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FOSTERING A DISCUSSION ON THE FUNCTIONING OF THE APPELLATE BODY

COMMUNICATION FROM HONDURAS

The following communication, dated 18 January 2019, is being circulated at the request of the delegation of Honduras.

1 INTRODUCTION

1.1. In furtherance of the communication dated 23 July 2018 and reiterating the importance of the Dispute Settlement System within the broader WTO framework, Honduras would like to address the issue of timelines for the conclusion of appellate proceedings. Concerns have been expressed regarding the extension of appellate proceedings far beyond the stipulated period of 90 days provided in Article 17.5 of the DSU. Others have called for a revision of such deadline in order to be more realistic of today's complex disputes and the Appellate Body's workload.

1.2. First, Members need to decide what time-period they want to allocate to an appeal after the conclusion of the panel process. Second, Members may explore how to streamline the Appellate process. The right of appeal extends the period of the dispute settlement process and hence needs to be limited and subject to certain conditions. Better cooperation among disputing parties and the Appellate Body, and incorporating more stringent adherence to conditions of appeal may reduce unnecessary delays. Third, Members may have to decide on the nature of the time-period allocated to an appeal, whether such deadline is mandatory and the consequence of its non-respect.

1.3. The issues and options presented here are not exhaustive, nor mutually exclusive, and they should not be read cumulatively. Furthermore, these options may be implemented through various means, to be discussed separately. Several other pertinent issues also need to be resolved to fully address the problems facing the Dispute Settlement System and the WTO.

2 PROPOSED OPTIONS

2.1 Timelines

2.1. Adhering to the existing timeline?

- a. One option could be to require the Appellate Body to comply with the existing 90-day time-frame set out in the DSU.
- b. Could/should the methodology of calculating the 90-day time-frame be modified to refer to *working* days only, as opposed to calculations that include weekends and official holidays?
- c. Could/should the methodology be modified to exclude from the 90 days, the time required for the translation of an Appellate Body report?
- d. Could/should, parties agree to extend the time-period for filing an appeal in cases where the Appellate Body is seized with a large number of appeals and present an appeal when

the Appellate Body is better equipped to receive it, and able to meet the 90-day time-frame?

2.2. Another time-period?

- a. Could/should the existing time limit be replaced by a more generous one (e.g. 120 days) or even by a requirement that appeals be processed "as quickly as possible"?
- b. Could/should the Appellate Body itself set a time limit for each case depending on the estimated time it will require to consider it?

2.3. Increasing the responsibility of the parties?

- a. In the DSU, the maximum period for conclusion of appellate proceedings is 90 days. In practice, the Appellate Body has not respected this period since 2011. In order to enhance the parties' responsibility and involvement in the appellate process, could/should the rule be modified to require disputing parties, in consultation with the Appellate Body, to agree upon a time limit for consideration of an appeal, failing which 90 days may be applied as a *default* time-frame?
- b. Could/should the rule be modified to require disputing parties to agree, in consultation with the Appellate Body, upon a time limit for consideration of an appeal, failing which the Appellate Body may decide the required time limit?

2.2 Efficiency of the AB process

2.4. Procedural steps could/should be implemented to help the Appellate Body meet the 90-day or otherwise agreed time limit.

- a. Consultations could/should be called for prior to commencement of AB proceedings whereby disputing parties, in consultation with the Appellate Body, could agree whether to extend the 90-day time-frame or limit the scope of the appeal. This could be done as soon as a party expresses its intention to appeal and at the latest [30] [45] days after the circulation of the panel report.
- b. Failing agreement between the disputing parties, the Appellate Body could/should be empowered to suggest and eventually to impose measures to enable it to meet the stipulated deadline.
 - Such measures may include the Appellate Body's indication to delete issues from the scope of the appeal and/or to extend the time-frame. Parties would then need to either agree to limit the scope of the appeal or extend the time-frame.
 - The Appellate Body could be empowered to impose limitations on the length of written submissions, limitations on the number of hearings, etc. in order to enable it to meet the stipulated deadline.
 - Generally, the AB could/should be requested to issue shorter reports dealing with legal issues in as little detail as possible.
 - This may be operationalized by narrowing the Appellate Body's consideration of issues, including the extent to which each issue is analyzed.
 - Similarly, cutting out unnecessary or repetitive information from Appellate Body reports may be considered in order to promote efficiency. This could include removing references to past cases, removing summaries, lengthy descriptions of facts, reducing the extent to which party submissions are presented (as the AB has begun to do) (this would be facilitated if parties' submissions were public or at least accessible to the WTO Members from the WTO website).

- The Appellate Body may become subject to "mandatory judicial economy" in order to limit the scope and length of Appellate Body reports in general. The existing obligation to 'address all issues' could be modified such that the Appellate Body would be prohibited from making a finding or an inquiry into the merits of each issue where it is not necessary for the resolution of the dispute.¹ A prohibition on *Obiter Dicta* could work in tandem with such an approach.
- c. Remand could be introduced. This could reduce the amount of information under review by the Appellate Body. It is worth noting however, that such a procedure may contribute to an extended time-frame for the overall dispute settlement process.
 - d. The practice of collegiality may be modified to the extent to which it increases delays.
 - e. The capacity of the Appellate Body to deal with a greater caseload may be increased through various means.

2.3 Dealing with reports circulated after expiration of the time limit

2.5. The consequences of expiration of the agreed or 90-day period depend on whether the said time-period is mandatory and whether its non-respect is fatal, leading to the automatic adoption of the prior panel report.

- a. Parties may enter into consultations prior to the expiration of the 90-day period to agree to extend the time-frame in light of the impending delay. Guidelines may be developed in this regard.
- b. The delay may be rectified by parties *ex post-facto* by way of deeming letters to the DSB recognizing the delivery of the Report as having been made within the stipulated time-frame.
- c. A report circulated after the expiration of the 90-day or otherwise agreed time-period may be subject to a positive consensus procedure for adoption. Such procedure may or may not include the disputing parties' votes in such positive consensus.
- d. The Appellate Body may be permitted, under certain conditions, to present a Report after the expiration of the stipulated deadline without losing jurisdiction. The Appellate Body may for instance, be required to demonstrate the existence of "exceptional or mitigating circumstances" that caused the delay.

2.6. There may be several ways to operationalize such a provision. For instance:

- the Appellate Body's justification may be considered sufficient;
- the justification may require further review and approval by a higher authority.

For instance:

- i. the Director-General;
- ii. a group of the three Chairpersons of the DSB, the General Council and the Trade Policy Review; or
- iii. the Director General and the group of the three Chairpersons acting together.

2.7. The time-frame for such a review would be [10 days] from the initially agreed or determined deadline.

¹ We recognize that a dispute is not limited solely to the remedy or implementation of a solution dealing with the WTO-inconsistency of the challenged measure(s) but may also concern procedural issues regarding the manner in which the panel had handled the evidence, the process and considered the matter.