to be discussed further.

2.41. Several Members indicated that setting a deadline for responding to a request to join consultations would be an improvement. Some Members expressed a preference for a soft obligation concerning the deadline. One Member suggested using "shall endeavour" language. However, one Member agreed with the hard five-day deadline in the Chair's text. Another Member wondered whether a mere five-day deadline allows for sufficient flexibility. It was noted that it takes time to assess the existence of a substantial trade interest asserted by a requesting Member. One Member considered that it is better not to specify the number of days, or alternatively if a number is indicated, to include the qualification "to the extent possible". For that Member, the number indicated would be acceptable with that qualification. A couple of Members suggested that the deadline be established by reference to the request for, instead of the date of, consultations, as the date of consultations would not be known to other Members.

2.42. One Member expressed the view that independently of whether the deadline for responding to a request to join consultations is adopted as a soft or a hard deadline, the obligation to notify the DSB of a Member's response to a request to join consultations should be a hard obligation. According to that Member, under the Chair's text both the deadline and the notification obligations are soft.

2.43. Another Member also suggested that "in writing" should be added in the first sentence of Article 4.11 to read in relevant part, "... in writing 10 days after the date of circulation ...".

Notification of third-party interest at the panel stage

2.44. Several Members expressed support for codifying the current practice of indicating a Member's interest to join a dispute as a third party at the relevant DSB meeting or else in writing within 10 days from panel establishment. Some Members indicated that while codifying the practice would be preferable, there should also be reasonable flexibility. One Member would prefer to go beyond the hortatory language used in the Chair's text.

2.45. A number of Members stated that while they had no particular concern about the 10-day period as such, it would be useful to clarify what happens if a Member signals its intention to join as a third party after the 10-day period. One Member reiterated that the 10-day period remained a concern. Another Member responded that consultations take place before a panel is established, with the consequence that a Member has more than 10 days to make its decision on whether to notify its interest to participate as a third party before the panel.

Enhanced third-party rights at panel stage

2.46. Several Members stated that they could, in principle, agree to the Chair's text in this regard. Several Members also expressed the view that qualifying third-party rights as "enhanced" is not

necessary. Accordingly, the Chair's text below has been adjusted to eliminate the word "enhanced" from one of the subheadings.

2.47. Some Members indicated that they could agree to granting third parties active rights up until the first substantive meeting and passive rights following that meeting. Another Member indicated that it would like to keep the option of panels enhancing active rights on an *ad hoc* basis, including following the first substantive meeting. A further Member reiterated its concern about granting passive rights to third parties following the first substantive meeting. One other Member expressed a concern about blurring the difference between parties and third parties.

2.2.3 Chair's text[34]

Article 4

Consultations

…

Article 4.11. 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, 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. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. ~~In that event they shall so inform the DSB.~~ **The Member to which the request for consultations was addressed should inform [the Member requesting to be joined in consultations][the applicant Member] and the DSB in writing no later than [5] days prior to the date of consultations whether it accepts the request to be joined in consultations.** If the 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.

_____

[4] *(unchanged footnote)*

...

Article 10

Third Parties

…

Article 10.2. ~~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") 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.~~

Deadline for notification

(a) Any Member interested in participating as a third party before a panel shall notify its interest to do so to the DSB and each party. Such Member should

[34] Chair Karau's proposed deletions of current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**.

notify its interest within a period of no more than 10 days after the date of establishment of the panel.

Rights in panel proceedings

(b) Each third party has the right to:

(i) be present at any substantive meeting 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 4 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 from the panel, at a session of the first substantive meeting set aside for that purpose; and

(iv) respond in writing to questions from the panel arising out of the session set aside for third parties at the first substantive meeting.

Article 10.3. ~~Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.~~

(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 4 of Article 18*].

_____

[* This provision does not preclude third parties from receiving information designated by a Member as strictly confidential if this is expressly provided for in the specific procedures adopted by the panel in accordance with paragraph 4 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.

_____

2.3 Strictly confidential information (SCI)

2.3.1 Comments from the Chair on his text on SCI

2.48. The Chair's text below on SCI was circulated in advance of the DSB-SS meeting of 12 June 2017 and presented under Chair Seck's own responsibility. It is without prejudice to Members' final positions.

2.49. The text reflects possible incremental improvements on which, in the Chair's assessment, there could be support among Members, taking into account the views of Members expressed during the focused work of the DSB-SS on SCI.

2.50. This text should not be taken as representing a conclusion by the Chair that further improvements in respect of SCI would not be possible. Rather, the text seeks to identify a possible common baseline reflecting the progress and convergence that has been achieved during the focused work conducted by the DSB-SS.

2.51. Draft Article 18.3 of the DSU would constitute an improvement over the current DSU in several respects:

- It enhances clarity for Members and individuals or entities providing SCI by clarifying in the DSU itself that additional protection for SCI is available in proceedings under the DSU.

- It creates greater certainty by providing that, if and when a party requests the adoption of SCI procedures for the protection of strictly confidential information that it wishes to submit in the context of the proceedings under the DSU, the relevant WTO adjudicator is required to adopt such procedures.

- It ensures consistency of the level of protection across successive proceedings in a dispute, by providing that the level of protection of SCI set in any initial proceedings (e.g. before a panel) will not be lower in any subsequent proceedings (e.g. before the Appellate Body) in which the SCI may also be used. This may also enhance the confidence of individuals or entities providing SCI.

- It provides assurance to individuals or entities providing SCI that their information will be used by those authorized to access the information (i.e. the panel, the Appellate Body, the arbitrator, the WTO Secretariat, the parties and the third parties) only for the purposes of the proceedings in which the information has been submitted or forms part of the record.

2.52. Draft Article 18.3 is non-prescriptive regarding the operational details of the SCI procedures to be adopted. It thus preserves the flexibility to adapt SCI procedures on a case-by-case basis, including with regard to the definition of SCI, the precise level of protection and other operational aspects.

2.53. The proposed Decision by the DSB would directly support draft Article 18.3 of the DSU by providing access to SCI procedures, both past and current, for parties that are considering whether to request the adoption of SCI procedures or are consulted by a WTO adjudicator on proposed SCI procedures. Ready access to a range of actual SCI procedures may also reduce uncertainty for individuals or entities considering whether to provide SCI. Public availability of such SCI procedures through the WTO website would also facilitate greater access compared to the practice of annexing SCI procedures to WTO adjudicators' reports or decisions.

2.54. The text on Third-party rights builds on former DSB-SS Chair Karau's text on components of Third-party rights. The new text in Articles 10.2(b)(i) and 10.3(a) would constitute an improvement over the initial draft in document JOB/DS/14 in that it preserves the current situation under which SCI procedures typically grant third parties access to SCI, while also maintaining the possibility, where this is deemed necessary, to restrict access to SCI for third parties on a case-by-case basis, through procedures adopted pursuant to draft Article 18.3 of the DSU that are consistent with the DSU.

2.3.2 Comments from Members on the Chair's text

2.55. The proponent on SCI noted that as explained by the Chair, the Chair's text is less ambitious than the previous draft legal text. The proponent still sees value in having definitions and objections procedures. However, the proponent agreed that the key element was the right to have SCI procedures adopted upon request. It also understood that aiming for incremental changes could be the best way to achieve convergence, and for this reason it would be able to support the Chair's text if this were needed to achieve a consensus on SCI.

2.56. Several Members that spoke stated that they have no major concerns with the text proposed by the Chair, that it would result in incremental improvements, and that it would be a good basis for future discussions. One Member thanked the Chair for having responded to the concerns expressed by some Members. Moreover, while another Member stated that the Chair's baseline approach should not preclude greater ambition, a further Member expressed the view that it is generally better to go with straightforward than with complicated text like the previous draft legal text.

2.57. A couple of Members noted that the recent new proposal on SCI by one Member[35] bears some similarities with the Chair's text. One Member indicated that it prefers the Chair's text for its clarity and accuracy and another Member expressed concern about aspects of the new proposal (e.g. if under the proposal a party's SCI designations were binding on WTO adjudicators). The new proponent on SCI indicated that the Chair's text incorporates the main elements that are also reflected in its proposal, including the right to have SCI procedures adopted upon request. This proponent further stated that it is willing to work with other Members on a text that can attract a consensus.

2.58. Reflected below are comments by Members on specific aspects of the Chair's text.

Draft Article 18.3

2.59. Several Members stated that the Chair's text would be a good basis for future discussions. With regard to the first sentence of the new Article 18.3, one Member stated that providing for a requirement to adopt procedures for the protection of strictly confidential information would be an improvement. One Member indicated that it would favour a general reference to "confidential information" rather than to "strictly confidential information" and leave it to parties to use more specific terms.

2.60. With regard to the second sentence of draft Article 18.3, one Member considers that it adds important value. In that Member's view, the same level of protection must be maintained on appeal. One Member likewise saw as positive the continuing protection of SCI across proceedings. It inquired about the drafting, specifically the reference to "newly submitted information" on appeal. That Member indicated that usually parties would not submit new information on appeal. Another Member indicated that it was important that any new Article 18.3 would not preclude the Appellate Body from reviewing a panel's findings of law on SCI.

2.61. With regard to the third sentence, the same Member wondered whether SCI was misused in the past. The same Member noted that draft Article 18.5 of the proposal provides for obligations on various parties, e.g. the WTO adjudicator, the Secretariat, the parties to the dispute and third parties, to protect SCI. The Member inquired whether this provision should be included in the Chair's text. Another Member stated that the third sentence is not necessary.

Proposed DSB Decision

2.62. A number of Members that spoke stated that the proposed DSB Decision would improve transparency and thus instil confidence in the system. It was noted that the public should be able to know what procedures WTO adjudicators are using. One Member noted that given that draft Article 18.3 is shorter than in the previous draft legal text, the proposed DSB Decision becomes all the

[35] See Annex 1 below, section 3.2.

more significant for parties that are less experienced because they would have something to draw on.

2.63. A number of Members expressed a preference for removing the phrase "subject to the agreement of the parties" in item (ii) as in their view this would devoid the proposed DSB decision of some of its value. One Member stated in this respect that it fails to see what concerns with publishing new SCI procedures could possibly arise.

2.64. A couple of Members did not consider the proposed DSB decision to be very useful because WTO dispute settlement practice shows that parties are in any event free to agree to the publication of the procedures.

Third-party rights

2.65. Some Members that spoke stated that they support the Chair's text. One Member noted that the text on Third-party rights is dependent on an agreement on draft Article 18.3.

2.66. A couple of Members suggested to delete the phrase "consistent with this Understanding" because, in their view, it does not add a lot of value to the text.

2.3.3 Chair's text[36]

Article 18

Communications with the Panel or Appellate Body

...

3. Where requested by a party to the dispute, the panel, the Appellate Body and the arbitrator acting pursuant to Articles 22 or 25 of this Understanding shall adopt procedures for the protection of strictly confidential information, including business confidential information, after consulting the parties to the dispute. The Appellate Body and the arbitrator shall adopt procedures that afford a level of protection not lower than that provided by the panel and that allow for the designation as strictly confidential information of newly-submitted information. The panel, the Appellate Body, the arbitrator, the WTO Secretariat, the parties and the third parties shall use information obtained in proceedings under this Understanding and protected under procedures adopted pursuant to this paragraph only for the purposes of the proceedings in which the information forms part of the dispute record.

Proposed decision by the DSB on protection of SCI

The DSB directs the WTO Secretariat and the Appellate Body Secretariat to make publicly available on the WTO website: (i) all published additional working procedures for the protection of strictly confidential information (SCI procedures), including business confidential information, adopted by a WTO adjudicator$^{\alpha}$ in past disputes; and (ii) subject to the agreement of the parties, any SCI procedures adopted by a WTO adjudicator after the date of this decision, upon adoption of the final version of these procedures and following their transmission by the WTO adjudicator. Public availability of these SCI procedures furthers transparency and provides a reference tool for parties to a dispute that are considering whether to request the adoption of such procedures.

[36] Regarding the proposed new Article 18.3 of the DSU, Chair Seck's proposed new text is in **bold**. Regarding the proposed new DSB decision, Chair Seck's proposed new text is in **bold**. Regarding Article 10.2 and 10.3 of the DSU, **bold text** indicates additions proposed by former Chair Karau in connection with Third-party rights, and **bold underlined text** indicates additional text proposed by Chair Seck in connection with SCI.

[α] The expression "WTO adjudicator" refers to panels, the Appellate Body and arbitrators acting pursuant to Articles 22 or 25 of the DSU.

ARTICLE 10 – Third-Party Rights in Panel Proceedings

Article 10.2

(b) Each third party has the right to:

(i) be present at any substantive meeting of the panel with the parties to the dispute preceding the issuance of the interim report to the parties, subject to any procedures adopted by the panel in accordance with paragraph 3 of Article 18 that are consistent with this Understanding;

...

Article 10.3

(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, subject to any procedures adopted by the panel in accordance with paragraph 3 of Article 18 that are consistent with this Understanding.

...

2.4 Sequencing

2.4.1 Comments from the Chair on his text on Sequencing

2.67. The Chair's text below on Sequencing was circulated in advance of the DSB-SS meeting of 28 July 2017 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.68. The text reflects elements discussed in recent focused work of the DSB-SS on Sequencing, on which, in the Chair's assessment, there is broad convergence among Members. During this recent period of work, there was broad support among Members for the view that no suspension of concessions or other obligations should be authorized, unless there has been a prior WTO determination of non-compliance or there is another situation establishing that there is no disagreement between the parties on compliance. However, Members continue to hold divergent views on whether disagreements on compliance should be resolved exclusively by panels acting under Article 21.5 of the DSU and before the DSB may be requested to authorize the suspension of concessions or other obligations under Article 22.2 of the DSU.

2.69. In light of the broad convergence among Members in respect of some elements discussed in the context of Sequencing and a lack of convergence in respect of others, the text presented below reflects possible clarifications and improvements with regard to Articles 21.5 and 22.7. These clarifications and improvements could be made independently of a possible amendment mandating recourse to Articles 21.5 in cases where there is disagreement as to the existence or WTO-consistency of a measure taken to comply, before recourse may be had to Article 22.2.

2.70. The text below on Articles 21.5 and 22.7 is largely based on relevant portions of the Sequencing working text of 2011, which reflects extensive work conducted among co-proponents and other interested delegations.

2.71. With regard to compliance proceedings under Article 21.5, the text contains possible incremental improvements that in some respects may also represent time-savings compared to current procedures under the DSU.

- Consultations: Draft Article 21.5(a) would provide that each party shall accord sympathetic consideration to a request from another party for consultations during the reasonable period of time (RPT), so as to give parties an opportunity to prevent a dispute over compliance from arising, without obligating a party to enter into consultations if so requested. Further, draft Article 21.5(c)(i) would clarify that after the expiry of the RPT and in situations where there is a dispute over compliance, formal consultations are not required before requesting the establishment of a compliance panel.

- Notification of measures taken to comply: Draft Article 21.5(b) would improve transparency at the implementation stage of disputes by requiring a Member to notify the DSB once it considers that it has fully complied with DSB rulings and recommendations. The required notification would include a description of any measure considered to achieve compliance, the date of entry into force, and the text of the measure, if any. Members may wish to consider whether similar to draft Article 21.5(a) and Articles 3.6 (on mutually agreed solutions) and 4.4 (on consultations) of the DSU, the text could also provide for notification to the relevant Councils and Committees.

- Compliance panel establishment and composition: Draft Article 21.5(c)(ii) would provide for mandatory establishment of compliance panels at the first DSB meeting at which the panel request is made. This draft provision would also provide for the possibility to replace a member of the original panel who is no longer available within an expedited time-frame compared to that provided for under current Article 8 of the DSU.

- No additional RPT following a finding of non-compliance: Draft Article 21.5(c)(iv) would clarify that a responding party is not entitled to an additional RPT to comply, should the DSB rule that a measure taken to comply does not exist or is WTO-inconsistent.

2.72. Taking into account views expressed during recent focused work, and recalling the lack of convergence regarding a possible amendment mandating recourse to Article 21.5 for disagreements on compliance, the text below would ensure that both complaining parties and responding parties may initiate compliance proceedings. Further, the chapeau of draft Article 21.5(c) would clarify that DSU rules and procedures, including those concerning appellate review, and relevant special or additional rules and procedures in Appendix 2 would apply in compliance proceedings, subject to any modification under draft Article 21.5(c).

2.73. With respect to Article 22.7, the added text provides for greater transparency through a requirement to notify the DSB of any measure taken pursuant to the DSB's authorization to suspend concessions or other obligations, including any amendment or termination of the measure, within a specified deadline. Such measures are discriminatory and trade-restrictive by design. Members may wish to consider whether the text could also provide for notification to the relevant Councils and Committees.

2.4.2 Comments from Members on the Chair's text

2.74. Members that spoke noted that the Chair's text reflects the discussions during the focused work conducted on Sequencing and identified incremental progress that could be achievable and would enhance efficiency and transparency. One Member observed that it shares the perception reflected in the Chair's text that there was no convergence regarding the component that would provide for mandatory sequencing. Another Member wished to underline, however, that there was convergence, except for one Member, towards relying on compliance panels as the proper forum for compliance disputes. That Member noted more generally that the latest draft legal text on Sequencing is a mature text that was the outcome of convergence among Members after the result of many years of negotiations. Another Member indicated willingness to explore conceptual alternatives, such as allowing a single adjudicative body to carry out and achieve the desired sequencing. That Member indicated that this could be done by authorizing Article 21.5 panels to rule first on compliance issues and then, in case of non-compliance, on the level of suspension to be authorized by the DSB.

2.75. Several Members stated that the component of the proposal which envisages a requirement for a multilateral decision on non-compliance before the DSB authorizes the suspension of concessions or other obligations remains important and of systemic interest in view of the lack of clarity of the current DSU provisions. These Members also declared that they are open to discussing with other Members about how to proceed. Two proponents stated that the Chair's text contains elements that are certainly of value and could be agreed independently, but that in themselves they are not sufficient to reach an agreement on the issue of Sequencing. In other words, there could be no agreement on "Sequencing" without a text stipulating a sequencing requirement. For that reason, one of those proponents suggested that the Chair could include Article 22.2*bis* in his document. Following this suggestion, for greater clarity about the scope of the underlying proposal on Sequencing, the Chair included the proposals concerning Article 22.2*bis* and 22.6 and the additional proposal concerning Article 22.7 in Annex 1 to this report. However, the additional components of Sequencing included in Annex 1 do not form part of the Chair's text on Sequencing.

2.76. Regarding the components of the proposal included in the Chair's text, which relate to Articles 21.5 and 22.7, several Members indicated that they see value in these components, that they promoted good faith engagement between parties, and that the Chair's text reflects the existing convergence among Members. They considered that the text would achieve clarifications and improvements and, if accepted, would constitute incremental progress by achieving efficiencies and greater transparency. Several Members therefore indicated that they could support the proposed text.

2.77. Some Members offered more specific comments on the Chair's text. Regarding the proposed Article 21.5(a), one Member stated that this proposal should be welcomed by all Members as it would serve to facilitate mutual understanding between the parties and facilitate solutions agreed between the parties.

2.78. Regarding the proposed Article 21.5(b), one Member questioned inclusion of the word "fully" ("considers that it has fully complied"). According to that Member, no explanation had been provided for why this is needed when the current DSU does not use that word. The Chair notes that this

comment had not been made during the preceding focused work on Sequencing. The Chair further notes that whereas Articles 21.1, 21.5 and 22.2 of the DSU do not use the word "fully" when referring to compliance with DSB recommendations or rulings, Article 22.1 refers to "full implementation of a recommendation". To take account of this doubt and bearing in mind that the second sentence of Article 21.5(b) does not repeat the word "fully" when using the word "compliance", the Chair put the word "fully" between square brackets in the first sentence of Article 21.5(b) in his Chair's text to indicate a possible need for confirmation.

2.79. Also, regarding the proposed Article 21.5(b), one Member raised the question of whether it might be useful to require that a notification of compliance be submitted not just to the DSB, but also other relevant WTO councils and committees. The proposed Article 21.5(a) in fact envisages a notification to the DSB and the relevant councils and committees.

2.80. Regarding the proposed Article 21.5(c)(i), one Member suggested that this clause not be included because, in its view, consultations are necessary. Regarding the proposed Article 21.5(c)(ii), one Member signalled a preference that a panel be established only at the request of the complaining party, but it indicated that it was still reflecting on this. One of the proponents likewise indicated concerns about allowing the responding party to initiate an Article 21.5 proceeding. In that Member's view, this would mean that the responding party could initiate new proceedings every time it takes a new measure that in its view achieves compliance, which would present the risk of an endless loop of litigation. That Member considers that the complaining party is in a better position to define any remaining disagreement and the matter to be referred to a compliance panel.

2.4.3 Chair's text[37]

Article 21 – Surveillance of Implementation of Recommendations and Rulings

…

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 a reasonable period of time pursuant to paragraph 3, each party 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 all relevant information including a description of any measure it considers achieves compliance, 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 ~~these dispute settlement procedures, including wherever possible resort to the original panel.~~ **the rules and procedures of this Understanding and relevant special or additional rules and procedures identified in Appendix 2, as modified by this sub-paragraph.**[γ]

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[37] Chair Seck's proposed deletions of current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**.

ɣ This is without prejudice to the right of a party to initiate new dispute settlement procedures under Articles 4, 5, 6 and 25 of this Understanding.

