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General Council

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GENERAL COUNCIL DECISION ON THE DISPUTE SETTLEMENT SYSTEM OF WTO¹

COMMUNICATION FROM THAILAND

The following communication, dated 25 April 2019, is being circulated at the request of the delegation of Thailand.

Whereas the WTO dispute settlement system is a central element in providing security and predictability to the multilateral trading system;

Whereas the role of the dispute settlement system is to preserve the rights and obligations of Members under the covered agreements and to clarify the provisions of those agreements;

Whereas recommendations and rulings of the DSB cannot add to or diminish the rights and obligations of Members under the covered agreements;

Recognizing both the contribution of panels and the Appellate Body to the goals of the DSU and to the well-being of the multilateral trading system and the concerns that have been raised about the need to improve the dispute settlement process;

Recognizing that addressing these concerns and clarifying aspects of the functioning of the dispute settlement process based on the existing provisions of the DSU is an efficient way to maintain the basic principles and objectives of the multilateral trading system and to continue to build trust among Members in the effectiveness of the process;

Reaffirming Members' commitment to the dispute settlement system and Members' obligation to engage in dispute settlement proceedings in good faith;

Desirous to provide panels and the Appellate Body with guidelines to ensure the effective and smooth functioning of the dispute settlement system;

Members agree as follows:

A. DSU Articles 17.1 and 17.2 – Transition rules for outgoing Appellate Body members:

1. Appellate Body members are appointed by the DSB, pursuant to Articles 17.1 and 17.2 of the DSU. A practical concern arises when an outgoing Appellate Body member's mandate ends while that member is performing his or her duties in an ongoing appeal. The importance is addressing this concern in a manner that ensures that the Appellate Body can discharge its duties properly in a timely manner, including by circulating its report in any given dispute with as little delay as possible.

2. An Appellate Body member whose term expires during an appeal to which he/she has been assigned shall complete his/her work only upon the approval by the DSB. At the request of the

¹ Thailand presents this draft General Council decision in an effort to make a focused and objective-oriented contribution to the current discussion. There may be other approaches, including the use of other methods, as appropriate, to implement and give legal effect to content of the draft General Council decision that Members could consider, in view of the importance of resolving the Appellate Body appointment impasse.

Chairperson of the Appellate Body, the DSB shall grant the approval automatically in appeals in which the oral hearing takes place at least 30 days before the completion of the term of the outgoing Appellate Body member.

3. The Appellate Body is requested to remove the current Rule 15 from the Working Procedures for Appellate Review.

B. DSU Article 17.5 - 90-day deadline to complete appeals:

4. Article 17.5 of the DSU provides that, "in no case shall Appellate Body proceedings exceed 90 days". Thus, Article 17.5 requires that appellate review shall be completed strictly within 90 days.

5. In this regard, Members exhort the Appellate Body to observe this rule strictly and, to the extent possible, where necessary, to expedite appellate proceedings in order to meet the DSU-mandated timeframe. The Appellate Body shall generally strive to complete appeals in the order in which they were initiated.

6. It is recognized that there may be cases of unusual complexity, or periods of numerous appeals, in which the 90-day deadline may excessively constrain the Appellate Body's ability to produce a report of the quality that the parties deserve.

7. In cases where the Appellate Body considers that it would be difficult to meet the 90-day deadline, the Appellate Body should immediately communicate with the parties to the dispute and consult on how the proceedings could be expedited. These may include, depending on the circumstances of each case, limiting the length of parties' submissions; limiting the scope of issues on appeal raised by the parties, and circulating the Appellate Body Report before translation of the report has been completed. These consultations shall be without prejudice to the role of the Appellate Body as an objective and impartial adjudicator of the dispute. The result of the consultations shall be notified to the DSB.

8. In situations in which the Appellate Body consults with parties to a dispute regarding the 90-day deadline, the parties shall make good faith efforts to facilitate the appeal process. In doing so, the parties shall take into account the interests of the parties to other pending or upcoming appeals.