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

(ii) The DSB shall establish a panel upon request by any party at the first meeting at which the request is made, unless it decides by consensus not to do so. The same persons shall serve on this panel as served on 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 14 days after the date of establishment of the panel, after consulting with the parties.

(iii) The panel shall circulate its report within 90 days after the date of ~~referral of the matter to it~~ it**s establishment**. When**re** 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 ~~submit~~ **circulate** 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 Suspension of Concessions

…

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. 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. 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. **The authorized Member shall notify the DSB of any measure taken pursuant to the authorization granted by the DSB and any amendment or termination of the measure. The Member shall submit the notification, including any relevant information, in writing no later than 28 days after the date on which the measure, its amendment or termination takes effect.**

_____

[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.

2.5 Post-retaliation

2.5.1 Comments from the Chair on his statement on Post-retaliation

2.81. The Chair's statement below on Post-retaliation was circulated in advance of the DSB-SS meeting of 28 March 2018 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.82. It has emerged from the recent focused work in the DSB-SS on Post-retaliation that there still is significant divergence between the two groups of proponents on Post-retaliation, two co-proponents, on the one hand, and the G6, on the other hand. In parallel, I have engaged directly with each group to explore the possibility for "middle ground" convergence. This also did not narrow the gap. It is therefore not possible to put forward a single and unified Chair's text on Post-retaliation.

2.83. In the light of this, I limit myself to recording some points that were clarified by the proponents, or could be clarified, in respect of the two textual proposals, and the main concerns that were expressed about each proposal. In addition, I provide an overall picture of the work conducted from my perspective, highlighting where Members' views converge or diverge.

2.5.2 Comments from Members on the Chair's statement

2.84. Members made general comments about both proposals at the meeting of 28 March 2018. The proponents indicated that the Chair's statement accurately reflected the discussions and that they remained open to continuing discussions on Post-retaliation. In response to their comments, I made minor editorial adjustments to my Statement, under points 1 and 3 of the points of convergence.

2.85. The two co-proponents noted that the two proposals were mature draft legal texts. They also stated that in addition to those reflected in the Chair's document, there were other points of convergence between the two proposals. For instance, the idea of having some kind of notification of compliance, as such, did not seem to be a concern for the G6 proponents, and all proponents appeared to agree that the complaining party had at least some role to play in defining the scope of the disagreement.

2.86. One G6 proponent stated that it agreed with the Chair's assessment that there was no convergence overall. Another G6 proponent considered the points of convergence identified by the Chair as the minimum level of convergence possible. That proponent also expressed the view that both the authorized Member and the responding Member should be allowed to initiate post-retaliation compliance proceedings. An additional G6 proponent stated that, in the light of the differences in views, it would be premature to move to a single text on Post-retaliation. That Member also stated that it was not in favour of adding new points of convergence to the Chair's list. For example, while many Members shared the view that the responding Member should provide enhanced information at some stage, there was no convergence between the proponents towards a notification requirement.

2.87. One other Member expressed a general preference for the joint proposal by the two co-proponents, but was open to continuing the discussions. Another Member noted that there were fundamental differences between the two proposals and that it had not been possible for the proponents to reach common ground. Against this background, that Member expressed doubts about the need to pursue specific regulation of post-retaliation. The Member noted that the current DSU as interpreted in the Appellate Body's ruling in *US/Canada – Continued Suspension*, while not perfect, could adequately address the problem covered by the proposals.

2.88. In their comments, Members also addressed certain specific aspects of both proposals:

- Notification of compliance: One of the two co-proponents of the joint proposal noted that the notification requirement provides an opportunity for the authorized Member to assess whether compliance has taken place. In response, one of the G6 proponents expressed

reservations about creating a system in which the responding Member subjectively defines the adequacy of its compliance notification.

- Withdrawal of the authorization to suspend concessions or other obligations: According to the two co-proponents, their joint proposal would not necessarily invite more litigation. Litigation was not the default option under their proposal, as litigation would occur only if there is no agreement between the parties on compliance.

- Initiation of post-retaliation compliance proceedings: One of the two co-proponents of the joint proposal stated that initiation of post-retaliation compliance proceedings after the deadline for requesting a panel is possible, with the agreement of the responding Member, but should not be encouraged. According to that proponent, the proposal provides ample opportunity for the complaining party to request establishment of a panel within the deadline. However, a G6 proponent responded that, whether the litigation started sooner or later, requiring the authorized Member to initiate litigation to avoid the withdrawal of the authorization to suspend concessions or other obligations would shift the burden of litigation back to the authorized Member and was thus at odds with the principle of fairness.

2.5.3 Chair's statement

Members' review of the two proposals on post-retaliation

Joint proposal by the two co-proponents

The two co-proponents indicated that an important consideration underlying their proposal is that retaliatory measures are "abnormal" and should be temporary, and that there should therefore be an efficient and orderly process by which such measures are removed automatically if compliance was asserted by the Member concerned, unless certain steps were taken. They emphasized, however, that under their proposal, if the Member concerned (original responding party) does not meet its burden of explaining in detail its post-retaliation compliance measure, no automatic withdrawal would occur.

The co-proponents clarified that the detailed notification, which under their proposal the Member concerned would need to submit to the DSB, would be substantially similar to the first written submission filed in panel proceedings, except that the notification would not include any confidential information and would provide a list of supporting documents, but not any actual exhibits. According to the co-proponents, if the authorized Member considers that the notification submitted by the Member concerned is insufficient and that the measure taken to comply is WTO-inconsistent, the authorized Member would include both matters in the request for establishment of an Article 21.5 panel that it would file within the 60-day deadline. The co-proponents also indicated that if the authorized Member does not request the establishment of a post-retaliation Article 21.5 panel within the 60-day deadline, the DSB authorization to suspend concessions would be withdrawn. They observed that the authorized Member could, however, initiate compliance proceedings after the deadline had passed and seek a new authorization to suspend concessions in this way.

The main concern raised by Members about this joint proposal is that the Member concerned might make a claim of compliance prematurely, or as a litigation tactic, and that the authorized Member would then have to assume the burden of initiating further proceedings under Article 21.5 if it wished to prevent the automatic withdrawal of the DSB authorization. Another aspect that was questioned is the 60-day deadline for the authorized Member to request the establishment of a post-retaliation Article 21.5 panel. It was noted that this might be too short to assess whether the Member concerned had achieved compliance, particularly in the case of complex measures taken to comply.

Proposal by the G6

The proponents highlighted that it is difficult and costly, and takes a long time, for a complaining party to obtain the DSB's authorization to suspend concessions, with its

trade being adversely affected in the meantime. The proponents thus consider that the Member concerned should assume the burden of initiating further litigation at the post-retaliation stage. They pointed out that this also provided an additional incentive for the Member concerned to come into compliance promptly at the post-retaliation stage. The proponents noted that recent dispute settlement practice, including the proceedings in WT/DS381, WT/DS430 and WT/DS461, confirmed that it could be appropriate for the Member concerned to initiate post-retaliation Article 21.5 proceedings.

The proponents clarified that under their proposal further litigation at the post-retaliation stage would not be necessary where the parties agree that the Member concerned had come into compliance. As foreseen in their proposal, in that scenario one or all parties could request the DSB to withdraw the authorization to suspend concessions. The proponents further clarified that where the authorized Member did not submit a notice setting out any additional measure taken to comply or additional WTO provision within the deadline specified for supplementing the terms of reference of a post-retaliation Article 21.5 panel, the authorized Member could still file its own, independent complaint under Article 21.5.

Other aspects that were discussed, but not definitively clarified, were whether the authorized Member's notice supplementing the terms of reference would be subject to the same or a lower standard of clarity and specificity as the Article 21.5 panel request filed by the Member concerned, and what would be the legally relevant date(s) of establishment of the post-retaliation Article 21.5 panel (since the panel would be established before the authorized Member would submit any notice setting out additional measures or WTO provisions that would fall within the terms of reference). Another aspect that was not fully clarified is whether under this proposal recourse to Article 22.6 arbitration is always required where a party to post-retaliation Article 21.5 proceedings requests that the DSB modify its authorization to suspend concessions, or whether such recourse is necessary only where a party disagrees with a modification previously proposed by the other party (Article 22.8(c)(ii) of the proposal).

One concern raised by some Members about this proposal is that in their view the authorized Member is better placed to determine the scope of any post-retaliation compliance dispute. As they see it, only the authorized Member knows what aspect of a post-retaliation compliance measure is problematic for it. Another point that was raised relates to the absence of a specific time-frame within which the authorized Member would be expected to indicate its agreement or disagreement as to the existence or consistency of a post-retaliation measure taken to comply.

Relationship with Article 12.12 of the DSU

WTO dispute settlement practice suggests that Article 21.5 panel proceedings can be suspended pursuant to Article 12.12 of the DSU.[38] A question from the Chair about the relationship of the proposals with Article 12.12 indicated that further clarification and consideration could be useful. As Article 12.12 provides for the possibility of suspension at the request of the complaining party, under the proposal by the G6 the issue arises as to which party is the complaining party and whether both the Member concerned and the authorized Member could be considered as complaining parties where the latter had submitted a notice. Under the joint proposal by the two co-proponents, the possibility of the authorized Member requesting a suspension of post-retaliation Article 21.5 proceedings could work to counteract any risk of premature claims of compliance by the Member concerned. It was mentioned, however, that the authorized Member might request a suspension even where the Member concerned had come into compliance, thereby unjustifiably delaying the withdrawal of the DSB authorization to suspend concessions.

Overall picture

[38] See e.g. Panel Report, *US – Stainless Steel (Mexico) (Article 21.5 – Mexico)* (WT/DS344/RW), para. 1.8. See also the sequencing agreements in e.g. documents WT/DS381/19, WT/DS384/25, WT/DS371/16, and WT/DS397/16.

Points in respect of which there appears to be convergence among Members

Based on the views expressed by Members during the focused work on Post-retaliation, there appears to be convergence towards the following conceptual points, with square brackets reflecting the differences in approach under the two textual proposals:

1. It is useful to provide for an explicit mechanism for withdrawing the authorization to suspend concessions by the DSB in situations where the Member concerned (original responding party) has substantively complied with the DSB recommendations and rulings.

2. The Member concerned must make known [to the authorized Member (original complaining party)]/[the DSB] its claim that it has complied with the DSB recommendations and rulings. In at least some situations, the Member concerned may have to provide a factual and legal explanation, in writing, of how its measure taken to comply brings it into compliance with the DSB recommendations and rulings.

3. The authorized Member must have the possibility to [determine]/[supplement] the scope of the disagreement [by initiating post-retaliation Article 21.5 proceedings]/[by adding measures and claims in response to the establishment of a post-retaliation Article 21.5 panel at the request of the Member concerned].

4. A DSB decision is needed to withdraw or modify the DSB's authorization to suspend concessions.

5. The DSB authorization to suspend concessions remains in effect during any post-retaliation Article 21.5 proceedings, until the DSB withdraws or modifies its authorization.

6. Where the DSB rules, following post-retaliation Article 21.5 proceedings, that the Member concerned has complied with the DSB recommendations and rulings, the DSB must, upon request, withdraw its authorization to suspend concessions, unless it decides by consensus not to do so.

7. Where the DSB rules, following post-retaliation Article 21.5 proceedings, that the Member concerned has not complied, fully or partially, with the DSB recommendations and rulings, any party to the Article 21.5 proceedings may request that the DSB modify its authorization to suspend concessions. The DSB may modify its authorization only if the request is consistent with the decision of an Article 22.6 arbitrator (where the matter has been referred to arbitration). Depending on the request and arbitrator decision, the DSB may either increase or lower the level of suspension, unless the DSB decides by consensus not to do so.

Points in respect of which Members have expressed divergent preferences

Notwithstanding the points listed above, Members have expressed divergent preferences regarding:

1. whether there should be a requirement that the Member concerned formally notify the DSB that it has complied with the DSB recommendations and rulings;

2. which party should initiate any post-retaliation Article 21.5 panel proceedings – the authorized Member (on the grounds that retaliation is an "abnormal" state of affairs and meant to be temporary, and that the authorized Member is better placed to determine the scope of the dispute) or the Member concerned (on the grounds that the right to retaliate is obtained following lengthy legal proceedings and that the Member concerned should not be enabled to impose on the authorized Member the burden of initiating further legal proceedings, notably if its claim of compliance is not well-founded); and

3. whether following a claim of compliance by the Member concerned (through a formal notification or otherwise) and upon request, the DSB should withdraw its authorization to suspend concessions, unless the authorized Member requests the establishment of a post-retaliation Article 21.5 panel within a defined time-period.

2.6 Transparency and *amicus curiae* briefs

2.6.1 Comments from the Chair on his text on Transparency and *amicus curiae* briefs

2.89. The Chair's text below on Transparency and *amicus curiae* briefs was circulated in advance of the DSB-SS meeting of 30 May 2018 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.90. The Chair's text takes into account the views of Members expressed during the focused work of the DSB-SS on Transparency and *amicus curiae* briefs, including clarifications by the proponents of certain elements of the proposals. As Members continue to hold opposite views on this issue, including at the conceptual level, it is not possible to identify a text on transparency that reflects broad convergence or a consolidated text on *amicus curiae* briefs. Nevertheless, the Chair's text contains possible incremental improvements, that, in the Chair's assessment, further clarify the proposals and could serve as a basis for further discussions.

Transparency

2.91. The transparency proposal, which takes the form of proposed amendments to Article 18 and Appendix 3 of the DSU and a proposed DSB decision, consists of three components: (i) open WTO panel, Appellate Body and arbitrator meetings, (ii) public access to most documents provided by parties and third parties to WTO adjudicators, and (iii) Member and public access to final panel reports in their original language already upon their issuance to the parties, rather than only upon completion of their translation.

2.92. The proposal suggests systematically opening WTO panel, Appellate Body and arbitrator meetings to public observation, without there being a need for a decision by the WTO adjudicator. This would include the third-party session of panel meetings. The proposal also provides that public observation need not be through physical presence at the meeting or simultaneous viewing. In addition, the transparency proposal also foresees public access to most documents submitted by the parties and third parties. In this regard, some Members indicated a preference for such access to extend to basically any type of document submitted, including the evidence, rather than only the written submissions by the parties and third parties.

2.93. There was general agreement that any increase in transparency of proceedings with regard to these two components would need be accompanied by safeguards to protect sensitive information, in particular business-confidential information. While several Members supported these two components of the transparency proposal, others expressed a preference for incremental solutions that would not entail systematically opening WTO dispute settlement proceedings to the public. Several Members generally opposed the idea of increasing transparency of WTO dispute settlement proceedings. These Members highlighted the intergovernmental nature of WTO disputes. Some developing country Members expressed concerns about the additional strain that enhanced transparency of proceedings could put on their resources owing to the need to handle greater media attention as well as the potential risk of misrepresentation of the proceedings by the media.

2.94. With respect to making final panel reports publicly accessible in their original language already when they are issued to the parties, there was convergence among Members that this could be useful, including because of the sometimes substantial amount of time required to translate reports into the other two official WTO languages. The proposal would ensure that prompt public access to the original language version of a final panel report would not affect the DSU deadlines for adoption of panel reports or appeals, which would still be triggered by the date on which panel reports are circulated in all three official WTO languages. There was broad support for the idea that if this proposal were adopted, there should be a procedure (i) to allow for the redaction of confidential information in the report issued to parties prior to disclosing its content to the public and (ii) to allow for the correction of any errors detected during the translation process. Members also discussed the idea of the relevant panel issuing a communication to Members in all three official WTO languages to inform them about the prompt public access to the panel report in its original language. In an annex to my Chair's text, in section 2.6.4 below, I have included additional material used by the DSB-SS during its focused work on this component of the transparency proposal.

***Amicus curiae* briefs**

2.95. Regarding *amicus curiae* briefs, Members' views are reflected in two contrasting proposals, which take the form of proposed amendments to Articles 13 and 17 of the DSU and a proposed DSB decision. The proposed DSB decision provides for standard procedures for use by WTO adjudicators that would regulate the filing of *amicus curiae* briefs. The other proposal precludes WTO adjudicators from accepting unsolicited *amicus curiae* briefs. The arguments that some Members presented against permitting and regulating the filing of *amicus curiae* briefs relate mainly to the intergovernmental nature of WTO disputes and resource constraints facing developing country Members. The argument about resource constraints arises because of a concern by developing country parties that they might need to respond not only to the views presented by the other party and third parties, but also to those presented by *amici curiae*. In view of the continuing divergence among Members, I identified for discussion purposes and under my own responsibility a potential compromise solution. Under that compromise solution, acceptance and consideration of *amicus curiae* briefs by a WTO adjudicator would be permitted only if the parties to a dispute agree that the WTO adjudicator may, in principle, accept and consider such briefs in the context of the relevant WTO proceeding. Where the parties agree that the WTO adjudicator may, in principle, accept and consider such briefs in the context of the relevant WTO proceeding, the WTO adjudicator would be required to apply the proposed Procedures for *Amicus Curiae* Submissions in Disputes (the proposed DSB decision). While some Members saw this as a possible basis for further discussion, others raised concerns about conditioning a WTO adjudicator's decision to accept or reject an *amicus curiae* brief upon the parties' consent. As a result, the Chair's text on *amicus curiae* briefs mainly reflects certain clarifying modifications, such as making clear that Members might also choose to submit such briefs.

2.6.2 Comments from Members on the Chair's text

2.96. Regarding the transparency proposal, several Members continued to harbour concerns about greater transparency and possible repercussions on the intergovernmental nature of the WTO. Those Members submitted that increased transparency may not facilitate the dispute settlement process and constitute an additional burden on developing country Members. They noted that there already is a good deal of transparency compared to WTO decision-making more generally. One of those Members stated that the priority in dispute settlement is to achieve a positive solution to dispute between Members and not to enhance public support for the WTO. That Member also considered it important to avoid additional political pressure from outside.

2.97. The proponent, supported by several other Members, considered that transparency would further enhance the legitimacy of the WTO. It noted that the lack of transparency in WTO dispute settlement contrasts with other international adjudicative fora and unhelpfully gives the impression that the WTO has something to hide. The proponent further suggested that it remains unclear which disputes would really be sensitive. It noted that the record of standard trade remedy disputes is usually either publicly available or available to the parties to a WTO dispute.

2.98. Several Members made comments on the various components of the transparency proposals. Regarding open meetings, one Member expressed the view that any opening of dispute settlement meetings should be gradual and should protect confidential information. According to that Member, what is missing is a standard procedure to be used in cases where the parties agree to open meetings. Another Member said that the current DSU rules should be maintained, as in that Member's view it would not be appropriate to open all meetings. Regarding public access to documents provided by parties and third parties, one Member wondered whether it would be appropriate to limit the intended exception to "strictly" confidential information and whether Members should not be allowed to redact also other confidential information. The proponent likewise indicated that it does not endorse the references to "strictly" confidential information, which had been inserted by a previous Chair of the DSB-SS. Another Member stated that the current DSU rules should be maintained, as it would not be appropriate to give access to all documents. Regarding the proposal to give Members and the public access to final panel reports in their original language already upon their issuance to the parties, the proponent noted that there had been positive movement on this component during the focused work conducted. Another Member agreed, noting that this component was the closest that Members had come to reaching an agreement during the focused work. One Member indicated that it is still evaluating this proposal and recorded its understanding that the reason behind the proposal are the delays resulting from the need to translate panel reports. In that Member's view, if this component were considered for adoption, it would be important to ensure, as already foreseen in the proposal, that the deadlines for adoption

of or appeal against panel reports would start running only from the date of circulation of panel reports.

2.99. Regarding the proposals concerning *amicus curiae* briefs, several Members reiterated their reservations about the idea of regulating them. One Member noted that the WTO provides for rights and obligations of Members and not entities other than Members, and that it would therefore need to be specified clearly what conduct was expected of *amici curiae*. Another Member observed that non-governmental organizations can provide input at the national level as and when a country formulates its positions and that *amicus curiae* briefs should therefore be allowed only in disputes where both parties agree to this. That Member also asked what accepting *amicus curiae* briefs would mean for the other parts of the WTO's work and whether this would mean that non-governmental organizations could also participate in WTO negotiations and committee work. One Member indicated that it would prefer not to go backwards on *amicus curiae* briefs by making their use subject to the parties' agreement. The proponent similarly indicated that it would have concerns about a single party being able to veto acceptance of *amicus curiae* briefs.

2.6.3 Chair's text[39]

Article 13

Right to Seek Information

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 [*Member,*] individual or body from whom the panel has not sought it.]

…

Article 17

Appellate Review

Standing Appellate Body

4.**(a)** ...

…

[(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].]

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**.

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[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.

[39] Chair Seck's proposed modifications appear in grey shading and italics, or in the case of proposed deletions, just in grey shading. Other proposed changes are explained in Annex 1, section 6.1.

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~~ preclude**s** 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 [*after a*] request [*by*] 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 [*(including each third party session held by 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.]]

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

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~~**.]]**

…

Proposed DSB decision on the protection of strictly confidential information

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 [*via the WTO website*], 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 [,*except for any [strictly] confidential information*].

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

_____

[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).

Proposed DSB decision on procedures for *amicus curiae* submissions in disputes (based on JOB/DS/14)

PROPOSED TEXT[40]	SOURCE
1. Any [~~person, whether~~] natural or legal [person] ("person"), [including a Member] other than a party to the dispute or a third party, wishing to file an amicus curiae submission ("submission") with a panel, the Appellate Body, or an arbitrator ("adjudicative body") must apply in writing[ξ] for leave to file such a submission by the deadline established by the adjudicative body. The adjudicative body should establish a deadline that (1) falls when the basic arguments of the parties to the dispute and third parties are known, (2) avoids	**Non-paper of 23 June 2011**

[40] This text incorporates proposed modifications by Chair Seck based on the discussions among Members. Those modifications appear in grey shading. Please note that errors corrected by Chair Seck did not appear in the original non-paper.

PROPOSED TEXT[40]	SOURCE
undue burden on a party to the dispute, and (3) does not delay [the proceedings]. The Secretariat will post on the WTO website the deadline and a description of where the documents relating to the dispute are to be found. **[ξ] Applying in writing would include transmission by electronic means.** **2. The person applying for the leave to file such a submission ("applicant") shall:** **(a) date and sign[η] the application and include the address and other contact details of the applicant;** **(b) limit the application to not longer than three [typed] pages;** **(c) include a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;** **(d) specify the nature of the interest [that] the applicant has in the dispute;** **(e) identify the specific issues in the dispute that the applicant intends to address in its submission;** **(f) explain why it would be desirable, in the interests of achieving a resolution of the matter at issue[,] in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the adjudicative body to grant the applicant leave to file a submission, and indicate, in particular, in what way the applicant will make a contribution to the resolution of the dispute that is not likely to be repetitive of what a party to the dispute or a third party submits; and** **(g) disclose whether the applicant has any relationship, direct or indirect, with any party to the dispute or any third party, as well as whether it has [received,] or will[,] receive any assistance, financial or otherwise, from [a] party to the dispute, a third party, or any other person in the preparation of its application or its submission.** **[η] A signature could be electronic.** **3. The adjudicative body will give each party to the dispute an adequate opportunity to comment on any application filed.**	

PROPOSED TEXT[40]	SOURCE
4. The adjudicative body will review and consider each application and will, without delay, render a decision whether to grant or deny leave to file in whole or in part. The adjudicative body will promptly notify the applicant and each party to the dispute and each third party of its decision with respect to an application. Where the adjudicative body has granted leave to file in part, [~~then~~] the adjudicative body will include in the notification the issues in the dispute for which it grants the applicant leave to file a submission. **5. The grant of leave to file a submission by the adjudicative body does not imply that the adjudicative body will address, in its report, the arguments made in the submission.** **6. An applicant granted leave to file a submission must:** **(a) file any submission in writing, and ser[v]e a copy of the submission on each party to the dispute and each third party, by a deadline established by the adjudicative body;** **(b) date and sign the submission;** **(c) be concise and limit the submission to no longer than the number of pages to be established by the adjudicative body (as a general guideline, the limit should normally be no more than 15 typed pages, including [any] appendices); and** **(d) limit the submission to those issues in the dispute for which the adjudicative body granted the applicant leave to file a submission.** **7. The adjudicative body will give each party to the dispute an adequate opportunity to comment on any submission filed by an applicant.**	

2.6.4 Annex to the Chair's text on the proposed early derestriction of final panel reports

2.100. As indicated in the Chair's text, the DSB-SS during its focused work reviewed in some detail the practical aspects of the proposed DSB decision providing for early derestriction of final panel reports in their original language. In response to comments and to facilitate discussions, I circulated to participants a brief summary of the practical benefits that early derestriction could afford Members and a step-by-step overview of how the proposal for early derestriction would operate in practice, especially in a case where strictly confidential information is at issue. I include these two contributions in this annex to my Chair's text.

2.101. The proposal for early derestriction of final panel reports would impose no new obligations on Members. It would, however, provide benefits that Members do not currently enjoy. Specifically, prompter access to final panel reports in their original language (English, French or Spanish, as the case may be) could be of interest to:

- parties to the dispute wishing to promptly inform members of their public of the outcome of the panel proceedings;
- third parties to the dispute participating in a possible appeal of the panel report;
- parties and third parties to other panel or Appellate Body proceedings in which similar issues arise;
- other panels and the Appellate Body in disputes in which similar issues arise; and
- other Members following disputes or engaging in dispute settlement activities, such as preparing requests for consultations or the establishment of panels.

2.102. Regarding how the proposal for early derestriction of final panel reports would work in practice, the table below illustrates how the proposal could be implemented, step by step, in WTO panel proceedings with additional working procedures for the protection of strictly confidential information.

	Sequence of steps	**Explanation of each step**
1.	Issuance of interim panel report to parties	The panel issues the confidential interim panel report to parties.
2.	Interim review, including parties' requests for redaction of strictly confidential information	Parties in their comments on the interim panel report may request redaction of strictly confidential information that cannot appear in the public version of the final panel report.
3.	Issuance of final original language panel report to parties (Where no party makes any comments on the interim report, the interim report is considered as the final original language panel report; see Article 15.2 of the DSU.)	The panel issues the confidential final panel report to parties.
4.	Supplementary parties' requests for redaction of the final original language panel report, as necessary	Parties would be given an opportunity to (i) review the changes made by the panel in its final report, as identified in the interim review section of the panel report, and (ii) request redaction of any new references to strictly confidential information that cannot appear in the public version of the final report.
5.	Making available to Members, via the WTO website, an advance copy of the public version of the final original language panel report, with redactions as appropriate	The panel makes further redactions, if appropriate, and requests the WTO Secretariat to make available on the WTO website the (redacted) public version of the final panel report to Members in the original language of the panel report as an advance copy (indicated as such). The panel could at the same time circulate a communication in all three official languages in the WT/DS series to inform the DSB of the circulation of its report in the original language. Such a communication could possibly also provide a tabular summary of the panel's conclusions in all three official languages.
6.	Translation	The WTO Secretariat undertakes and completes the translation of the public version of the final panel report into the other two official WTO languages.
7.	Circulation to Members of the (redacted and possibly corrected) public version of the final panel report in the three official WTO languages	The WTO Secretariat circulates to Members the (redacted) public version of the final panel report in the three official WTO languages. The translation process may result in typographical errors being spotted in the original language panel report. If the original language version is initially circulated as an advance copy, the original language version that would replace the advance copy version when the panel report

	Sequence of steps	Explanation of each step
		is circulated to Members in the three official languages could incorporate all necessary corrections.
8.	Date of circulation of the panel report	The DSU deadline for appeal or adoption of a panel report (Article 16.4 of the DSU) starts to run from the date on which the panel report is circulated to Members in the three official WTO languages.

2.7 Timeframes

2.7.1 Comments from the Chair on his text on Timeframes

2.103. The Chair's text below on Timeframes was circulated in advance of the DSB-SS meeting of 12 July 2018 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.104. The Chair's text takes into account the views of Members expressed during the focused work conducted by the DSB-SS on Timeframes. The proposals on Timeframes cover five main components: (i) the length and start of consultations, (ii) establishment of panels at the first DSB meeting, (iii) rebalancing of and other adjustments to standard indicative panel timetables, (iv) prompter adoption of panel reports, and (v) accelerated timeframes for disputes on safeguard measures.

2.105. The DSB-SS' recent focused work has shown that there is insufficient convergence among Members regarding this issue. I am therefore unable to put forward a text that identifies a common baseline for further work regarding any of the five components of this issue.

2.106. Nonetheless, there was broad conceptual support among Members for key aspects of two components – establishment of panels at the first DSB meeting and rebalancing of standard indicative timeframes for the filing of the parties' first written submissions.

2.107. The first such instance of conceptual convergence concerns the proposal that the DSB establish panels at the first DSB meeting at which the request appears as an item on the DSB's agenda. One Member considered it important, however, to include a mechanism for the postponement of panel establishment upon request. That Member explained that such a mechanism was important for developing country Members because they needed to have sufficient time, once it became clear that a panel would be established, to hire outside legal advisors, where appropriate, to assist them in the panel proceedings.

2.108. The second instance of conceptual convergence concerns the proposal that would rebalance the standard indicative timeframes for the filing of the parties' first written submissions in a manner that would grant the respondent more time than is currently contemplated in Appendix 3 of the DSU. Some differences remain among Members, however. They relate mainly to the precise time-period to be granted each party for the filing of its first written submission.

2.109. The two aspects on which there was broad support should not be viewed in isolation. Although under the second proposed component a panel could be established already at the first DSB meeting, the respondent would be granted additional time under the third proposed component to prepare its first written submission.

2.110. Owing to the lack of sufficient convergence, in the Chair's text below, I limited myself to identifying possible incremental changes to the text of the proposals beyond those already reflected in document TN/DS/25. These possible changes serve to clarify the proposals and respond to concerns raised by Members during the focused work.

2.111. The following observations are provided to introduce the changes identified in the Chair's text:

- Length and start of consultations: As regards the length of the consultations period, the Chair's text concerning draft Article 4.7 clarifies that any request to extend the consultations period would need to be made by a "responding" developing country Member. It indicates the maximum extension that a responding developing country Member could request, and clarifies that the extension would correspond to the number of days requested, provided that this number does not exceed the maximum. Similar changes have been included in the third sentence of draft Article 12.10. The text concerning draft Article 12.10 also clarifies that an extension of the consultations period would need to be granted regardless of whether the complaining party is a developed country Member or a developing country Member. The second and third sentences of draft Article 12.10 further clarify that just like the consultations period must be extended upon request, so also the time-period within which

consultations are to be started must be extended upon request by the responding developing country Member.

- Establishing panels at first request: The Chair's text concerning draft Article 6.1 dispenses with the word "first", as there would no longer be a need to distinguish between a first and subsequent request for establishment. If and when a request for establishment appears on the DSB's agenda, the DSB would be required to establish a panel immediately. As regards draft footnote a, which is about the possible postponement of panel establishment, the Chair's text now contemplates that both developed and developing country Members would have the possibility to request the complaining party to postpone panel establishment. This avoids the need for characterizing Members as either developed or developing to determine eligibility to make a request for postponement. During the focused work, the view was expressed that where the complaining party agrees to a request for postponement, it should withdraw the request for establishment from the DSB's agenda. Consequently, if the complaining party later proceeds to seek establishment of a panel, the DSB would be dealing with the request for the first time at such later date. Bearing this in mind, the Chair's text also makes consequential adjustments to footnote 5 to draft Article 6.1.

- Rebalancing and other adjustments of standard indicative panel timetables: The Chair's text concerning paragraph 12 of Appendix 3 of the DSU creates a new timetable item for the organizational meeting, to provide a starting date for the panel proceedings for purposes of calculating due dates. During the focused work, it was clarified that the date of the organizational meeting had been chosen deliberately following prior discussions among Members, and notwithstanding Article 12.8 of the DSU (which refers to the date of panel composition as the starting date for calculating the maximum period in which panels must, as a general rule, conduct their examination). Annex 2 to the Chair's text reflects, for illustrative purposes, (i) the standard panel timetable applicable in disputes involving developed country respondents under draft paragraph 12 of Appendix 3 and (ii) the standard timetable applicable, in general, in disputes involving developing country respondents under the penultimate sentence of draft Article 12.10. The Chair's text concerning draft Article 12.10 modifies the last sentence in response to a comment from a Member that any additional time granted by way of special and differential treatment should not result in less time being available for panels to complete their internal work.

- Prompter adoption of panel reports: The Chair's text concerning draft Article 16 reinserts the provisions contained in paragraphs 2 and 3 of the current Article 16, as some Members were concerned about dispensing with the rights and obligations they contain. As Article 16 is entitled "Adoption of Panel Reports" and paragraphs 2 and 3 do not use the term "adoption", the Chair's text in the interest of greater clarity reinserts these two paragraphs at the end of draft Article 16, after the new opening paragraph, which, for its part, does use the term "adoption". Regarding the new paragraph 2 of draft Article 16, the Chair's text also indicates a need to specify a new deadline for circulating written objections to the adoption of a panel report. The current 10-day minimum deadline could in some circumstances be unworkable (e.g. where circulation of a report and the request for adoption occur immediately before the expiry of the 10-day notice period for including items on the DSB agenda). It should be noted in this respect that this issue would not arise if Members were to adopt the proposal that is part of the Transparency issue and that would require early derestriction of final panel reports. Under that proposal, a final panel report would be available to all Members when it is issued to the parties, which is well before the circulation of the same panel report to Members.

- Accelerated timeframes for disputes on safeguard measures: The Chair's text concerning draft Article 20*bis* adds a reference to paragraph 4 in the opening paragraph to clarify the relationship between the two paragraphs. The Chair's text further explains that the second paragraph would be unnecessary if Articles 4.7 and 6.1 were amended as envisaged in the Timeframe proposals. The Chair's text also spells out more clearly in the second paragraph of draft Article 20*bis* what is meant by "immediate" panel establishment by referencing language used in the current Article 6.1 of the DSU. To ensure consistency with the current Article 6.1, the second paragraph also identifies only the complaining party as the Member that would be able to request the establishment of a panel. Regarding the third paragraph of draft Article 20*bis*, the Chair's text reflects more clearly the intention of the proponent that panels would be required to halve the standard indicative timeframes provided for in

paragraph 12 of Appendix 3 of the DSU. However, paragraph 1 provides for the possibility that the parties could nonetheless extend any otherwise accelerated timeframes by mutual agreement. The new numbering adopted in the Chair's text – Article 20*bis* rather than Article 8*bis* –reflects that Article 8 concerns only the panel composition stage, whereas the current Article 20 deals with overall timeframes and thus would seem to provide an appropriate article to which the new rules concerning accelerated timeframes in safeguards disputes could be attached.

2.7.2 Comments from Members on the Chair's text

2.112. The proponent generally agreed with the Chair's assessment of the discussions on Timeframes. In particular, the proponent agreed that the components relating to panel establishment upon first request, with a mechanism that would allow for postponement, and rebalancing of timeframes present most potential for convergence. Two other Members also agreed with this appraisal by the Chair. Like the Chair, the proponent noted, however, that these components should not be viewed in isolation, and that they are linked with other components of the same proposal as well as other issues discussed by the DSB-SS, including Transparency.

2.113. One Member considered the current timeframes to be reasonable and did not see a need for any amendments. That Member considered that the WTO should rather adhere to the timeframes that are already there and give itself the resources to do so.

2.114. Two developing country Members indicated that establishment at first request would have to be accompanied by a guarantee that panel establishment can be postponed, and that due to resource constraints the proposed rebalancing of timeframes is likewise problematic for a developing country complaining Member. Fourteen days, in their view, are not enough to file the first written submission. For the proponent, the Chair's proposed changes to Article 6 provide the necessary flexibility to postpone the establishment of a panel and does so in a way that dispenses with the need to distinguish between developed and developing country Members. The proponent observed in this regard that one Member opposed introducing any distinction between developed and developing country Members in connection with the process of panel establishment. Regarding the rebalancing of timeframes, the proponent noted that the complaining Member has the time to determine when it is ready to bring a case and fourteen days are therefore enough.

2.115. With regard to adoption of panel reports, the proponent stated that it is open to retain Article 16.2, as suggested by the Chair, to ensure full participation of Members, including the disputing parties, in considering a report submitted for adoption. At the same time, the proponent and one other Member stated that they are not convinced that it is necessary to retain Article 16.3, as the parties' right of participation should be understood to follow implicitly from the provisions of the DSU. One Member noted that the 20-day period before adoption of a panel report should be maintained as it is important to the consideration about whether to file an appeal.

2.116. Finally, the proponent noted that unlike previously, the issue of translation times should now also be part of the discussions about timeframes.

2.7.3 Chair's text[41]

Article 4

Consultations

…

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	***Note by Chair Seck:*** *To avoid ambiguity about the length of the extension, it may be*

[41] Chair Seck's proposed modifications appear in grey shading and italics, or in the case of proposed deletions, just in grey shading. Other proposed changes are explained in Annex 1, section 7.1.

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 [*~~responding~~*] party. *~~The maximum extension that may be requested is 30 days.~~*]**

advisable not to combine the last sentence with the amendment to the second sentence of Article 12.10 as proposed below.

…

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, t[T~~*]he complaining party shall accord sympathetic consideration to a request from *~~that Member~~ [the party complained against]* 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] **[In 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~~ *and*]** 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.

…

Article 12

Panel Procedures

…

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 ***[3,]*** 7 and 8 of Article 4. **[*~~[[Where]] t~~*The consulting ***~~Member~~*** ***complaining party ~~[[is a developed country [Member], it]]~~*** shall agree to a request [***by the consulting responding party***] for an extension of the periods established in paragraphs ***[3 (for entering into consultations),]*** 7 and 8 of Article 4. ***The maximum extensions that the consulting responding party may request are ~~of up to~~ [15 days,]*** 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*~~] [*responding party*] 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.~~ ***Where the panel has acted pursuant to this paragraph to extend the time for preparation and presentation of submissions, the additional time taken shall be added to the periods referred to in Article 20 and paragraph 4 of Article 21***].

…

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.~~

~~3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.~~

~~*4.1.*~~ Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[42] 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. 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.

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

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

…

[[Article [~~8~~20]bis

Accelerated time-frames for disputes on safeguard measures

1. [Subject to paragraph 4, t]he 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~~ [the complaining] party to such consultations may refer the matter to the ~~Dispute Settlement Body~~ [DSB] for the ~~immediate~~ establishment of a panel [at the DSB meeting at which the request appears as an item on the DSB's

Note by Chair Seck: *This paragraph would not be necessary if Articles 4.7 and 6.1 were amended as proposed above.*

[42] 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.

agenda], unless the DSB decides by consensus not to establish a panel.

3. [Notwithstanding paragraph 1 of Article 12, t]he time-frames in the Working Procedures of item 12 of Appendix 3 [shall be halved.] ~~and~~. [The time-frames] in paragraph 4 of Article 16 shall [also] 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.]]

…

APPENDIX 3

WORKING PROCEDURES

…

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

[(a)] **Organisational meeting with the parties**		**Starting date**
~~*[(a)*~~*(b)]*	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

…

Standard indicative timetable for panel proceedings prepared by Chair Seck based on the proposed new Appendix 3 and Article 12.10 of the DSU

Description	**Date[fn]** **Disputes involving a DEVELOPED country responding party**	**Date** **Disputes involving a DEVELOPING country responding party, "in general" (proposed new Article 12.10)**
Organizational meeting	Starting date	Starting date
(a) First written submissions		
i) [complaining party]	14 days	14 days
ii) [responding party]	3-4 weeks	**5-6 weeks**
(b) Third parties' written submissions		
(c) First substantive meeting with the parties (including third-party session)	1-2 weeks	**2-3 weeks***
(d) Responses from the parties and third parties to written questions		
(e) Integrated executive summaries of third parties' arguments		
(f) First integrated executive summaries of the parties		
(g) Second written submissions of the parties	2-3 weeks	**3-4 weeks***
(h) Second substantive meeting with the parties	1-2 weeks	**2-3 weeks***
(i) Responses to written questions		
(j) Comments on responses to questions		

Description	Date[fn] **Disputes involving a DEVELOPED country responding party**	Date **Disputes involving a DEVELOPING country responding party, "in general" (proposed new Article 12.10)**
(k) Second integrated executive summaries of the parties		
(l) Issuance of descriptive part of the report to the parties	2-4 weeks	2-4 weeks
(m) Comments by the parties on the descriptive part of the report	2 weeks	**3 weeks***
(n) Issuance of the interim report, including findings and conclusions, to the parties	2-4 weeks	2-4 weeks
(o) Deadline for parties to request review of part(s) of the report and to request an interim review meeting	1 week	**2 weeks***
(p) Interim review meeting or, if no meeting is requested, deadline for comments on requests for review	2 weeks	**3 weeks***
(q) Issuance of the final report to the parties	2 weeks	2 weeks
(r) Circulation of the final report to Members	Following translation	Following translation
Total net difference, where the respondent is a developing country:	**+ 8 weeks**	

* The additional week would be granted to both parties.

[fn]The above timetable may be changed in the light of subsequent developments (Article 12.1 of the DSU).

2.8 Remand

2.8.1 Comments from the Chair on his statement on Remand

2.117. The Chair's statement below on Remand was circulated in advance of the DSB-SS meeting of 20 November 2018 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.118. It emerged from the focused work in the DSB-SS on Remand that there still is significant divergence between the G7 proposal, on the one hand, and the other proposal by a single proponent, on the other hand. I therefore engaged directly with the proponents to explore the possibility for achieving convergence through combining elements of both proposals. As this did not result in any progress, I am not in a position to put forward a single and unified Chair's text on Remand.

2.119. In the light of this, this statement limits itself to recording in respect of the two textual proposals certain points that were clarified by the proponents, or could be clarified. In addition, the statement indicates points of convergence and divergence among the WTO membership at large.

2.8.2 Comments from Members on the Chair's statement

2.120. Members who commented noted that the Chair's statement correctly reflects that there was a lack of convergence between the G7, on the one hand, and the other proponent, on the other hand, and that there is substantial divergence among Members on whether it is desirable to have remand at all.

2.121. For one Member, remand raises serious concerns and would likely have negative consequences for dispute settlement without adding any real value to the system. According to that Member, it is unclear what problem remand would solve and it could even create new issues. That Member considered that no plausible reason exists to think that remand would lead to time-saving; to the contrary, it is difficult for that Member to see how parties could resist having a second bite at the apple by initiating remand proceedings. There would also be additional resource costs both for parties and the system. In that Member's view, the Chair's statement serves to highlight that significant elements of the proposals remain unclear.