9. Regardless of whether or not the Appellate Body issues the report within the deadline, the Appellate Body report shall be deemed to be properly issued and shall be adopted by the DSB in accordance with the rules contained in Article 17.14 of the DSU.

C. DSU Article 17.6 - Appellate Body review of facts, including Panel findings concerning the meaning of a Member's domestic law:

10. Article 17.6 of the DSU clearly limits the scope of the Appellate Body's review to "issues of law covered in the panel report and legal interpretations developed by the panel".

11. Under public international law, the meaning of municipal law is normally considered to be a question of fact. The DSU does not address this issue. Hence, issues sometimes arise when a panel's findings are viewed as involved "mixed" questions of fact and law.

12. In these circumstances, panels are encouraged to characterize their findings as factual or as legal, as appropriate, bearing in mind that the meaning of municipal law of a Member is not a question of law. Where issues concerning the proper meaning of municipal law arise on appeal, the Appellate Body should afford due consideration to the panel's characterization.

D. DSU Article 17.12 - Findings necessary for the resolution of the dispute:

13. Under Article 17.12 of the DSU, the Appellate Body is required to "address each of the issues raised" in the appeal. In addition, Article 3.7 of the DSU provides that the aim of the dispute settlement mechanism is to secure a positive solution of the dispute. In addressing each of the issues raised on appeal, the Appellate Body shall consider carefully, in the light of the findings of the Panel and its own judgment, the extent to which findings on each issue raised are necessary to

secure a positive solution to the dispute. The Appellate Body shall also consider carefully the precise nature of the findings to be made on each issue raised, in the light of Article 3.7.

14. The Appellate Body shall explore this issue with the parties upon initiation of appeal proceedings and during the oral hearing with a view to avoiding findings that are not necessary to achieve the overriding purpose of securing a positive resolution to a dispute. It is recognized, however, that the parties may disagree on what findings are necessary to achieve this purpose and that the decision finally lies with the Appellate Body as the objective and impartial adjudicator of the dispute.

15. In its reports, the Appellate Body shall explicitly indicate why it considered that issuing particular findings requested by the parties was necessary for the resolution of the appeal before it, and why it considered that making other findings requested by the parties was not necessary for the resolution of the appeal.

E. The precedential effect of previous panel and Appellate Body reports:

16. Under Article 3.2 of the DSU, the role of panels and the Appellate Body is to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law. Panels and the Appellate Body, in their reports, cannot add to or diminish the rights and obligations of WTO Members under the covered agreements.

17. Similarly, the findings of panels and the Appellate Body are not authoritative interpretations of general application of the covered agreements. Under Article IX: 2 of the Marrakesh Agreement, the exclusive authority to adopt such interpretations is granted to the Ministerial Conference and the General Council. In these circumstances, adopted panel and Appellate Body reports, as such, do not have any binding effect on panels or the Appellate Body in subsequent disputes.

18. It is, nevertheless, recognized that it is useful for parties in panel and Appellate Body proceedings to refer to prior panel and Appellate Body reports in developing their arguments. In considering these arguments, panels (in making their assessment under Article 11 of the DSU) and the Appellate Body should carefully consider the extent to which prior reports are relevant to the issues before them. Panels and the Appellate Body should explain in their reports the extent to which they considered the prior reports to be relevant to the dispute at hand.

F. Regular dialogue between Members and the adjudicative bodies of the WTO:

19. Desiring to ensure the effective and smooth functioning of the WTO dispute settlement system in a manner that duly preserves the rights and obligations of Members under the covered agreements, Members recognize the value of having regular dialogue between Members and the adjudicative bodies of the WTO. To this end, the DSB shall hold annual meetings with members of the Appellate Body. The meetings, the function of which is recognized as not affecting the legitimacy of an Appellate Body report, shall be open to all Members and any members of the Appellate Body. All Appellate Body members should, to the extent possible, be present at the meetings. Furthermore, the meetings shall be without prejudice to the right of Members to express their views on an Appellate Body report as provided under Article 17.14 of the DSU, and shall be conducted in a manner that ensures the integrity and impartiality of the appellate review.