2.122. The G7 proponents regretted that consensus was not possible among the various proponents and reiterated their view that the introduction of a remand mechanism would improve WTO dispute settlement. They also observed that the Chair's statement would provide a useful document for future discussion of the topic. One G7 proponent suggested a small clarification to the Chair's statement. Specifically, it recalled that initiation of remand proceedings would be possible only by the party who had advanced the claim or defence to which the unresolved issue to be remanded to the original panel relates. The Chair modified his statement to incorporate that suggestion.

2.123. The other proponent highlighted that there are key differences between the two proposals. For that proponent, the main question is which proposal assists more in achieving implementation by the responding party. This proponent prefers a single implementation process in this regard and considers that multiple Appellate Body or panel reports, as foreseen under the G7 proposal, could hamper the ultimate resolution of the dispute.

2.124. One Member that spoke indicated that a remand mechanism could promote efficient dispute resolution, but emphasized that its support would depend on there being a properly conceived mechanism. That Member indicated that it would need assurances that the mechanism would not be exploited to cause delay in the process or that it would not lead to unintended consequences. According to that Member, the discussions showed that the proponents need to provide further clarifications.

2.8.3 Chair's statement

Members' review of the two proposals on Remand

Proposal by the G7

Six of the seven Members that make up the G7 proponents indicated that an important consideration underlying their proposal is that any incomplete analysis by the Appellate Body is an unfortunate outcome for the parties to a dispute, as it will result in a partially unresolved dispute. In their view, the inclusion in the DSU of a mechanism that would allow either party to pursue a remand to the panel would not waste time, but save time, since the likely alternative would be to re-litigate aspects of the dispute through ordinary dispute settlement proceedings.

The same G7 proponents highlighted that the key elements of their remand proposal include that: (i) the Appellate Body would provide a detailed description of what aspects of a dispute it cannot resolve; (ii) there would be standard procedures for the adoption of panel and Appellate Body reports; (iii) the party that advanced the claim or defence in respect of which the Appellate Body could not complete the analysis would have discretion to pursue or not pursue remand (no automatic remand); (iv) if a party wished to pursue remand, the matter would be referred to the panel prior to the adoption of the panel and Appellate Body reports; (v) the mandate of the remand panel would be clearly circumscribed to facilitate expedited proceedings; (vi) the remand panel's report would be subject to appeal; and (vii) there would again be standard procedures for the adoption of remand panel and Appellate Body reports.

The remaining G7 proponent observed that there was a known concern around the amount of time it would take to complete remand proceedings. There could be more or less delay in the resolution of a dispute depending on whether the adoption of non-remanded parts of a panel report could be requested before or after the completion of remand proceedings. That G7 proponent also pointed to studies suggesting that the Appellate Body was unable to complete the analysis in only about 20 per cent of appeals. It was also not clear that in all these instances the Appellate Body could not complete the analysis because of a lack of necessary factual findings in the panel reports. The Member in question posed the question whether in the light of these elements it was necessary to create a remand procedure. The Member made clear, however, that it remained flexible if there was a shared understanding among Members that it was desirable to introduce a remand procedure.

One of the G7 proponents stated that the deadline for a referral to a remand panel was very short, as a referral would need to occur before the adoption of the Appellate Body report, which in turn must occur within 30 days of its circulation to Members. That proponent indicated its willingness to discuss alternatives. Other G7 proponents that addressed this point saw no need for any extension, but indicated flexibility.

The focused work conducted on the G7 proposal showed that there are aspects of the proposal that could benefit from further textual clarification.

- First, the G7 proposal envisages that the referring party must make its referral before the adoption of the Appellate Body report. This raises the question of what would constitute the date of referral, i.e. whether it would be the date of receipt of the referral letter by the panel or the date of receipt by the Secretariat of the notification to the DSB. The G7 proponents indicated flexibility to add clarity about the date of receipt. The G7 proponents that spoke on this indicated a preference for using the date of receipt of the referral letter by the panel as the formal date of referral.

- Second, the G7 proposal provides that the referring party must address its referral to the panel and must notify the DSB thereof. It is not clear from the text of the G7 proposal whether the DSB would need to be notified at the same

time as the panel or only afterwards, and if so, whether the notification would need to be circulated to Members prior to the DSB meeting at which the relevant panel and Appellate Body reports would be adopted. In connection with the adoption of the panel and Appellate Body reports, it could be useful for WTO Members to know, e.g. for purposes of expressing their views on panel and Appellate Body reports (Articles 16.4 and 17.14 of the DSU), whether aspects of the reports will be the subject of further litigation.

- Third, and again concerning the proposed requirement to notify the DSB of a referral to a remand panel, it is not clear from the text of the G7 proposal whether, in view of the broad wording of Article 10.2 of the DSU, additional Members could come forward and participate as third parties for the first time in remand panel proceedings. The G7 proponents that addressed this point expressed the view that no additional Members should be allowed to participate as third parties for the first time in remand panel proceedings.

- Fourth, the G7 proposal envisages that both the complaining party and the responding party may make a referral to a remand panel. If it is the responding party who makes the referral, it would appear to be important to consider also the applicability to remand panel proceedings of Article 12.12 of the DSU, which provides for the possibility to suspend panel proceedings at the request of the complaining party. The DSB-SS already discussed a similar problem in the context of focused work conducted on the Post-retaliation proposals. If Article 12.12 applied to remand panel proceedings initiated by the responding party and the original complaining party (the complaining party from the original panel proceedings) could request a suspension of the remand panel proceedings, this could raise the concern that the complaining party might seek a suspension to delay the resolution of unresolved issues (e.g. the merits of an affirmative defence invoked by the responding party) that had been referred to the remand panel by the responding party.

- Fifth, as experience shows, the original panelists may not always be available to serve again. A partial or complete re-composition of the remand panel may sometimes be necessary. As it can take time to re-compose the remand panel, it could be appropriate to have the 90-day period for the completion of the remand panel's work start to run from the date on which the remand panel has been constituted, or (in accordance with the Timeframes proposal before the DSB-SS) the date on which the remand panel holds its organizational meeting, rather than from the date of referral of the matter to it. The G7 proponents that spoke on this point indicated readiness to review this matter.

- Sixth, the G7 proposal states that Article 17 of the DSU and the proposed new Article 17.*bis* would apply to Appellate Body proceedings initiated after remand panel proceedings. It would appear that this would make it possible to initiate an appeal against a remand panel report on procedural grounds, e.g. that the remand panel examined issues that the referring party had not identified clearly enough in accordance with Article 17.*bis*.2. As such appeals would have an impact on the overall timeframe for dispute settlement and some Members emphasized the need to minimize the risk of abuse of remand, it could be reviewed whether the reference to the applicability of Article 17.*bis*.2 serves an important purpose.

<u>The other proposal by a single proponent</u>

The proponent of the other proposal observed that a key consideration behind its distinct proposal is that, in its view, the inclusion in the DSU of a remand procedure should result in minimum changes to the current DSU. Otherwise, there was a risk of overburdening the dispute settlement system. This proponent noted that consistent with this consideration its proposal envisages that the Appellate Body would suspend the finalization of its report in order to give time to a remand panel to make the necessary factual findings. In this proponent's view, limiting the remand panel's role to that of

providing the necessary factual findings would ensure that remand proceedings could be completed promptly.

Various aspects of this proposal were clarified during the focused work through questions from the Chair.

- First, the proposal contemplates that the Appellate Body would provide the parties with tentative findings and recommendations on the issues for which it had been able to complete the analysis. The proponent confirmed that if no party made a subsequent referral to a remand panel, the Appellate Body's findings and recommendations would become definitive. It also confirmed that if there were a referral to a remand panel, the Appellate Body could modify its tentative findings and recommendations in the light of the remand panel's factual findings.

- Second, the proponent clarified the clause in its proposal that indicates that the Appellate Body, prior to circulating its report, would provide to the parties its tentative findings and recommendations and its description of the types of findings required to complete the analysis. According to this proponent, the Appellate Body would provide to the parties its tentative findings and recommendations and its description of the relevant types of findings before the 60-90-day-period (Article 17.5 of the DSU) elapses (i.e. sooner than it currently provides its findings and recommendations), and that the Appellate Body would circulate its report to Members within the 60-90-day period if no party makes a referral to a remand panel.

- Third, the proposal states that the Appellate Body is to complete its analysis upon receiving the factual findings from the remand panel. The proponent confirmed that this means that the Appellate Body would complete its analysis on its own, without further input from the parties and third parties. However, the proponent indicated that it could be open to reviewing this aspect of its proposal.

It emerged from the focused work conducted on this proposal that there also were aspects of the proposal that could be further clarified.

- First, the proposal envisages that the referring party make any referral to a remand panel by the time the Appellate Body specifies. The proponent confirmed that the Appellate Body would provide more or less time to parties for deciding whether to make a referral depending on the number and complexity of the issues for which the Appellate Body lacks a sufficient factual basis. The proponent also answered in the affirmative the question whether it would be appropriate for the Appellate Body to specify the time-period in each case only after consulting the parties.

- Second, unlike the G7 proposal, this proposal does not specify the number of days that the remand panel would have to complete its task. The proponent indicated that it was reviewing the matter. It stated, however, that there should be flexibility to take into account the complexity of disputes and that a fixed 90-day period would therefore not be desirable.

- Third, the proposal indicates that the remand panel would submit its factual findings to the Appellate Body. There is no suggestion that these findings would be circulated as a separate panel report. There thus is a question as to how these findings, which are findings by the panel and not the Appellate Body, would be adopted by the DSB.

- Fourth, under this proposal, appellate review proceedings are suspended in case of remand. It seems likely that if the Appellate Body had to complete the analysis upon receiving the factual findings by the panel, the 90-day-period (Article 17.5 of the DSU) could be exceeded, since the Appellate Body would first have to prepare and issue to the parties its tentative findings and provide a detailed description of the issues that could be remanded and would later still have to complete the analysis in the light of the remand panel's factual findings. It could therefore be considered

whether in the context of this proposal it would be useful to clarify in Article 17.5 of the DSU that Article 17.5 applies subject to the provisions of the proposed Article 17.*bis*.6, if indeed those provisions could result in the 90 days being exceeded.

Overall picture

The comments made during the focused work on Remand by Members other than the proponents revealed that Members hold contrasting views on whether it would be desirable to provide in the DSU for a remand procedure.

At one end of the spectrum, some Members indicated that they were in favour of inserting a remand procedure in the DSU, but they did not necessarily support all features of the procedure set out in the two proposals. Several other Members indicated that they supported the idea of creating a remand procedure in principle. At the same time, they signalled that their ultimate support would critically depend on whether all relevant aspects were adequately addressed. Their hesitation concerned such aspects as the impact that remand proceedings would have on the overall timeframes for dispute settlement and questions about how to guard against unintended consequences as well as how to prevent the responding party from exploiting the availability of remand to delay dispute settlement.

At the other end of the spectrum, one Member expressed serious concerns about the two proposals to introduce a remand procedure, saying that remand would have negative consequences for the dispute settlement system. In that Member's view, the value of remand is not clear, as the system has been working well for many years and there was no instance where remand was critical for resolving a dispute. One concern raised by this Member is that remand could affect how panels or the Appellate Body address issues before them. For instance, with the possibility of remand, panels might prepare incomplete reports because they would not want to reach complicated or sensitive issues. Or the Appellate Body might not want to complete the analysis in some cases. The result could be delay in case of a remand in a specific dispute. Another concern identified by this Member is that remand could change the nature of the relationship between panels and the Appellate Body in that there could be more mutual criticism between the two adjudicating bodies, leading to more remands. In that Member's view, it is also not clear how it could be avoided that the parties would try to re-argue their cases on remand. Finally, the Member concerned pointed to the implications remand would have for the resources of parties, particularly responding parties.

Even reviewing the Remand proposals on a without prejudice basis, Members expressed divergent preferences, or continued to have concerns, about a number of specific aspects of these proposals. Some of these are briefly identified below.

- Initiation of remand proceedings. All proponents favour an approach under which both the complaining and the responding party can initiate remand proceedings, it being understood that only the party who put forward the claim or defence to which the unresolved issue relates may refer that issue to the original panel. Several other Members have stated that they would prefer that only, or mainly, the complaining party have the automatic right to initiate remand proceedings. In their view, this could avoid a situation where the responding party would make a referral to a remand panel just to delay the process, which would be the case e.g. where the outcome of the remand proceedings could not materially affect the ultimate dispute settlement outcome in view of other conclusions that the Appellate Body had been able to reach on the measure in question.

- Double adoption (G7 proposal) versus single adoption (the other proposal) of panel and Appellate Body reports. Some Members expressed a preference for double adoption (immediate adoption of panel and Appellate Body reports in a given dispute before any remand proceedings and subsequent adoption of panel and Appellate Body reports in the same dispute after any remand proceedings). In their view, this would make it possible for the complaining party to seek implementing action from

the responding party in respect of any findings of violation that the Appellate Body had made in its report, without having to wait for the completion of the remand panel and any subsequent appellate review proceedings. However, other Members voiced a strong preference for single adoption and opposed double adoption. In their view, under a double adoption system, it could be difficult for the responding party, for domestic political and legal reasons, to implement adverse rulings and recommendations in the same dispute in two separate stages, or it might at the very least be inefficient to do so where the later rulings and recommendations could impact upon how the earlier rulings and recommendations would be implemented. The concern was also raised that there could even be conflicting rulings and recommendations concerning the same measure, in the sense that a measure initially found WTO-inconsistent would subsequently, following remand panel proceedings, be found to be justified under a WTO exception.

Noting the concerns raised about double adoption, the Chair explored with Members whether under a double adoption system the responding party could be required to implement only those recommendations and rulings of the DSB that would not be affected by the possible outcomes of remand proceedings, and if so, whether the Appellate Body could be required to identify in its report which recommendations and rulings the responding party should implement in case there is a referral to a remand panel. Some Members that spoke agreed that it should not be left up to the responding party to determine which rulings and recommendations it would implement because it could have an incentive to determine that all recommendations and rulings of the DSB could be affected by the remand proceedings. Equally, however, other Members wondered whether the Appellate Body should make that determination on its own, and if not, whether it would complicate and prolong the appellate review process if the Appellate Body first had to seek the views of the parties.

- Overall length of dispute settlement proceedings. The proponents highlighted that the availability of remand would ultimately save time, by obviating the need for re-litigating unresolved issues. They also highlighted that their proposals already incorporate time-saving features, such as the short deadlines and the limited scope of remand panel proceedings (only issues identified by the Appellate Body may be the subject of remand proceedings). Some Members remained concerned, however, arguing that even if remand proceedings were conducted with a limited mandate and on an expedited basis, they would still constitute a new step in the procedure and thus would prolong the dispute settlement process. They also stated that there was a risk of abuse, as the losing party could initiate remand proceedings to delay the entire process or part of the process (depending on whether a single or double adoption system was used).

- Possibility of multiple remands. In connection with concerns raised about extending the overall timeframes, one G7 proponent stated that under its proposal multiple remands in the same dispute are a possibility, but are considered unlikely owing to the narrow focus of remand proceedings, which could concern only those issues that the Appellate Body could not resolve. However, other G7 proponents indicated that they preferred to allow only a single remand. The other proponent observed that under its proposal there should be no need for multiple remands because remand would be limited to issues of fact. It is not clear from that proponent's proposal, however, how the Appellate Body should proceed if it considered that the additional factual findings by the remand panel still did not provide it with a sufficient factual basis to complete the analysis.

2.9 Panel composition

2.9.1 Comments from the Chair on his text on Panel composition

2.125. The Chair's text below on Panel composition was circulated in advance of the DSB-SS meeting of 27 March 2019 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.126. The Chair's text takes into account the views of Members expressed during the focused work conducted by the DSB-SS on Panel composition. The proposal on Panel composition takes the form of a draft DSB decision on Working Practices Concerning Panel Composition, which sets forth a specific process for selecting the chair and members of WTO dispute settlement panels. Along with this proposal, the DSB-SS, at my suggestion and consistent with the approach of a previous DSB-SS Chair, included in its focused work on Panel composition an aspect of the proposal on Flexibility and Member control relating to the required expertise of panelists.

Proposed DSB Decision on Working Practices Concerning Panel Composition

2.127. The proponent explained that the draft DSB decision aims at increasing the likelihood of the parties agreeing on a panel's composition, expediting the panel composition process and enhancing its predictability for the parties to a dispute. The proposal seeks to achieve these objectives through, among other things, a single list of candidates to be put forward by the WTO Secretariat that allows the parties to know about all potential candidates from the outset and to rank them in accordance with their preferences. The proposal also limits the parties' ability to reject candidates, as routine rejection of candidates with no effective independent review of the reasons supporting the rejection can, according to the proponent, lead to a sub-optimal, lowest-common-denominator choice of panelists. The proponent indicated that the proposed DSB decision is the result of a collective Member effort and constitutes a mature draft, but that the proponent remained open to modifying the text to make it acceptable to Members.

2.128. Two Members wondered whether the ranking approach reflected in the proposed Working Practices would ensure that a panel's composition was balanced overall and included panelists with a sufficiently diverse background and a wide spectrum of experience, as required by Article 8.2 of the DSU. One Member was also concerned that the proposal could be going too far in limiting a party's ability to reject a potential panelist whom that party did not consider acceptable. Some Members indicated a need for further clarifications of certain aspects of the proposed DSB decision.

2.129. During the focused work of the DSB-SS, I posed questions to the proponent aimed at clarifying various aspects of the proposal. Based on the proponent's responses as well as questions and comments shared by other Members, I have suggested some specific modifications of the text of the proposed DSB decision. They are reflected in my Chair's text.

2.130. Below I provide a brief explanation of these changes and address certain other aspects of the proposal that were discussed by the group.

<u>Compiling a single Secretariat list of candidates for panelists</u>

2.131. With respect to the single list of candidates that the Secretariat would submit to the parties under paragraph 4 of the proposed DSB decision, I have suggested clarifying that *each* person on the list meet at least one of the criteria requested by the parties to ensure that the list is responsive to those criteria. In a similar vein, I have suggested a textual modification in the first footnote to paragraph 6 of the draft DSB decision to make it clear that the parties may be present when the Secretariat must draw by lot the number of persons needed to compose a panel (as would be the case in a situation where there is more than one nomination with equal combined preference and the lowest degree of divergence between the parties' rankings).

<u>Procedure in case of objections to Secretariat nominations on conflict of interest grounds</u>

2.132. Paragraph 5 of the proposed DSB decision states that the parties may object to the Secretariat's nominations in the event of a conflict of interest as referred to in the WTO's Rules of Conduct (WT/DSB/RC/1). Pursuant to paragraph 5, the Secretariat is to decide whether there is a

conflict of interest with respect to a particular nomination, and if there is, the relevant nomination is to be withdrawn from the Secretariat's list of nominations. At the DSB-SS meetings, Members considered whether in view of the existing Rules of Conduct, and in particular their paragraph VIII, it would be necessary and appropriate for the Secretariat to be the decision-maker in a contentious situation where one party considers that there is a conflict of interest and another considers that there is none and that the nomination should therefore remain on the list. According to the proponent, a party's objection based on conflict of interest would need to be substantiated. In the proponent's view, such an objection should not be ignored, but it should also not be accepted automatically, and the Secretariat would be best placed to make a decision on whether a conflict exists. One Member expressed doubt that the Secretariat would be best placed to judge whether a conflict of interest arises and submitted that a party's objection relating to a conflict of interest should be accepted automatically, as long as it had been duly substantiated. Another Member suggested that the Secretariat could avoid the need for a decision if it withdrew from its list a nomination with respect to whom a conflict of interest issue had been raised. However, the proposed DSB decision does not appear to enable the Secretariat to avoid a decision and instead withdraw and replace a nomination in a situation where the parties disagree on whether a conflict of interest arises regarding a particular nomination. The Chair's text below does not contain any suggestions concerning paragraph 5.

Appointment of panelists by the WTO Director-General

2.133. Paragraph 9 of the proposed DSB decision provides that the WTO Director-General "shall determine the composition of the panel by appointing, [if possible][to the utmost extent possible] from the nominations proposed by the Secretariat, [to the extent they are available,] 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". The proposed draft text does not explicitly reflect the current practice of some Members whereby they initially authorize the Secretariat to nominate third-party nationals (e.g. non-governmental third-party nationals), but subsequently invoke their rights under Article 8.3 of the DSU, with the consequence that the Director-General is not authorized to appoint any third-party nationals (whether governmental or non-governmental individuals). The proposed draft text requires the Director-General to appoint panelists from the nominations proposed by the Secretariat, which may include third-party nationals, and stipulates an exception, which relates to previously rejected nominations (paragraph 5). During the focused work, Members discussed whether the current draft text makes sufficiently clear that the Director-General would not be allowed to appoint a third-party national previously nominated by the Secretariat, but not rejected by a party in accordance with paragraph 5, if a party does not wish the Director-General to appoint any third-party nationals to the panel. The proponent took note of the issue and stated that it was open to considering it further.

2.134. Paragraph 9 refers to the Director-General's obligation under Article 8.7 of the DSU to consult with the parties before determining the composition of a panel, but it does not refer to the Director-General's parallel obligation under Article 8.7 to consult with chairpersons of the DSB and the relevant WTO councils or committees before determining the composition of a panel. In response to a question, the proponent expressed the view that the latter obligation need not be repeated in the proposed DSB decision, but indicated its readiness to consider this issue further.

2.135. In response to a further question about the meaning of the language within the first set of square brackets in paragraph 9 (according to which the Director-General is to determine the composition of the panel by appointing, "[if possible][to the utmost extent possible]", from the nominations proposed by the Secretariat), the proponent responded that the options between square brackets are meant to provide the Director-General with a degree of flexibility in appointing panelists. According to the proponent, the objective is to make the panel composition process more predictable for the parties. But the proponent observed that ultimately it was for the Director-General to assess whether it would be possible to appoint candidates from the list initially suggested by the Secretariat. Members did not express any preference concerning the two options proposed in square brackets.

2.136. Finally, after receiving confirmation from the proponent, I have suggested inserting in paragraph 9 a reference to the chairperson of the panel to clarify that the Director-General can be requested to compose a panel also in the situation contemplated in the second set of square brackets in paragraph 6 of the proposed DSB decision, i.e. in a situation where the parties can in principle agree on three persons, but cannot agree on who should serve as chairperson of the panel.

Proposed additional language on the required expertise of panelists (Article 8.2 of the DSU)

2.137. In view of its direct relevance to the selection of panelists, I suggested to participants that the DSB-SS discuss the revised language in Article 8.2 of the DSU, which forms part of a proposal on Flexibility and Member control, together with the proposal on Panel composition. One of the co-proponents of the amendment to Article 8.2 stated that it was continuing to consult internally on the issue of Flexibility and Member control and that it was not in a position to discuss the proposal concerning Article 8.2 during the opening meeting and Chair's consultations. That co-proponent reserved its right to comment on the proposal at a later stage. The other co-proponent explained that the additional language in Article 8.2 of the DSU is intended to ensure that panelists have the preparation and competence to do their work. It noted that while in practice the condition has been met, there currently is no obligation to do so.

2.138. While several Members spoke in support of the proposed modified language of Article 8.2, one Member questioned the need for the amendment given that the Director-General and Secretariat have, in that Member's view, been mindful in their panel composition activities of the expertise required for panel service.

2.139. The Chair's text below does not suggest any changes to the proposed additional language on the expertise of panelists as contained in document JOB/DS/14.

2.9.2 Comments from Members on the Chair's text

2.140. According to the proponent, the Chair's text appropriately reflects the most recent discussions on Panel composition. The proponent indicated that it supports the additional language inserted by the Chair. The proponent further stated that this latest draft legal text already incorporates the views previously expressed by Members and that it is a technically ready and mature legal draft, which, with the additional clarifications by the Chair, should be acceptable to Members.

2.141. Two Members raised concerns about the proposal on a conceptual and technical level. One Member questioned the need to change the current process and doubted that the proposal would improve the panel composition process. That Member expressed the view that the proposal would make it more difficult for the parties to agree on panel composition. Another Member queried whether the mathematical formula embedded in the proposal would ensure that the overall composition of a panel was balanced and that the panelists selected through the process have appropriate background. That Member also had doubts regarding whether rejections of candidates can be limited only to instances of conflict of interests.

2.9.3 Chair's text[43]

Article 8 – Composition of Panels

…

2. ~~Panel members~~ **Panelists** should be selected with a view to ensuring ~~the~~ **their** independence ~~of the members~~ **and that the panel as a whole contains expertise to examine the kind of matter at issue in the dispute**, a sufficiently diverse background and a wide spectrum of **relevant** experience.

…

Proposed Decision by the Dispute Settlement Body on Working Practices Concerning Panel Composition

[43] Chair Seck's proposed modifications appear in grey shading and italics. Other proposed changes are explained in Annex 1, section 9.1.

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][predictability];**

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

Hereby *decides* as follows:

1. This Decision establishes [rules] [procedures] [working practices] 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 at any time review or terminate 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][to the composition of panels], without prejudice to the parties' [right][ability] to agree on any or all panelists or on an alternative procedure for selecting them.

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][satisfy]. The Secretariat shall present to the parties a single list of persons [whom the Secretariat has been able to identify][known to the Secretariat] who *each* meet ~~[~~at least one~~]~~ ~~[any of~~] the requested criteria[s], to the utmost extent possible. Unless the parties agree otherwise, ~~T~~this list should normally comprise the names of between 12 and 20 persons, together with their [if possible updated] 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. [Paragraph 3 of Article 8 of the DSU remains unaffected.]

_____

[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] [the parties agree on the resulting panel composition as well as on the member of the panel who shall serve as chairman and whether these persons are available].

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[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 *, in the presence of the parties,* 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, or where an insufficient number of persons are available, the Secretariat shall ~~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 request~~s~~ed, at the moment of indicating criteria under paragraph 4, ~~[~~this Decision shall ~~be~~ apply~~ied~~ in such a manner that at least one panelist shall be from a developing country Member. To this end,] as necessary, the Secretariat shall select the developing country citizen obtaining the highest combined preference ~~shall be chosen~~.[w]

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[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*, including the panel's chairperson,* 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, [if possible][to the utmost extent possible] from the nominations proposed by the Secretariat, [to the extent they are available,] 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.

2.10 Effective compliance

2.10.1 Comments from the Chair on his statement on Effective compliance

2.142. The Chair's statement below on Effective compliance was circulated in advance of the DSB-SS meeting of 27 March 2019 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.143. The proposals on Effective compliance, which relate to distinct aspects of compliance with and enforcement of DSB rulings and recommendations, include:

- a joint proposal by a group of Members relating to effective remedies as well as temporary administrative measures in case of a failure to comply with DSB rulings and recommendations;
- a proposal by another Member on including in the calculation of the level of nullification or impairment the nullification or impairment suffered during the RPT; and
- a proposal by a further Member seeking to clarify that the level of nullification or impairment should be calculated from the expiry of the RPT and that the year of expiry of the RPT should be used as the relevant reference period.

2.144. A further proposal for a new obligation to be inserted in Article 22.7 of the DSU requires that the DSB be notified of any retaliatory measure taken pursuant to an authorization granted by the DSB and any amendment or termination of such measure. This proposal was discussed by the DSB-SS as part of its focused work on Sequencing. The present Chair's statement does not, therefore, include any further reference to this proposal.

2.145. During its focused work on Effective compliance, the DSB-SS did not hold substantive discussions on all aspects of the three above-mentioned proposals. Some proponents requested clarifications from the Secretariat regarding the origin and status of the texts of the proposals that the Secretariat had circulated. The sponsors of the joint proposal also stated that they were revisiting certain aspects of their proposal with a view to narrowing its scope and consolidating it. The proponents reserved their right to come back to this matter at a later stage.

2.146. Against this background, I have decided to circulate a Chair's statement rather than a Chair's text.

2.10.2 Comments from Members on the Chair's statement

2.147. One Member noted that effective compliance was essential for the proper functioning of the system and therefore deserves attention. Another Member recognized the importance of making compliance with DSB rulings and recommendations more effective, but expressed serious reservations about whether the proposals were the right ones to achieve that objective. A further Member questioned whether the proposals on Effective compliance would improve the functioning of the WTO dispute settlement. In that Member's view, the proposals are problematic because they would fundamentally change the nature of compliance by introducing retroactivity and distorting the concept of compliance.

2.10.3 Chair's statement

Joint proposal relating to effective remedies as well as temporary administrative measures in case of a failure to comply with DSB rulings and recommendations

In the context of the meetings of the DSB-SS on Effective compliance, I submitted a list of possible questions to the sponsors of the joint proposal. They were annexed to the meeting agendas. As no responses could be received to these questions during our focused work, it is useful for purposes of any follow-up work to record which aspects of the text or practical functioning of the joint proposal could be further examined. The article references identified below relate to the joint proposal as it currently stands.

With respect to effective remedies, the following aspects of the joint proposal may benefit from further clarification by the proponents:

- regarding the proposed additional sentence of Article 22.4, the question arises whether in the case of a developing country complaining Member the level of nullification or impairment would include not only lost trade, but also a separate estimate of the impact of the inconsistent measure on the economy of that Member, and if so, what kinds of direct or indirect economic "impact" could properly be taken into account;

- regarding the proposed additions to draft Article 22.6(b), there are questions around how authorizing other Members to suspend concessions or other obligations on behalf of the developing country complaining Member would operate in practice (e.g. when the developing country complaining Member would have to request that the DSB authorize other Members to suspend concession on its behalf and whether the other Members who would be granted authorization would have to be identified by name in advance, and whether once other Members have been authorized to suspend concessions on behalf of the developing country complaining Member, the latter would have given up its right to suspend concessions, and if not, whether all authorized Members could suspend concessions at the same time); and, finally,

- regarding the proposed new Article 22.3*bis*, I explored the possibility of using language that ensures consistency with the language of the current Article 22.2 of the DSU.

As regards the proposed Article 28*bis* concerning temporary administrative measures in case of a failure to comply with DSB rulings and recommendations, a question was submitted to further clarify what, precisely, the Secretariat would report in every DSB and General Council meeting about the implementation of temporary administrative measures.

Proposals concerning the calculation of the level of nullification or impairment

As noted, there are two separate proposals relating to the manner in which arbitrators acting under Article 22.6 of the DSU should calculate the level of nullification or impairment.

Proposal to include the RPT in the calculation of the level of nullification or impairment

First, the DSB-SS considered one Member's proposal to render compliance with rulings and recommendations of the DSB more effective by including the RPT for implementation of these rulings and recommendations in the calculation of nullification or impairment. This element of the proposal is reflected in document JOB/DS/14, which I had generally used as a basis for the group's discussion on Effective compliance.

According to the proponent, this proposal would include both a retroactive and a prospective element, because the complaining Member suffers nullification or impairment already during the RPT. The proponent submitted that its proposal would reduce the incentive for the responding party to maintain inconsistent measures until the end of the RPT or even during any subsequent compliance proceedings. According to the proponent, the proposal would thus help to bring about prompter compliance following the adoption of a panel report or panel and Appellate Body reports. The proponent also clarified that under its proposal, an Article 22.6 arbitrator would, upon request, make a separate determination of the level of nullification or impairment suffered during the RPT, in addition to the determination of the level of nullification or impairment suffered from the end of the RPT, and that the DSB would then be required to authorize an additional level of suspension (beyond the level of suspension that may already be authorized under the DSU as it currently stands) that reflects the level of nullification or impairment suffered during the RPT.

Proposal to calculate the level of nullification or impairment from the end of the RPT and using the year of expiry of the RPT as the relevant reference period

Second, the DSB-SS considered a proposal by another Member clarifying that the level of nullification or impairment should exclude any nullification or impairment suffered during the RPT and that the reference period for the Article 22.6 arbitrator's calculation should be the year in which the RPT expired. This proposal, while not reflected in document JOB/DS/14, was discussed by the DSB-SS after the circulation of that document and prior to the commencement of the sequential focused work in 2016.

In explaining its proposal, the proponent noted that it is often very difficult for a responding Member to correct inconsistent measures immediately after the DSB issues its rulings and recommendations. The proponent stated that if a responding Member needs a RPT to implement DSB rulings and recommendations, this is not a failure to comply and any impairment or nullification caused during any RPT that has been granted should therefore not be included in the calculation of the level of nullification or impairment. However, the proponent clarified that under its proposal an authorization from the DSB to suspend concessions or other obligations would include an amount covering nullification or impairment suffered during the period between the expiry of the RPT and the day of the DSB authorization. The proponent further observed that arbitrators acting under Article 22.6 needed guidance from Members regarding what reference period they should use to determine the level of nullification or impairment. The proponent indicated that its proposal regarding the relevant reference period codified the practice at the time the proposal was made.

As regards using the year in which the RPT expires as the reference period for calculating the level of nullification or impairment, the proponent explained that the phrase "unless circumstances require otherwise" would allow deviations from this approach, including using the year immediately after the year in which the RPT expires. It was further clarified in response to a question that the intention of the proposal is that an Article 22.6 arbitrator would use as a reference period, if possible, a period of the year in which the RPT ends (e.g. a six-month period in year 20XX). However, the reference period used would need to follow the end of the RPT (i.e. the six-month period following the last month of the RPT, which might for instance be March 20XX). One Member wondered in this respect how this would work in practice if, for instance, the RPT were to expire close to the end of a year, leaving, for instance, only two weeks as the relevant reference period for establishing the level of nullification or impairment.

During the discussions of this proposal, certain Members expressed support for the idea that the calculation of the level of nullification or impairment should include nullification or impairment suffered after the end of the RPT, but not nullification or impairment suffered earlier.

In view of the comments that Members made on this proposal, it is in my view useful for future work of the DSB-SS to insert it in the most recent draft legal text under consideration by the DSB-SS as a possible alternative amendment to Article 22.7. I have therefore included the proposal in Annex 1 to this document.[44]

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[44] See Annex 1 below, section 10.1.

2.11 Developing country interests

2.11.1 Comments from the Chair on his text on Developing country interests

2.148. The Chair's text below on Developing country interests was circulated in advance of the DSB-SS meeting of 27 March 2019 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

2.149. The Chair's text takes into account the views of Members expressed during the focused work conducted by the DSB-SS on Developing country interests. The Chair's text excludes certain elements relevant to Developing country interests that have been previously considered by the DSB-SS when conducting focused work on other issues, such as Third-party rights, Timeframes and Effective compliance.

2.150. The joint proposal on Developing country interests, on which the DSB-SS conducted focused work, has three main components:

- a proposed amendment to Article 4.10 of the DSU requiring Members to give special attention to problems and interests of developing country Members, including with regard to the venue for consultations and the questions to be answered by developing country responding Members during consultations;

- a proposed amendment to Article 21.3 of the DSU, requiring an arbitrator acting under that provision to give due consideration to the problems and interests of developing country Members in determining the RPT to implement DSB rulings and recommendations; and

- a proposed new Article 28 of the DSU and a related proposed new Appendix to the DSU, establishing a DSB Fund to facilitate developing country Members' effective use of dispute settlement procedures and requiring that in certain situations WTO adjudicators award legal costs to developing country Members unable to access the DSB Fund due to lack of WTO budget.

2.151. Thus, the joint proposal has essentially two prongs: one that seeks to ensure adequate consideration of developing country interests at the consultations and implementation stages and another that aims at making the WTO dispute settlement mechanism more accessible for developing country Members.

2.152. As there was limited engagement by Members on this issue, in the Chair's text below, I limited myself to identifying possible incremental changes to the text of each of the components of the proposal. These possible changes serve to clarify the text or operation of the relevant component. The following observations are provided to introduce the possible changes and identify issues or concerns by some Members that emerged during the focused work of the DSB-SS.

Proposal relating to developing country Members' problems and interests at the consultations stage

2.153. The proposal concerning Article 4.10 contemplates three changes. First, it introduces mandatory rather than exhortatory language to ensure that special attention be given during consultations to the developing country Members' problems and interests. Second, it gives developing country Members the right to determine the venue for consultations with developed country Members. Third, it provides for a mandatory deadline by which a complaining Member must submit to a developing country responding Member any written questions prior to the consultations. The focused work of the DSB-SS concentrated on the second and third proposed changes.

2.154. Regarding the obligation of developed country Members to accept a request of a developing country Member concerning the venue for the consultations, the co-proponents explained that the proposal is meant to address developing country Members' financial constraints, since travelling to Geneva for consultations is costly for them. In response to a question from the Chair, the co-proponents agreed that the current draft text is quite broad and could thus be appropriately circumscribed, as the preference was for consultations to be held in the territory of the developing country Member concerned, specifically its capital. Two co-proponents also indicated that with the

advances of technology, it could now also be contemplated that consultations would be held via videoconferencing, provided this was available and secure so that the confidentiality of the consultations could be safeguarded. They indicated that appropriate language could be built into the proposal.

2.155. During the discussions, some Members indicated that they were open to exploring the idea of holding consultations at a venue other than Geneva. One Member considered that different scenarios should be developed, as different developing country Members had different needs. Another Member made a cautionary note about the mandatory nature of the proposal. In its view, there should be an agreement between the parties to hold consultations outside Geneva, as aspects like efficiency and convenience also came into play for developed country Members even if they could financially afford holding consultations at another venue.

2.156. The Chair's text below seeks to reflect the incremental additional convergence that was achieved during the focused work by inserting into the proposed Article 4.10(a) an alternative version to express more clearly that when it comes to consultations, the co-proponents are mainly seeking to avoid the need for travelling, due to its cost implications, and that this could be achieved in a variety of ways, including, where appropriate, recourse to electronic communication.

2.157. Regarding the other proposal, which requires the complaining Member to give specified advance notice of questions that a developing country responding Member is invited to answer when the consultations take place, the co-proponents indicated in response to a question that there was no need to refer to questions that third parties participating in consultations may have, as only the complaining Member was typically given the opportunity to ask questions. One co-proponent suggested that for the avoidance of doubt it could thus be clarified in the draft text that the questions at issue in the proposal are questions posed by the complaining party.

2.158. One Member noted that the language of the proposal could be understood as precluding follow-up questions that might arise only during the consultations. One co-proponent explained that this was not the intention of the proposal. As Chair, I submitted for discussion a textual clarification to indicate that the questions at issue are questions "for which responses are requested on the date of holding the consultations", which would preserve the possibility of asking follow-up questions for which responses would be requested after the consultations. One co-proponent expressed the view that it was not necessary to insert this clarification.

2.159. Based on a question from the Chair, the DSB-SS also explored the practical operation of the proposed deadline for submitting questions in different situations, as it seemed possible that the 15-day deadline could not be met in all scenarios contemplated in Article 4.3 of the DSU. One co-proponent indicated that in view of the timeframes specified in Article 4.3 it appeared reasonable to specify in the proposed text that the complaining party is not expected to submit any questions before the developing country responding Member has responded to the request for consultations in accordance with Article 4.3.

2.160. Based on Members' discussions during the focused work, I included in the Chair's text below possible changes to clarify the proposal and its operation.

Proposal relating to consideration of the problems and interests of developing country Members in determining the RPT to implement DSB rulings and recommendations

2.161. The proposed amendment to Article 21.3 of the DSU requires that due consideration be given to the problems and interests of developing country Members in determining the RPT to implement rulings and recommendations of the DSB. One co-proponent clarified in response to a question from the Chair that this proposed obligation would apply in three situations and operates as follows:

- Where a developing country complaining Member prevailed in a dispute against a developed country responding Member, it should, for instance, be considered what impact on the economy of the developing country Member the grant of a longer RPT to the developed country Member could have.

- Where a developing country Member is the responding party, it should, for instance, be considered what particular challenges a developing country responding party would face in complying with DSB rulings and recommendations.

- Where all parties to the dispute are developing country Members, all developing country parties' interests should be considered.

2.162. The co-proponent also clarified that the proposed obligation would apply under all three methods set out in Article 21.3 for determining the RPT, and that the proposal is concerned with the problems and interests of any developing country Members involved in a dispute as parties.

2.163. One Member cautioned that it was less than clear what were relevant and appropriate problems and interests of developing country Members that an arbitrator acting under Article 21.3(c) would need to consider in determining the RPT and wondered whether a developing country Member could simply assert the existence of such problems and interests.

2.164. To clarify that the proposal applies to each subparagraph of Article 21.3 (such that developing country Member interests must be considered when the responding Member proposes an RPT, the parties agree on the RPT, or the RPT is determined by an arbitrator), I have included in the annexed Chair's text appropriate modifications to the proposed language of the provision. In the same vein I have included in the Chair's text below additional wording to clarify that the problems and interests to be considered are those of developing country Members that are parties to the dispute in which the RPT is to be established.

Proposal for the creation of a DSB Fund and award of legal costs to developing country Members

DSB Fund

2.165. The proposed new Article 28(a) requires the DSB to establish a DSB Fund, to be financed, *inter alia*, from the regular WTO budget, to facilitate access to and use of the WTO dispute settlement mechanism by developing country Members, whether it be as complaining or responding parties. A proposed new Appendix to the DSU sets forth the rules governing disbursements under the DSB Fund to developing country Members involved in dispute settlement.

2.166. In response to questions from the Chair regarding the method for allocating disbursements to developing country Members, two co-proponents explained that disbursements from the DSB Fund could be made on a first come, first served basis and that specific minimum amounts could be allocated for each quarter to ensure that some funds would be available throughout the year. One co-proponent further explained in response to a question that, in its view, if a disbursement from the DSB Fund was made to a developing country Member for one stage of the dispute settlement process, disbursement should also be made available for any subsequent stages that the dispute might reach. The co-proponent acknowledged, however, that this aspect of the proposal would need to be further clarified and elaborated.

2.167. Two Members expressed reservations about the creation of a DSB Fund in the light of the assistance already available to developing country Members involved in dispute settlement through the Advisory Centre on WTO Law (ACWL). One co-proponent noted in response that the services of the ACWL are not always available to Members due to conflicts of interest on the part of the ACWL and that even if in such cases a developing country Member party could obtain legal assistance from another source and benefit from subsidized lawyers' fees through that source, the fees that would be charged would still have to be financed by the developing country Member. Another Member indicated that it was generally supportive of the creation of a DSB Fund, but that more details needed to be provided regarding how funds would be distributed under such a fund.

2.168. Based on the aforementioned suggestions from co-proponents, I inserted in the Chair's text below an additional sentence at the end of paragraph 1 of the proposed new Appendix to achieve additional clarity on the important question of how disbursements would be made under the proposed DSB Fund.

Award by a WTO adjudicator of legal costs to developing country Members

2.169. The proposed new Article 28(b) requires a panel or the Appellate Body to award legal costs to a developing country Member prevailing in a dispute settlement proceeding against a developed country Member, either as complaining party or as responding party, provided that the developing country Member was unable to access the DSB Fund due to lack of WTO budget.

2.170. In response to questions from the Chair, one of the co-proponents explained that an award of legal costs was available only in circumscribed situations, i.e. if a developing country Member's measure had been found to be inconsistent with provisions of the covered agreements, or a developed country Member's claims against a developing country responding Member had failed. This is different from the proposed DSB Fund, under which disbursements would be available to a developing country Member already at the pre-litigation stage. And at the litigation stage, disbursements could be made under the DSB Fund regardless of the outcome of the dispute settlement procedures and also in disputes not involving developed country Members. According to that co-proponent, although legal costs can be awarded only if a developing country Member is unable to access disbursements under the DSB Fund, which are subject to the limits set forth in paragraph 5 of the proposed new Appendix, those limits should not apply to the award of legal costs, which would need to be awarded in full.

2.171. In response to a question about how a panel could meet its obligation to award legal costs at the end of panel proceedings if it does not know whether there would be an appeal and whether its conclusions would stand, one of the co-proponents expressed the view that the legal costs would be awarded by the panel subject to DSB adoption of the panel report (in the event of no appeal) or the panel and Appellate Body subject to DSB adoption of their reports (in the event of an appeal). The co-proponent explained that the award could be included in the panel's and Appellate Body's recommendations under Article 19 of the DSU.

2.172. A further question was posed to inquire about the time-period within which the developed country Member would have to pay for the legal costs awarded to a developing country Member. One co-proponent responded that there would seem to be two options. Either the panel or Appellate Body would determine such a time-period in their reports on a case-by-case basis. Or Members could establish a fixed *ex ante* deadline, such as six months from the adoption of the panel and Appellate Body report(s).

2.173. One Member stated that the proposal relating to the award of legal costs might be beneficial, but that further details needed to be provided to facilitate further evaluation of the proposal. As indicated, this could include the question of the time-period within which legal costs would have to be paid.

2.174. To reflect the explanations provided during Members' discussions on the award of legal costs, I have included in the Chair's text below a possible insertion to clarify the operation of the proposed new Article 28(b).

2.11.2 Comments from Members on the Chair's text

2.175. Several Members doubted that the proposals on Developing Country Interests would improve the functioning of the system and that after almost 25 years the system now needs the proposed changes. One Member stated that the proposals would in any event need more detailed discussions and work to take them further.

2.176. More specifically, regarding the venue for consultations, one Member expressed concerns that replacing the word "should" with "shall" in the chapeau of Article 4.10 of the DSU could lead to procedural difficulties, as the hard obligation would not match with the ambiguous and open-ended content of the first subparagraph. The Member cautioned that while this was not intended by the proponents, a hard obligation regarding venue preferences could be abused by a developing country Member to block the consultations process. The Member considers the textual qualifications proposed by the Chair to be helpful and finds the reference to video-conferencing interesting, but ultimately considers them to be still not sufficient to address the main concern related to the mandatory wording of the proposal. Regarding the proposal in the second subparagraph concerning advance notice of questions, that same Member wonders whether 15 days is the right period, even

taking into account the adjustments included in the Chair's text. The Member also questioned whether this subparagraph should use mandatory language.

2.177. One Member also wondered about the rationale behind the proposed amendment to Article 21.3 of the DSU and was unclear about how the proposed change would benefit the interests of developing country Members.

2.178. Finally, one Member expressed reservations about whether the proposed award of legal costs is the most appropriate way to increase developing country Members' participation in WTO dispute settlement.

2.11.3 Chair's text[45]

Article 4 – Consultations

…

10. During consultations Members ~~should~~ **shall** give special attention to ~~the~~ particular problems and interests of **the** developing country Members. **This includes *inter alia* the following:**

(a) Developed country Members shall accept the request from a developing country Member *[*regarding the venue for the consultations*] [that consultations be held in its capital or, where appropriate, via secure videoconferencing]*; and

(b) In the context of consultations involving a measure taken by a developing country *M*ember, any questions shall be submitted *by the complaining party* in writing at least 15 days before the date of holding of the consultations*, but not before the developing country Member has responded to the request for consultations in accordance with paragraph 3*.

…

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 a 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

[45] Chair Seck's proposed modifications appear in grey shading and italics, or in the case of proposed deletions, just in grey shading. Other proposed changes are explained in Annex 1, section 11.1.

adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

In *proposing, mutually agreeing on or* determining the reasonable period of time, due consideration shall be given to the problems and interests of developing country *M*embers *that are parties to the dispute*.

_____

[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.

…

Article 28 (proposed)

28. (a) The DSB shall establish a fund called the DSB Fund to facilitate the effective utilisation of the dispute settlement procedures by developing country Members. The disbursement from this fund shall be made in accordance with the provisions of Appendix [X].

(b) In a dispute between a developed and developing country Member, where a developing country Member is unable to access the DSB Fund due to lack of budget, the panel or the Appellate Body shall award legal costs to the developing country Member *as part of its recommendations under Article 19* in the case where the developed country Member's measures have been found inconsistent with the covered agreements or a developed Member's claims do not succeed in a dispute against a developing country Member.

…

APPENDIX [X]

Disbursements under the DSB Fund shall be made in accordance with the following criteria:

1. The DSB Fund shall be available to all developing country Members where they are parties in a dispute in the WTO as complainants, co-complainants or respondents. *Disbursements under the DSB Fund shall be made every quarter on a first come, first served basis.*

2. The DSB Fund established under Article 28 shall be financed from the regular WTO budget. Voluntary Contributions could also be accepted for this fund.

3. The DSB Fund shall have an initial corpus of 4 million CHF and thereafter an annual budget of 2 million CHF. From the initial corpus, 2 million CHF shall be put in a buffer fund called the DSB Operation Fund. The DSB Operation Fund will be utilized only if the DSB Fund has lapsed in any fiscal year. At the end of any fiscal year, the money left unspent in the DSB Fund shall be transferred to the DSB Operation Fund. In case the amount is less than 2 million CHF in the DSB Operation Fund in any fiscal year, the DSB Operation Fund shall be recouped in the next fiscal year from the regular budget of the WTO.

4. Only cost incurred by a developing country Member towards payment of the fee and charges to the lawyers/legal firms shall be reimbursed from the DSB Fund.

5. The reimbursement in each dispute shall be limited to the following amounts:[ε]

Stage of the Dispute Settlement Process	Maximum Amount to be Reimbursed
Consultations	CHF 28, 261
Panel	CHF 85, 359
Appellate Body	CHF 50, 562
Article 21.3 (c)	CHF 21, 532
Article 21.5 Panel	CHF 37, 104
Article 21.5 AB	CHF 34, 221
Article 22.6 Panel	CHF 22,109
Total	CHF 279,148

[ε] The adequacy of these amounts shall be reviewed by the Committee on Budget, Finance and Administration every two years.

6. A developing country Member shall be eligible for reimbursement from the Fund for a maximum of two disputes per year.

7. The developing country Member concerned shall present a bill for the reimbursement of the legal costs after each stage of the dispute settlement process. The Secretariat, upon confirmation of the availability of funds, will release the payment.

8. The Committee on Budget, Finance and Administration shall oversee the functioning of these funds and the General Council shall annually review the adequacy and utilization of the funds with a view to improving its effectiveness.

2.12 Flexibility and Member control and Additional guidance for WTO adjudicative bodies

2.12.1 Comments from the Chair on his statement on Flexibility and Member control, and on Additional guidance for WTO adjudicative bodies

2.179. The Chair's statement below on Flexibility and Member control, and Additional guidance for WTO adjudicative bodies, was circulated by the Chair on 17 June 2019 and presented under the Chair's own responsibility. It is without prejudice to Members' final positions.

Flexibility and Member control

2.180. The proposals on Flexibility and Member control, which were put forward by two co-proponents, seek to amend the DSU to provide Members with greater flexibility and control over dispute settlement proceedings and their outcomes. These proposals comprise the following components:

- a proposal for a revised provision on the suspension of panel proceedings;
- a proposal for partial deletion of the content of panel and Appellate Body reports upon agreement of the parties;
- a proposal for partial adoption of panel and Appellate Body reports by consensus of the DSB (which consists of both proposed DSU amendments and a proposed DSB decision);
- a proposal for suspension of Appellate Body proceedings upon request of the parties;
- a proposal for an interim review stage on appeal; and
- a proposal for mutually agreed solutions to appeals.

2.181. A further component of Flexibility and Member control, which concerns the composition of dispute settlement panels, is addressed in the Chair's text on Panel Composition. The present Chair's statement does not, therefore, include any further reference to this component.

Additional guidance for WTO adjudicative bodies

2.182. One of the two co-proponents on Flexibility and Member control also put forward a proposal for a DSB decision on additional guidance for WTO adjudicative bodies. The proposed additional guidance concerns three identified parameters:

- the use of public international law;
- the interpretative approach to be followed in WTO dispute settlement; and
- the measure under review in WTO dispute settlement.

2.183. During the time set aside for focused work on Flexibility and Member control, and Additional guidance for WTO adjudicative bodies, the DSB-SS could not engage in substantive discussions on the above-mentioned proposals. This is because one of the co-proponents indicated that it had not completed its internal consultations on the various proposals. The co-proponents reserved the right to come back to this matter at a later stage.

2.184. Against this background, I have decided to circulate this Chair's statement rather than a Chair's text.

2.12.2 Chair's statement

> In convening meetings of the DSB-SS on Flexibility and Member control, and Additional guidance for WTO adjudicative bodies, I submitted possible questions to the sponsors of these proposals. As no responses were received to these questions during our focused

work, it is useful for purposes of any follow-up work to record which aspects of the text or practical functioning of the proposals could be further examined.

Flexibility and Member control

With respect to the proposals on Flexibility and Member control, the following aspects may benefit from further clarification by the co-proponents:

- regarding the proposal for partial deletion of the content of panel or Appellate Body reports upon agreement of the parties, questions that arise include:

  (a) when the parties would have to approach the panel regarding what they do not wish the panel to include in its report, i.e. during the interim review stage of the panel proceeding or only after the panel has issued its confidential final report to the parties,

  (b) whether the Appellate Body would have to delay the circulation of its report to give the parties time to reach agreement on any finding or rationale that they would not like the Appellate Body to include in its report, and if so, whether the 60/90-day time-period for completing Appellate Body proceedings provided for in Article 17.5 of the DSU would need to be adjusted upwards to accommodate this new procedural step, and by how many days, and

  (c) whether panel and Appellate Body reports circulated to Members would make transparent where in the public version of the reports an exclusion has occurred, for instance in the same way that is already the case for any redactions of confidential information;

- regarding the proposal for partial adoption by the DSB of findings contained in panel or Appellate Body reports, there are questions around how the proposal would operate in practice, including:

  (a) whether a separate WTO document would need to be circulated in the DS series after a panel or Appellate Body report has been circulated to Members and adopted by the DSB, to identify any specific finding or rationale that the DSB has decided not to adopt,

  (b) whether the DSB would be required to decide on any non-adoption of a finding or rationale in a panel or Appellate Body report during the same DSB meeting at which the report is adopted, such that the opportunity for partial adoption would be lost if the right were not exercised at the same time as the report is adopted, and

  (c) whether it is correct that a Member's request for non-adoption of certain findings or rationales could only cover those parts of the panel report that had not been appealed and thus had not in the meantime formed the basis for the Appellate Body's consideration of allegations of error;

- regarding the proposal for the suspension of Appellate Body proceedings upon request of the parties, a question that arises is whether, unlike the proposal for a time-limited suspension of panel proceedings, an appeal could be suspended indefinitely and even permanently, and if so, what indefinite suspension of an appeal would mean systemically for the status of the underlying panel report that has been circulated, but not adopted;

- regarding the proposal for an interim review stage on appeal, similar questions arise as in the case of partial deletion of the content of Appellate Body reports, i.e. whether the 60/90-day time-period for completing Appellate Body proceedings provided for in Article 17.5 of the DSU would need to be adjusted upwards to accommodate this new interim review stage on appeal, and if so, how much

additional time the Appellate Body should be allowed for carrying out the new stage, including any further meeting with the parties; and, lastly,

- regarding the proposal for mutually agreed solutions to appeals, and specifically the scenario in which the parties have reached a solution to the appeal (but not a solution to the matter), a question that arises is whether the language proposed in Article 17.13 ("if a party … so requests") is intended to allow the adoption of the underlying panel report to become optional, which would appear to be a possible consequence in cases where no party requests that the DSB adopt the circulated panel report.

Additional guidance for WTO adjudicative bodies

With respect to the proposed DSB decision on Additional guidance for WTO adjudicative bodies, the following aspects may benefit from further clarification by the proponent:

- whether WTO adjudicators would be required, rather than merely invited, to follow this Guidance in addition to the DSU rules, and if so, how this Guidance would fit within the analytical framework of the customary rules of interpretation referred to in Article 3.2 of the DSU; and

- whether the guidance as presently drafted (in section B concerning the "second type" of gap-filling) indicates that, when faced with unresolved ambiguity, a WTO adjudicating body engaging in treaty interpretation should adopt (i) a plausible meaning favouring the responding party in case the ambiguous provision at issue is the basis for a claim and (ii) a plausible meaning favouring the complaining party in case the ambiguous provision is the basis for a defence invoked by the responding party; if that is not the intention and an unresolved ambiguity should rather favour the responding party in both situations, it could be reviewed whether the relevant text of the Guidance could be further clarified.

ANNEX 1: PROPOSED DRAFT LEGAL TEXTS THAT FORMED THE BASIS OF THE FOCUSED WORK CONDUCTED

Previous Chairs' draft legal texts were used as basis for focused work. This was with a view to taking into account extensive prior work of the DSB-SS on the issues under negotiation. During the focused work conducted, Members submitted new or updated proposals as reflected below.

Unless otherwise indicated, the draft legal texts compiled in Annex 1 contain proposals for amendments to the text of the DSU. References to article numbers and appendices in these texts are to those contained in the DSU in force, except where new articles or appendices are proposed.

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1 MUTUALLY AGREED SOLUTIONS

1.1 Relevant parts of JOB/DS/14 reproduced in RD/TN/DSB/1[46]

PROVISION	PROPOSED TEXT	SOURCE
Article 3 - General Provisions		
Article 3.6	6. ~~Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.~~ **Where the parties to a dispute reach a mutually agreed solution with respect to a matter raised under the dispute settlement provisions of the covered agreements, each party shall notify the solution to the DSB and relevant Councils and Committees. The parties shall submit jointly or, if a party so prefers, separately, the notification in writing within 14 days after reaching the solution and shall set out in detail the terms of the solution. Any Member may raise any point relating to the solution in the DSB and the relevant Councils and Committees.**	**JOB/DS/3, para. 46. (See also JOB/DS/4, paras. 77-79 and JOB/DS/2, p. 7.)**

[46] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

2 THIRD-PARTY RIGHTS

2.1 Relevant parts of JOB/DS/14 reproduced in RD/TN/DSB/7[47]

PROVISION	PROPOSED TEXT	SOURCE
Article 4 - Consultations		
Article 4.11	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 the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB.~~ **The Member to which the request for consultations was addressed undertakes to accord sympathetic consideration to any representations made by the applicant Member concerning its reasons to be joined in the consultations. The applicant Member shall be joined in the consultations unless the Member to which the request for consultations was addressed notifies the applicant Member and the DSB, within 7 days after the date of receipt of the request to be joined in the consultations, that it considers that the claim of substantial trade interest is not well-founded.**	**Enhanced Rights for Third Parties – Consolidated (Non-Consensus) Text of G7 and "Friends" (13 November 2012)**

[47] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

PROVISION	PROPOSED TEXT	SOURCE
Article 10 – Third Parties		
Article 10.2	2. ~~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") 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.~~ **(a) Any Member 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. [FRIENDS: The panel shall decide, in consultation with the parties to the dispute, whether a Member may participate as a third party if its notification of interest is submitted after this 10-day period.]**	**Enhanced Rights for Third Parties – Consolidated (Non-Consensus) Text of G7 and "Friends" (13 November 2012)**
	(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 4 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 [G7: the first / FRIENDS: each] substantive meeting set aside for that purpose; and** **(iv) respond in writing to questions arising out of such a session.**	**Enhanced Rights for Third Parties – Consolidated (Non-Consensus) Text of G7 and "Friends" (13 November 2012)**
Article 10.3	3. ~~Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.~~ **(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 4 of Article 18.[b]** **[b] This provision does not preclude third parties from receiving information designated by a Member as strictly confidential if this is expressly provided for in the specific procedures adopted by the panel in accordance with paragraph 4 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.**	**Enhanced Rights for Third Parties – Consolidated (Non-Consensus) Text of G7 and "Friends" (13 November 2012)**

2.2 Updated proposal by the Friends of Third Parties (JOB/DS/21/Rev.1)

Introduction

This communication is submitted at the request of [the Proponents] and provides a revised version of the proposals contained in documents JOB/DS/6 and JOB/DS/14.

For convenience, the proposals below replace those contained in previous documents. Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Following previous practice, footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

Consultations

The Proponents support the proposed amendment to Article 4.11 of the DSU, contained in document JOB/DS/14, which reflects an emerging consensus of the Members by May 2013. For convenience, the text is reproduced below:

> 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 the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB.~~ **The Member to which the request for consultations was addressed undertakes to accord sympathetic consideration to any representations made by the applicant Member concerning its reasons to be joined in the consultations. The applicant Member shall be joined in the consultations unless the Member to which the request for consultations was addressed notifies the applicant Member and the DSB, within 7 days after the date of receipt of the request to be joined in the consultations, that it considers that the claim of substantial trade interest is not well-founded.**
>
> **(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.

Under the current DSU provisions, a Member can request to join consultations if it considers that it has a "substantial *trade* interest" on the matter at issue. There is no definition of, nor guidelines to determine a "substantial trade interest". It is the Member to which the request for consultations was addressed who decides whether the request of the Member wishing to join consultations is well-founded.

Furthermore, to be joined in the consultations, Article 4.11 requires an *action* by the Member to which the request for consultations was addressed: i.e., to agree that the claim of substantial interest is well founded and to notify its decision to the requesting Member. There is no obligation for the Member to which the request for consultations was addressed to respond to the requests to be joined in the consultations nor the obligation to inform the DSB about which requests were accepted or denied.

The proposal to amend Article 4.11 of the DSU has essentially two objectives: a) without defining "substantial trade interest", to provide responding Members with enough flexibility to accord "sympathetic consideration to any representations made" by any Member concerning its reasons to join consultations. This language is similar to the one used in current Article 4.2 of the DSU. This proposal would not change in any way the discretion that Members to which the request for consultations was addressed have in deciding whether to accept or not Members' requests to join consultations; b) To increase transparency and efficiency. All requests to join consultations would be considered to have been accepted unless denial to join consultations is notified to the requesting Members and to the DSB. In other words, action by the Member to which the request for consultations was addressed is required only if it intends to deny any request to join the consultations. Additionally, WTO Members would have information as to whom was accepted or rejected to participate in the consultations.

Panel proceedings

The proposals on Article 10 address three issues:

a) The codification of the 10-day period after the establishment of a panel to request a participation as a third party (Article 10.2(a)).
b) The third-party rights during panel proceedings (Article 10.2(b) and 10.2(c)); and
c) Clarifications about the submissions that would be made available to third parties.

Article 10.2(a) of the DSU (10-day period)

The proposed text is reproduced below:

> 2. ~~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") 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.~~
>
> **(a) Any Member 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. Unless agreed otherwise by the parties to the dispute, any notification received after the 10-day period will be considered by the panel. The panel shall decide, after consulting with the parties to the dispute, to allow a Member to participate as a third party if its notification of interest is submitted after this 10-day period, provided that doing so would not unduly affect the panel proceedings or prejudice the interests of any of the parties to the dispute. In accordance with Article 8.3, the acceptance of a request after the 10-day period from a Member whose citizen has been appointed to the panel is subject to the agreement of the parties to the dispute.**

Practice has been consistent in allowing any Member to express its interest in becoming a third party within 10 days as from the moment of establishment of a Panel. There have been cases in which Members have requested to become a third party after this deadline. There is no precise procedure to address those cases; in particular, when the disputing Parties disagree with respect to whether a particular Member could be accepted as a third party.

The proposal seeks to codify the 10-day period for requesting a participation as a third party. The proposal also seeks to establish a procedure to address those situations in which a Member requests participation as a third party after the 10-day deadline.

Article 10.2(b) and 10.2(c) of the DSU (third-party rights)

The proposed text is the following:

> **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 4 of Article 18 is discussed;**
>
> **(ii) make an oral statement to the panel at a session at the first substantive meeting set aside for that purpose;**
>
> **(iii) make a written submission after the rebuttal submissions of the parties to the dispute but prior to the second substantive meeting; and**
>
> **(iv) respond orally and in writing to questions arising out of each session set aside for third parties at each substantive meeting held prior to the issuance of the interim report.**
>
> **c) The panel may grant third-party rights additional to those listed in paragraph (b) only upon agreement by the parties to the dispute.**

Article 10.1 of the DSU guarantees that the "interest of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be *fully taken into account during the panel process*" (emphasis added).

In the view of the Proponents, current rules are inadequate to fully take into account the interests of third parties. This inadequacy is due to the limited access to information; and the impossibility to express any views after the first substantive meeting of the Panel with the Parties; particularly, views regarding new arguments and counterarguments submitted by the Parties after that first substantive meeting.[48]

Article 12.1 of the DSU provides the Panel with the discretion to adopt Working Procedures, in consultation with the Parties. Such Working Procedures could fully take into account the interests of third parties. Panels have used this discretion in the past to enhance third-party rights. Enhanced third-party rights have been adopted on an *ad hoc* basis and have varied in scope.[49]

The proponents are mindful of the need to maintain a distinction between the role of the Parties to a dispute and that of the third parties; as well as the need to avoid any interference with the efficiency of the Panel's proceedings. In this regard, the Proponents are of the view that a balance should be achieved between efficiency of the proceedings on the one hand; and a meaningful participation of third parties on the other hand.

[48] Normally, third parties only have access to the first written communications of the Parties to the dispute.

[49] See for example *Canada – Renewable energy / Feed-in tariff*; *US – Cool* and *US-Cool (21.5)*; *EC-Bananas*, *EC-Bananas (21.5)* and *EC-Bananas (21.5) II*; *EC-Tariff preferences*; *EC-Hormones*.

Bearing in mind the need for that balance, there has been an evolution in the thinking of the Proponents regarding third party rights during the panel proceedings. In this regard, the Proponents would like to see the following third-party rights reflected in an amendment to the DSU:

a) The right to receive copies of all submissions and statements by the Parties, including responses to panel questions, up to immediately before the issuance of the interim report.
b) The right to be present for the entirety of all substantive meetings of the Panel with the Parties. Third parties would only participate and respond to questions from the Panel during the session that is specifically designated for that purpose.
c) The right to respond to questions from the Panel during the proceedings, up to immediately before to the issuance of the interim report.

These rights relate to access to information and are intended to improve transparency. In no way, these rights would increase the workload of the disputing Parties and/or the Panel and the WTO Secretariat.

Additionally, Article 10 of the DSU provides that a third party "shall have an opportunity to be heard by the panel and to make written submissions to the panel". Unless the Panel exercises its discretion to adopt different Working Procedures, Appendix 3 of the DSU foresees the *moments* in which a panel may give these opportunities to the third parties.

In practice, both the written communication and the statement of a third party, address the arguments raised by the Parties to the dispute in their first written communications. The Proponents are of the view that this is inefficient: third parties have the opportunity to comment *twice* on the *same set of documents* (i.e., the first written communications of the Parties to the dispute). In this manner, third parties miss the opportunity to comment on issues that are discussed *after* the first substantive meeting of the Panel with the Parties.

In the view of the Proponents, this inefficiency can be solved by redistributing the *moments* in which those submissions and statements can be delivered. This redistribution would improve the participation of third parties. In this regard, the Proponents would like to propose the following:

a) To deliver an oral statement during the first substantive meeting of the Panel with the Parties, during a session dedicated to third parties.

b) To submit a written communication before the second substantive meeting, but after the submission of the written rebuttals of the Parties to the dispute.

With this proposal, third parties would maintain the same two opportunities to express their views. However, third parties would have the opportunity to address different aspects of the dispute, at different points in time. Because third parties would maintain the same two opportunities to express their views, it is not expected that there will be an increase in the workload of the Parties to the dispute, the Panel and the WTO Secretariat team.

Furthermore, the Parties to the dispute would have to comment on the same amount of interventions and they would also have ample opportunities to comment on submissions and statements made by third parties (i.e., during the first substantive meeting; in the written rebuttals; during the second substantive meeting; and in their responses to the Panel's questions).

Finally, if these proposed amendments are accepted, the Proponents consider that any additional right to third parties should be granted by a Panel only upon agreement by the parties to the dispute.

Article 10.3 of the DSU (submissions)

The proposed text is the following:

> 3. ~~Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.~~
>
> **(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 4 of Article 18.[b]

_____

[b] This provision does not preclude third parties from receiving information designated by a Member as strictly confidential if this is expressly provided for in the specific procedures adopted by the panel in accordance with paragraph 4 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.

The proposal seeks to amend the DSU in order to make it clear that third parties would receive written submissions up to the issuance of the interim report. The proposal further clarifies that the submissions shall be received at the time such submissions are made, except for information designated as strictly confidential pursuant to paragraph 4 of Article 18. Footnote b provides that this provision does not preclude third parties from receiving strictly confidential information if that is allowed by the procedures adopted by the panel in accordance with paragraph 4 of Article 18 of the DSU.

Appellate Proceedings

The Proponents seek to amend Article 17.4 of the DSU as follows:

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

(b) Each third party 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 9 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) ~~Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.~~ **Each third participant shall have an opportunity to be heard by and to make a written submission to 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.

In accordance with Article 17.4 of the DSU, third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body. Thus, in all phases of the dispute settlement mechanism but the appellate proceedings, any Member may notify its interest to be joined as a third party.

The proposal seeks to open the possibility for Members that have not been third parties in panel proceedings to become third participants in appellate proceedings.

Compliance Panel Proceedings

The proposal seeks to amend a proposal under paragraph 5 of Article 21 as follows:

> 5. **(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.~~ The complaining party may request the establishment of a panel without requesting consultations.**

The proposal intends to clarify what appears to be a general understanding among delegations participating in the DSU review. That is, if the complaining party decides to request consultations, where applicable, third parties would be allowed to participate in such consultations in accordance with Article 4 of the DSU.

Post-retaliation proceedings

The Proponents supports the text contained in document JOB/DS/14. For convenience, the text is reproduced as follows:

> 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. Any Member may participate as a third party before the arbitrator by notifying its interest to do so to the DSB and to each party to the dispute no later than 10 days after the referral of the matter to arbitration. Article 10 shall apply *mutatis mutandis*.
>
> 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, 4, 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.

The participation of third parties is not addressed under current Article 22 of the DSU. In practice, such participation is subject to the discretion of the arbitrator, in accordance with Article 12.1 of the DSU. The arbitrator, after lengthy discussions, takes the decision to allow or deny the participation of third parties. The participation of third parties in these proceedings is, therefore, uncertain and time-consuming. In view of that, the proposal seeks to grant Members the possibility to participate as third party in the proceedings under Article 22.6 of the DSU.

If Members agree on an appeal proceeding under Article 22.7, third parties should also be allowed to participate in such a proceeding. This proposal is without prejudice to the proponents' views on the inclusion of an appeal proceeding under Article 22.7.

2.3 A new and separate proposal on third-party participation in consultations (JOB/DS/22/REV.1)

Third-party participation in consultations

Article 4.11 of the DSU:

11. 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, 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. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. **The Member to which the request for consultations was addressed shall endeavor to notify the DSB and the Member requesting to join in the consultations of its agreement within a reasonable period of time [X days (for ex. 5 days)] prior to the date of consultations.** ~~In that event they shall so inform the DSB.~~ If the 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.

[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.

3 STRICTLY CONFIDENTIAL INFORMATION

3.1 Relevant parts of JOB/DS/14 reproduced in RD/TN/DSB/14[50]

PROVISION	PROPOSED TEXT	SOURCE
Article 18 – Communications with the Panel or Appellate Body		
Article 18.4	**4. Where requested by a party to the dispute, the panel shall adopt procedures for the treatment of Strictly Confidential Information (SCI) after consulting the parties to the dispute. The Appellate Body and the arbitrator[α] shall, after consulting the parties, adopt procedures that afford the same level of protection as provided by the panel and that allow for the designation as SCI of newly-submitted information. SCI procedures adopted pursuant to this provision shall incorporate directly or by reference the minimum provisions set in Appendix 5.** **[α] The expression "arbitrator" shall be interpreted as referring either to an individual or a group acting pursuant to DSU Articles 22 or 25.**	**Revised SCI proposals in DSU – May 2012**
Article 18.5	**5. Subject to paragraphs 5 and 6 of Appendix 5, where a party or a third party designates information it has submitted as SCI through procedures adopted pursuant to Article 18.4, including information submitted through the information-gathering procedures of Annex V of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the adjudicator[β], the Secretariat, the parties to the dispute, third parties and the representative designated under the SCM Agreement, shall treat the information as SCI and in accordance with the requirements of the SCI procedures established for this purpose. [Where information has been designated as SCI, it shall retain this designation until the party making the designation withdraws it. / or / Information obtained in this manner shall be used only for the purposes of the proceedings under the DSU].** **[β] The expression "adjudicator" refers to panels, the Appellate Body and arbitrators acting pursuant to DSU Articles 22 or 25.**	**Revised SCI proposals in DSU – May 2012**
Appendix 3 – Working Procedures		
Paragraph 3*bis* (proposed)	**3*bis*. Information designated by a Member as strictly confidential shall be treated in accordance with the adopted procedures.**	**Revised SCI proposals in DSU – May 2012**
Appendix 5 – Strictly Confidential Information (proposed)		
Paragraph 1 (proposed)	**1. In accordance with Article 18 of this Understanding, the following rules shall be incorporated directly or by reference into procedures established for the protection of SCI.**	**Revised SCI proposals in DSU – May 2012**
Paragraph 2 (proposed)	**2. In acknowledgement of the intention that procedures established for the protection of SCI be used only in exceptional circumstances, each party or third party shall act in good faith and exercise the utmost restraint in exercising its rights under these procedures.**	**Revised SCI proposals in DSU – May 2012**
Paragraph 3 (proposed)	**Definition**	**Revised SCI proposals in**

[50] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

	3. "Strictly confidential information" means: specific information, including business confidential information, in any form, that (i) is secret in the sense that it is not in the public domain; (ii) has been the subject of reasonable efforts by the individual or entity lawfully in control of the information to keep it secret; and (iii) if disclosed would cause or threaten to cause serious harm to an essential interest of that individual or entity.	**DSU – May 2012**
Paragraph 4 (proposed)	**Designation of SCI by a Party or Third Party** **4. When submitting information, a party or third party may designate all or any part of that information as SCI provided that such information meets the definition of SCI.**	**Revised SCI proposals in DSU – May 2012**
Paragraph 5 (proposed)	**Objections by a Party to Designations and Non-Designations of SCI** **5. Information designated by a party or third party as SCI shall be presumed to be SCI unless a party objects to the designation. Upon an objection, the panel shall decide if the information meets the definition of SCI. If the panel decides that the information does not meet the definition, the party or third party submitting it shall promptly:** **(i) withdraw the designation of the information as SCI; or** **(ii) withdraw the information, in which case the panel, the parties and the third parties shall promptly return to the party or third party submitting it any physical copies and destroy any electronic copies, and refrain from disclosing its content.**	**Revised SCI proposals in DSU – May 2012**
Paragraph 6 (proposed)	**6. If a party considers that information submitted by another party or a third party should have been designated as SCI and it objects to such submission without the designation, the panel shall decide if the information meets the definition of SCI. If the panel decides that the information meets the definition, the party or third party submitting it shall promptly:** **(i) designate the information as SCI; or** **(ii) withdraw the information, in which case the panel, the parties and the third parties shall promptly return to the party or third party submitting it any physical copies and destroy any electronic copies, and refrain from disclosing its content.**	**Revised SCI proposals in DSU – May 2012**

Proposed DSB decision on strictly confidential information in JOB/DS/14

PROPOSED TEXT	SOURCE
The DSB takes note of Document [XX] that has been circulated to Members. This document is designed to further transparency and to provide a reference tool when parties to a dispute are considering requesting the adoption by the panel of additional procedures for the protection of Strictly Confidential Information (SCI). It contains examples of procedures adopted in past disputes for the protection of confidential business information and other highly confidential information. **In addition, the DSB directs the WTO Secretariat and the Appellate Body Secretariat to make publicly available on the WTO website any procedures adopted by a panel, the Appellate Body or an arbitrator for the protection of SCI.**	**Revised SCI proposals in DSU – May 2012**

3.2 A new and separate proposal on confidential information (JOB/DS/23)[51]

PROVISION	PROPOSED TEXT
Article 10.2 of the DSU	**(a) ...** **(b) Each third party has the right to:** **(i) be present at any substantive meeting of the panel with the parties to the dispute preceding the issuance of the interim report to the parties [subject to the procedures adopted by the panel in accordance with paragraph 3 of Article 18];**
Article 10.3 of the DSU	**(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 [subject to the procedures adopted by the panel in accordance with paragraph 3 of Article 18]**
Article 18.3 of the DSU	**Where requested by a party to the dispute, the panel shall adopt procedures for the treatment of confidential information after consulting the parties to the dispute. The Appellate Body and the arbitrator[a] shall, after consulting the parties to the dispute, adopt procedures that afford at least the same level of protection as provided by the panel.** _____ **[a] The expression "arbitrator" shall be interpreted as referring either to an individual or a group acting pursuant to DSU Articles 22 or 25.**
Article 18.4 of the DSU	**Where a party or a third party designates information it has submitted as confidential through procedures adopted pursuant to Article 18.3, including information submitted through the information-gathering procedures of Annex V of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the adjudicator[b], the Secretariat, the parties to the dispute, third parties and the representative designated under the SCM Agreement, shall treat the information as confidential in accordance with the requirements of the procedures established for this purpose. Information designated as confidential shall be used only for the purposes of the proceedings under the DSU, during which this information was submitted. Where information has been designated as confidential, it shall retain this designation until the party making the designation withdraws it.** _____ **[b] The expression "adjudicator" refers to panels, the Appellate Body and arbitrators acting pursuant to DSU Articles 22 or 25.**

[51] The proposal is based on the relevant parts of the draft legal text contained in JOB/DS/14.

4 SEQUENCING

4.1 Relevant parts of JOB/DS/14 reproduced in RD/TN/DSB/19[52]

PROVISION	PROPOSED TEXT	SOURCE
Article 21.5	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 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 all relevant information including a description of any measure it considers achieves compliance, 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 ~~these dispute settlement procedures, including wherever possible resort to the original panel.~~ **the [rules and] procedures [provided for under][of] this Understanding [and relevant special or additional rules and procedures identified in Appendix 2], as modified by this paragraph.**[γ] _____ [γ] **This is without prejudice to the right of a party to initiate new dispute settlement procedures under Articles 4, 5, 6 and 25 of this Understanding.** **(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. [FRIENDS: The complaining party may request the establishment of a panel without requesting consultations.]** **(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 same persons shall serve on this panel as served on the original panel. If any member of the original panel is not available, unless the parties to the dispute agree otherwise, the Director-General shall appoint a replacement within 14 days after the date of establishment of the panel, after consulting with the parties.** **(iii)** The panel shall circulate its report within 90 days after the date of ~~referral of the matter to it~~ it**s**	**Sequencing Working Text – 10 March 2011** *Shaded text in (c)(i):* **Consolidated G7/Friends of third parties text – 13 November 2012**

[52] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

PROVISION	PROPOSED TEXT	SOURCE
	establishment. When**re** 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 ~~submit~~ **circulate** 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		
Article 22.2*bis* (proposed)	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:** **(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 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.[δ]** _____ **[δ] Recourse to new dispute settlement procedures as foreseen in footnote [1] does not constitute recourse to proceedings under paragraph 5 of Article 21. Recourse to arbitration under Article 25, as foreseen in footnote [1], does not constitute recourse to proceedings under paragraph 5 of Article 21, unless the parties to the arbitration agree otherwise.**	**Sequencing Working Text – 10 March 2011**
Article 22.6	**6. (a)** ~~When~~ **Following one of** 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. **[FRIENDS: Any Member may participate as a third party before the arbitrator by notifying its interest to do so to the DSB and to each party to the dispute no later than 10 days after the referral of the matter to arbitration. Article 10 shall apply *mutatis mutandis.*]**	**Sequencing working text – 10 March 2011** *Shaded text in (a):* **Consolidated G7/Friends of third parties text – 13 November 2012**

PROVISION	PROPOSED TEXT	SOURCE
	(b) Such arbitration shall be carried out by the original panel~~, if members are available, or by an arbitrator[15] 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 [within X days], after consulting with the parties. The arbitration** shall be completed within 60 days ~~after the expiry of the reasonable period of time~~ **of the appointment of the arbitrator.[15] 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.	*Shaded text in (b): Based on commentary in Sequencing Working Text of 10 March 2011*
Article 22.7	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 or 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, [FRIENDS: 4,] 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.	**Sequencing working text – 10 March 2011** *Shaded text: as contained in Chairman's text of July 2008 (JOB(08)/81)* *Shaded text: as contained in Chairman's text of July 2008 (JOB(08)/81)* *Square brackets within shaded text:* **Enhanced Rights for Third Parties – Consolidated (Non-Consensus) Text of G7 and "Friends" (13 November 2012)**
	… **The authorized Member shall notify the DSB of any measure taken pursuant to the authorization granted by the DSB and any amendment or termination of the measure. The Member shall submit the notification, including any relevant information, in writing no later than**	**JOB/DS/4, para. 34.**

PROVISION	PROPOSED TEXT	SOURCE
	28 days after the date on which the measure, its amendment or termination takes effect.	

5 POST-RETALIATION

5.1 Relevant parts of TN/DS/25, JOB(04)/52/Rev.1, and JOB(05)/47/Rev.1, reproduced in RD/TN/DSB/26[53]

DSU Article 22.8			
	G6	**Joint proposal by two co-proponents**	
(a) <u>Note:</u> *G6 proposal moves second sentence of Article 22.8 to subpara. (e) below*	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.	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. 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.	(a)
(b) <u>Note:</u> *G6: Compliance proceedings initiated by respondent*	**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**	**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**	(b) <u>Note:</u> *Two co-proponents: respondent's compliance notification*

[53]Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

The marginal notes and the double square bracket are not part of the proponents' proposed texts. The text in double square brackets was inserted by Chair Seck.

DSU Article 22.8			
	G6	**Joint proposal by two co-proponents**	
	rulings of the DSB, the Member concerned may have recourse to the procedures of Article 21.5 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] of [[or "after" (see document TN/DS/25)]] 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**	**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.**	

DSU Article 22.8			
	G6	**Joint proposal by two co-proponents**	
	Article 7 comprises the request for the establishment of the panel and the notice submitted under this provision.		
(c) <u>Note</u>: *G6: Conditional withdrawal of authorization* *Modification of level of suspension following compliance proceedings*	**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**	**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.**	(c) <u>Note:</u> *Two co-proponents: Consultations after notice of compliance*

DSU Article 22.8			
	G6	**Joint proposal by two co-proponents**	
	consensus to reject the request.		
(d) <u>Note</u>: *G6:* *Continued authorization*	**The existing authorization to suspend concessions or other obligations remains in effect until, pursuant to paragraph (c), the DSB withdraws or modifies that authorization.**	**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),[1] the establishment of a panel under paragraph 7 of Article 21; or** **(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 benefit under, the covered agreements.** **[1] 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.**	(d) <u>Note:</u> *Two co-proponents: Conditional withdrawal of authorization* *Compliance proceedings under Art. 21.7 initiated by complainant (for Article 21.7, see the Sequencing proposal in document JOB(05)/71/ Rev.1)*
(e) <u>Note</u>: *G6:*	**In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the**	**If, as a result of recourse to the dispute settlement procedures provided for in paragraph 7 of**	(e) <u>Note:</u> *Two co-proponents:*

DSU Article 22.8			
	G6	**Joint proposal by two co-proponents**	
Moved from current Article 22.8, second sentence	**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.**	**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 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.**	*Modification of level of suspension following compliance proceedings* *For Article 22.6(a) and (b), see the Sequencing proposal in document JOB(05)/71/ Rev.1*

DSU Article 22.8			
	G6	**Joint proposal by two co-proponents**	
(f) <u>Note</u>*:* *G6:* *Request for withdrawal/modification of authorization*	**Upon the request of a party to the dispute, the DSB may at any point withdraw or modify an authorization.**		

6 TRANSPARENCY AND *AMICUS CURIAE* BRIEFS

6.1 Relevant parts of TN/DS/25 reproduced in RD/TN/DSB/30[54]

I. PROPOSED AMENDMENTS TO THE DSU

…

Article 13
Right to Seek Information

…

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 17

Appellate Review

Standing Appellate Body

…

4.**(a)** …

…

[(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].]

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.

[54] This text is based on the contributions of Members, and also incorporates some proposals by [Chairman Saborío Soto]. It is presented under [the Chairman's] 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 not expressly reflected in this text.

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~~ preclude**s** 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.

…

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~~. **]]**

…

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]]

[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).

PROPOSED DSB DECISION ON PROCEDURES FOR *AMICUS CURIAE* SUBMISSION IN DISPUTES IN JOB/DS/14

PROPOSED TEXT	SOURCE
1. Any person, whether natural or legal ("person"), other than a party to the dispute or a third party, wishing to file an amicus curiae submission ("submission") with a panel, the Appellate Body, or an arbitrator ("adjudicative body") must apply in writing[ξ] for leave to file such a submission by the deadline established by the adjudicative body. The adjudicative body should establish a deadline that (1) falls when the basic arguments of the parties to the dispute and third parties are known, (2) avoids undue burden on a party to the dispute, and (3) does not delay the dispute. The Secretariat will post on the WTO website the deadline and a description of where the documents relating to the dispute are to be found. **[ξ] Applying in writing would include transmission by electronic means.** **2. The person applying for the leave to file such a submission ("applicant") shall:** **(a) date and sign[η] the application and include the address and other contact details of the applicant;** **(b) limit the application to not longer than three pages;** **(c) include a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;** **(d) specify the nature of the interest the applicant has in the dispute;** **(e) identify the specific issues in the dispute that the applicant intends to address in its submission;** **(f) explain why it would be desirable, in the interests of achieving a resolution of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the adjudicative body to grant the applicant leave to file a submission, and indicate, in particular, in what way the applicant will make a contribution to the resolution**	**Non-paper of 23 June 2011**

PROPOSED TEXT	SOURCE
of the dispute that is not likely to be repetitive of what a party to the dispute or a third party submits; and **(g) disclose whether the applicant has any relationship, direct or indirect, with any party to the dispute or any third party, as well as whether it has, or will, receive any assistance, financial or otherwise, from party to the dispute, a third party, or any other person in the preparation of its application or its submission.** **[η] A signature could be electronic.** **3. The adjudicative body will give each party to the dispute an adequate opportunity to comment on any application filed.**	
4. The adjudicative body will review and consider each application and will, without delay, render a decision whether to grant or deny leave to file in whole or in part. The adjudicative body will promptly notify the applicant and each party to the dispute and each third party of its decision with respect to an application. Where the adjudicative body has granted leave to file in part, then the adjudicative body will include in the notification the issues in the dispute for which it grants the applicant leave to file a submission. **5. The grant of leave to file a submission by the adjudicative body does not imply that the adjudicative body will address, in its report, the arguments made in the submission.** **6. An applicant granted leave to file a submission must:** **(a) file any submission in writing, and sere a copy of the submission on each party to the dispute and each third party, by a deadline established by the adjudicative body;** **(b) date and sign the submission;** **(c) be concise and limit the submission to no longer than the number of pages to be established by the adjudicative body (as a general guideline, the limit should normally be no more than 15 typed pages, including and appendices); and** **(d) limit the submission to those issues in the dispute for which the adjudicative body granted the applicant leave to file a submission.** **7. The adjudicative body will give each party to the dispute an adequate opportunity to comment on any submission filed by an applicant.**	

7 TIMEFRAMES

7.1 Relevant parts of TN/DS/25 and JOB/DS/14, reproduced in RD/TN/DSB/35

Relevant parts of TN/DS/25[55]

Article 4

Consultations

…

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.]**

…

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] **[In 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.

…

[[Article 8bis

Accelerated time-frames for disputes on safeguard measures

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[55] This text is based on the contributions of Members, and also incorporates some proposals by [Chairman Saborío Soto]. It is presented under [the Chairman's] 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 not expressly reflected in this text.

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 12

Panel Procedures

…

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.

…

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~~.

…

APPENDIX 3

WORKING PROCEDURES

…

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

…

Relevant parts of JOB/DS/14[56]

PROVISION	**PROPOSED TEXT**	**SOURCE/**COMMENTS
Article 12 – Panel Procedures		
Article 12.10	10. In the context of the 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.~~ **upon the request by that developing country Member:** **(a) The period to hold consultations established in paragraph 3 of article 4, shall be extended by at least 15 days;** **(b) the periods established in paragraphs 7 an 8 of Article 4 shall be extended up to [x] days and [y] 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~~ **a minimum period of 4 to 6 weeks** for developing-country Members to prepare and present its first written submission. ~~The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph~~. **Where the panel has acted pursuant to this paragraph to extend the time for preparation and presentation of the first written submission, the additional time taken shall be added to the periods referred to in Article 20 and paragraph 4 of Article 21.**	**Non-Paper of 17 July 2012 on Suggested Textual Changes on Timeframes for Developing Country Members**

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[56] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

8 REMAND

8.1 Relevant parts of JOB/DS/14 reproduced in RD/TN/DSB/40[57]

PROVISION	PROPOSED TEXT	SOURCE
Article 17.12	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 provide [G7: in its report / Other proponent: , prior to circulating its report, the parties to the dispute with] a detailed description of the types of findings that are required to complete the analysis with respect to those issues [Other proponent: , including identification of a party whose claim or defence is determined to relate to such issues and who may refer them to the original panel according to paragraph 1 of Article 17 *bis*; it shall also provide the parties with its tentative findings and recommendations on the issues for which it has been able to complete the analysis.]**	**Merged G7/Other proponent's remand text with mark-up – 13 November 2012**
	[G7: (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.]	
	[G7: (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.]	
Article 17*bis* – Referral Procedure (proposed)		
Article 17*bis*.1 (proposed)	**17*bis*.1 Where the Appellate Body has identified certain issues according to paragraph 12(b) of Article 17, the party who advanced the particular claim or defence to which the unresolved issues relate [Other proponent: , as determined and identified by the Appellate Body,] may refer such issues to the original panel.**	
Article 17*bis*.2 (proposed)	**17*bis*.2 The referring party shall make the referral [G7: before the adoption of the Appellate Body report / Other proponent: by the time the Appellate Body specifies]. 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 [G7: the Appellate Body report/ Other proponent: the Appellate Body determination according to paragraph 12(b) of Article 17]. The referring party shall address the referral to the panel and shall notify the DSB thereof.**	
Article 17*bis*.3 (proposed)	**17*bis*.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 the referring party has identified in accordance with paragraph 2.**	
Article 17*bis*.4 (proposed)	**17*bis*.4 The panel shall make such [G7: findings and recommendations / Other proponent: factual findings] in accordance with the description provided by the Appellate Body pursuant to paragraph 12 of Article 17, as will assist the DSB in making its rulings and recommendations.**	
Article 17*bis*.5 (proposed)	**17*bis*.5 [G7: As a general rule,] the panel shall [G7: circulate its report / Other proponent: submit its factual findings to the Appellate Body and to the parties] within [G7: 90 / Other**	

[57] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

PROVISION	PROPOSED TEXT	SOURCE
	proponent: XX] days after the date of referral of the matter to it. When the panel considers that it cannot provide its [G7: report / Other proponent: findings] within [G7: 90 / Other proponent: XX] days, it shall inform the DSB [Other proponent: and the Appellate Body] in writing of the reasons for the delay together with an estimate of the period within which it will provide its [G7: report / Other proponent: findings].	
Article 17*bis*.6 (proposed)	**17*bis*.6 [G7: If a party appeals the report of the panel, Article 17 and Article 17*bis* apply to Appellate Body proceedings and the adoption of the Appellate Body report.]** **[Other proponent: The Appellate Body shall complete its analysis upon receiving the factual findings by the panel on the referred issues, and circulate its report within [XX] days.]**	

9 PANEL COMPOSITION

9.1 Relevant parts of JOB/DS/14 reproduced in RD/TN/DSB/45[58]

PROVISION	PROPOSED TEXT	SOURCE
Article 8 – Composition of Panels		
Article 8.2	2. ~~Panel members~~ **Panelists** should be selected with a view to ensuring ~~the~~ **their** independence ~~of the members~~ **and that the panel as a whole contains expertise to examine the kind of matter at issue in the dispute**, a sufficiently diverse background and a wide spectrum of **relevant** experience.	**JOB/DS/7, paras. 22-23.**

Proposed DSB Decision on Panel composition

PROPOSED TEXT	SOURCE
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][predictability];** ***[Recalling*** **the need to compose panels of well-qualified individuals and to ensure their independence;]]** **Hereby *decides* as follows:** **1. This Decision establishes [rules] [procedures] [working practices] 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 at any time review or terminate 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][to the composition of panels], without prejudice to the parties' [right][ability] to agree on any or all panelists or on an alternative procedure for selecting them.** **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][satisfy]. The Secretariat shall present to the parties a single list of persons [whom the Secretariat has been able to identify][known to the Secretariat] who meet ~~[~~at least one~~]~~ ~~[any~~ of~~]~~ the requested criteria~~*~~, to the utmost extent possible. Unless the parties agree otherwise, ~~T~~this list should normally comprise the names of between 12 and 20 persons, together with their [if possible updated] curricula vitae~~, unless the parties agree otherwise~~.** ~~* Where the parties request several or different criteria, the list should comprise persons who meet one or more of these criteria.~~	**Proposal as in TN/DS/25, as well as comments received from delegations during discussions – May 2011**

[58] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

PROPOSED TEXT	SOURCE
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. [Paragraph 3 of Article 8 of the DSU remains unaffected.] **[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] [the parties agree on the resulting panel composition as well as on the member of the panel who shall serve as chairman and whether these persons are available].** **[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, or where an insufficient number of persons are available, the Secretariat shall ~~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 request~~s~~ed, at the moment of indicating criteria under paragraph 4, [this Decision shall ~~be~~ apply~~ied~~ in such a manner that at least one panelist shall be from a developing country Member. To this end,] as necessary, the Secretariat shall select 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**	

PROPOSED TEXT	SOURCE
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, [if possible][to the utmost extent possible] from the nominations proposed by the Secretariat, [to the extent they are available,] 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.	

10 EFFECTIVE COMPLIANCE

10.1 Relevant parts of JOB/DS/14 and non-paper of 18 January 2011, reproduced in RD/TN/DSB/46/Rev.1[59]

Relevant parts of JOB/DS/14

PROVISION	PROPOSED TEXT	SOURCE
Article 22 – Compensation and the Suspension of Concessions		
Article 22.3*bis* (proposed)	**3*bis* Notwithstanding the provisions contained in paragraph 3, if the complaining party is a developing country, such Member shall have the right to seek authorization to suspend concessions or other obligations in any sector(s) under any covered agreement(s).**	**Non-Paper – Textual Suggestions for Developing Countries' Issues in DSB-SS - 14 November 2012**
Article 22.4	4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment. **If the case is one brought by a developing country Member, the level of nullification and impairment shall also include an estimate of the impact of the inconsistent measure on the economy of such Member.**	**Non-Paper – Textual Suggestions for Developing Countries' Issues in DSB-SS - 14 November 2012**
Article 22.6	**6. (a)** ~~When~~ **Following one of** 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. **[FRIENDS: Any Member may participate as a third party before the arbitrator by notifying its interest to do so to the DSB and to each party to the dispute no later than 10 days after the referral of the matter to arbitration. Article 10 shall apply *mutatis mutandis.*]** **(b)** Such arbitration shall be carried out by the original panel~~, if members are available, or by an arbitrator[15] 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 [within X days], after consulting with the parties. The arbitration** shall be completed within 60 days ~~after the expiry of the reasonable period of time~~ **of the appointment of the arbitrator.[15] A complaining party may not suspend** ~~C~~concessions 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.	**Sequencing working text – 10 March 2011** *Shaded text in (a):* **Consolidated G7/Friends of third parties text – 13 November 2012**
	(b) … **Where a developing country Member has been authorized to suspend concessions or other obligations under Article 22.6 (a), the DSB shall, upon request by such**	**Non-Paper – Textual Suggestions for Developing**

[59] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

PROVISION	PROPOSED TEXT	SOURCE
	Member, authorize other Member(s) to suspend concessions or other obligations on behalf of the requesting Member unless the DSB decides by consensus to reject the request. The authorization established in this Article shall be the same as the initial authorization granted under Article 22.6 (a).	**Countries' Issues in DSB-SS - 14 November 2012**
Article 22.7	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 or 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, [FRIENDS: 4,] 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.	**Sequencing working text – 10 March 2011** *Shaded text: as contained in Chairman's text of July 2008 (JOB(08)/81)* *Shaded text: as contained in Chairman's text of July 2008 (JOB(08)/81)* *Square brackets within shaded text:* **Enhanced Rights for Third Parties – Consolidated (Non-Consensus) Text of G7 and "Friends" (13 November 2012)**
Article 22.8*bis (proposed)*	**8*bis* If a Member fails to comply with the rulings and recommendations of the DSB at the expiry of the reasonable period of time established under Article 21.3, the DSB shall, at the request of the complaining party, apply the following temporary administrative measures to the Member that has failed to comply with the rulings and recommendations of the DSB, unless the DSB decides by consensus not to do so:** **1. Representatives of such Member shall not be nominated to preside over WTO bodies.** **2. Documentation will not be posted to such Member's delegation in Geneva nor to its Capital. The access to the WTO Members' website will be discontinued.** **3. The Secretariat shall report about the implementation of these administrative measures in every meeting of the DSB and the General Council.**	**Non-Paper – Textual Suggestions for Developing Countries' Issues in DSB SS - 14 November 2012**

PROVISION	PROPOSED TEXT	SOURCE
	4. At the beginning of each year, the Director-General shall notify in writing the Minister of such Member of the applicable administrative measures, and emphasise the importance of full implementation of the rulings and recommendations of the DSB. **5. The Director-General shall report to each Ministerial conference about the administrative measures already applied to such Member. Such Member shall inform the Ministerial conference of its intention and time frame for full implementation of the rulings and recommendations of the DSB.**	

Relevant part of non-paper of 18 January 2011

PROVISION	PROPOSED TEXT*	SOURCE/COMMENTS
Article 22 – Compensation and the Suspension of Concessions		
Article 22.7	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 **[suffered from the day after RPT expires. A period of reference for the arbitrator shall be the year in which the reasonable period of time ends, unless circumstances require otherwise.]** … [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.	**Non-Paper of 18 January 2011, Revised Textual Contribution to the Dispute Settlement Understanding Review Negotiations**

11 DEVELOPING COUNTRY INTERESTS[60]

11.1 Relevant parts of non-paper of 17 July 2012 and non-paper of 14 November 2012, reproduced in RD/TN/DSB/46/Rev.1

PROVISION	PROPOSED TEXT	SOURCE
Article 4 – Consultations		
Article 4.10	10. During consultations Members ~~should~~ **shall** give special attention to ~~the~~ particular problems and interests of **the** developing country Members. **This includes *inter alia* the following:** **(a) Developed country Members shall accept the request from a developing country Member regarding the venue for the consultations; and** **(b) In the context of consultations involving a measure taken by a developing country member, any questions shall be submitted in writing at least 15 days before the date of holding of the consultations.**	**Non-Paper of 17 July 2012 on Suggested Textual Changes on Timeframes for Developing Country Members**
Article 21 – Surveillance of Implementation of Recommendations and Rulings		
Article 21.3	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 a 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. **In determining the reasonable period of time, due consideration shall be given to the problems and interested of developing country members.** [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.	**Non-Paper of 17 July 2012 on Suggested Textual Changes on Timeframes for Developing Country Members**

[60] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

<table>
<tr><th>PROVISION</th><th>PROPOSED TEXT</th><th>SOURCE</th></tr>
<tr><td></td><td>[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.</td><td></td></tr>
<tr><td colspan="3">Article 28 (proposed)</td></tr>
<tr><td>Article 28 (proposed)</td><td>28. (a) The DSB shall establish a fund called the DSB Fund to facilitate the effective utilisation of the dispute settlement procedures by developing country Members. The disbursement from this fund shall be made in accordance with the provisions of Appendix [X].

(b) In a dispute between a developed and developing country Member, where a developing country Member is unable to access the DSB Fund due to lack of budget, the panel or the Appellate Body 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 or a developed Member's claims do not succeed in a dispute against a developing country Member.</td><td>Non-Paper – Textual Suggestions for Developing Countries' Issues in DSB-SS - 14 November 2012</td></tr>
<tr><td colspan="3">Appendix [X] (proposed)</td></tr>
<tr><td>Paragraph 1 (proposed)</td><td>Disbursements under the DSB Fund shall be made in accordance with the following criteria:

1. The DSB Fund shall be available to all developing country Members where they are parties in a dispute in the WTO as complainants, co-complainants or respondents.</td><td rowspan="5">Non-Paper – Textual Suggestions for Developing Countries' Issues in DSB-SS - 14 November 2012</td></tr>
<tr><td>Paragraph 2 (proposed)</td><td>2. The DSB Fund established under Article 28 shall be financed from the regular WTO budget. Voluntary Contributions could also be accepted for this fund.</td></tr>
<tr><td>Paragraph 3 (proposed)</td><td>3. The DSB Fund shall have an initial corpus of 4 million CHF and thereafter an annual budget of 2 million CHF. From the initial corpus, 2 million CHF shall be put in a buffer fund called the DSB Operation Fund. The DSB Operation Fund will be utilized only if the DSB Fund has lapsed in any fiscal year. At the end of any fiscal year, the money left unspent in the DSB Fund shall be transferred to the DSB Operation Fund. In case the amount is less than 2 million CHF in the DSB Operation Fund in any fiscal year, the DSB Operation Fund shall be recouped in the next fiscal year from the regular budget of the WTO.</td></tr>
<tr><td>Paragraph 4 (proposed)</td><td>4. Only cost incurred by a developing country Member towards payment of the fee and charges to the lawyers/legal firms shall be reimbursed from the DSB Fund.</td></tr>
<tr><td>Paragraph 5 (proposed)</td><td>5. The reimbursement in each dispute shall be limited to the following amounts:[8]
<table>
<tr><th>Stage of the Dispute Settlement Process</th><th>Maximum Amount to be Reimbursed</th></tr>
<tr><td>Consultations</td><td>CHF 28, 261</td></tr>
<tr><td>Panel</td><td>CHF 85, 359</td></tr>
<tr><td>Appellate Body</td><td>CHF 50, 562</td></tr>
<tr><td>Article 21.3 (c)</td><td>CHF 21, 532</td></tr>
<tr><td>Article 21.5 Panel</td><td>CHF 37, 104</td></tr>
<tr><td>Article 21.5 AB</td><td>CHF 34, 221</td></tr>
<tr><td>Article 22.6 Panel</td><td>CHF 22,109</td></tr>
<tr><td>Total</td><td>CHF 279,148</td></tr>
</table></td></tr>
</table>

PROVISION	PROPOSED TEXT	SOURCE
	[8] **The adequacy of these amounts shall be reviewed by the Committee on Budget, Finance and Administration every two years.**	
Paragraph 6 (proposed)	**6. A developing country Member shall be eligible for reimbursement from the Fund for a maximum of two disputes per year.**	
Paragraph 7 (proposed)	**7. The developing country Member concerned shall present a bill for the reimbursement of the legal costs after each stage of the dispute settlement process. The Secretariat, upon confirmation of the availability of funds, will release the payment.**	
Paragraph 8 (proposed)	**8. The Committee on Budget, Finance and Administration shall oversee the functioning of these funds and the General Council shall annually review the adequacy and utilization of the funds with a view to improving its effectiveness.**	

12 FLEXIBILITY AND MEMBER CONTROL AND ADDITIONAL GUIDANCE FOR WTO ADJUDICATIVE BODIES

12.1 Relevant parts of JOB/DS/14 and TN/DS/25, reproduced in RD/TN/DSB/45

Relevant part of JOB/DS/14[61]

PROVISION	PROPOSED TEXT	SOURCE
Article 8 – Composition of Panels		
Article 8.2	2. ~~Panel members~~ **Panelists** should be selected with a view to ensuring ~~the~~ **their** independence ~~of the members~~ **and that the panel as a whole contains expertise to examine the kind of matter at issue in the dispute**, a sufficiently diverse background and a wide spectrum of **relevant** experience.	**JOB/DS/7, paras. 22-23**

Relevant part of TN/DS/25[62]

PROVISION	PROPOSED TEXT	SOURCE
Article 17 – Appellate Review		
Article 17.5	5. **(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**	**Joint proposal on Flexibility and Member Control (FMC) in TN/DS/25, p. A-10**

[61] The compilation [in document JOB/DS/14] reproduces the most recent draft legal texts presented and discussed in the DSU negotiations, where the relevant text has evolved since the issuance of the consolidated text reproduced in TN/DS/25, Annex A. The compilation supplements the Chairman's summaries of discussions issued in the JOB/DS series. It is without prejudice to the position of any participant.

Unless otherwise indicated, proposed deletions to the current DSU text are reflected in ~~strikeout~~ and proposed new text is in **bold**. Footnotes reproduced from the current DSU carry their current numbering, whereas proposed footnotes are identified with letters.

[62] This text is based on the contributions of Members, and also incorporates some proposals by [Chairman Saborío Soto]. It is presented under [the Chairman's] 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 not expressly reflected in this text.

PROVISION	PROPOSED TEXT	SOURCE
	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.]	
Article 17.13	**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.]**	**Joint proposal on FMC in TN/DS/25, p. A-11**
Article 17.14	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] [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.	**Joint proposal on FMC in TN/DS/25, p. A-11**

Proposed DSB Decision on partial adoption of panel and Appellate Body Reports

PROPOSED TEXT	COMMENTS/ SOURCE
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.**	**TN/DS/25, p. A-25**

Proposed DSB Decision on additional guidance for WTO adjudicative bodies

PROPOSED TEXT	COMMENTS/ SOURCE
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**	**TN/DS/25, pp. A-27 to A-35**

PROPOSED TEXT	COMMENTS/ SOURCE
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] **[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**	

PROPOSED TEXT	COMMENTS/ SOURCE
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**	

PROPOSED TEXT	COMMENTS/ SOURCE
[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]** **[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]**	

PROPOSED TEXT	COMMENTS/ SOURCE
[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*.)**	

PROPOSED TEXT	COMMENTS/ SOURCE
[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.]]**	