

SUMMARY OF PROPOSALS ON THE AB ISSUE

29 November 2018

Issue ¹	EU Concept paper on WTO modernisation (pp 13-17) ²	WT/GC/W/752 (26 Nov) EU, CN, IND, CA+ ³	WT/GC/W/753 (26 Nov) - EU, China, India	JOB/GC/201 (24 Sep) Theme 2 of Canada discussion paper
1) 90-day timeframe for appeals (Art 17.5 DSU)	<p>Amend Art 17.5 DSU by providing possibility for the parties to agree to the exceeding of 90-day time frame. (“ unless the parties agree otherwise”)</p> <p>AB would need to consult early if it estimates that the report will be circulated beyond 90 days and request agreement of the parties on exceeding this timeframe. If no agreement, alternative procedure / working arrangements might be adopted⁴</p>	<p>Same as proposal contained in EU concept paper.</p> <p>Unlike the EU concept paper, this proposal does not explicitly state that the consultation obligation cannot impact on the negative consensus adoption procedure in Art 17.14 DSU nor on the validity of late AB reports</p>	N/A	Develop guidance related to consultations with parties when the AB is unable to meet its deadline.
2) Transitional arrangement for outgoing AB members (Art 17.2 DSU)	Outgoing AB member shall complete the disposition of a pending appeal in which a hearing has already taken place during that member’s term	Same as proposal contained in EU concept paper.	Outgoing AB members should continue discharging their duties until their places have been filled but not longer than for a period of two years following the expiry of the term of office. (i.e. differs from W752)	N/A

¹ The first 5 issues correspond with the “examples of concerns with the approach of the Appellate Body that the United States has raised in the WTO over many years” listed in the US President’s 2018 Trade Policy Agenda, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>, at pp. 22-28

² Formally published on 18 September 2018, http://europa.eu/rapid/press-release_IP-18-5786_en.htm

³ EU, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore, Mexico.

⁴ E.g. publication of the report in the language of the appeal only (within the 90 days); voluntary reduction of scope of appeal, indicative page limits on parties’ submissions.

Issue ¹	EU Concept paper on WTO modernisation (pp 13-17) ²	WT/GC/W/752 (26 Nov) EU, CN, IND, CA+ ³	WT/GC/W/753 (26 Nov) - EU, China, India	JOB/GC/201 (24 Sep) Theme 2 of Canada discussion paper
3) Findings unnecessary for resolution of dispute (Art 17.12 DSU)	Amend Article 17.12 DSU to provide that AB shall address each of the issues raised on appeal by the parties to the dispute to the extent this is necessary for the resolution of the dispute	Same as proposal contained in EU concept paper.	N/A	Narrow the scope for "advisory opinions" by clarifying that the primary objective of the dispute settlement system is the settlement of specific disputes and that only findings that are necessary to achieve this objective are required.
4) AB review of facts and review of Member's domestic law de novo	Clarify that issues of law covered in the panel report and legal interpretations developed by the panel do not include the meaning itself of the municipal measure	Same as proposal contained in EU concept paper.	N/A	Focus appellate review on legal issues by clarifying the standard of review to be applied by the AB to panels, especially with regard to factual findings and those related to the operation of domestic law;
5) Precedential value of findings in AB reports	Annual meetings between AB and DSB (WTO Members) where Members could express their views on AB approaches and systemic issues or trends in jurisprudence, unrelated to the adoption of particular AB reports	Same as proposal contained in EU concept paper.	N/A	Reiterating that interpretations adopted by the panel and AB apply only to the disputes in which they are adopted
6) Efficiency - Increase number of AB members	Increase from 7 to 9, help increasing efficiency and geographical balance	N/A	Same as proposal contained in EU concept paper.	N/A
7) Efficiency - Resources of AB Secretariat	Expand resources	N/A	<ul style="list-style-type: none"> Expand resources, in order to facilitate the prompt circulation of AB reports while safeguarding the quality of the reports. Attract and retain staff members offering the highest standards of efficiency, competence and integrity 	N/A

Issue ¹	EU Concept paper on WTO modernisation (pp 13-17) ²	WT/GC/W/752 (26 Nov) EU, CN, IND, CA+ ³	WT/GC/W/753 (26 Nov) - EU, China, India	JOB/GC/201 (24 Sep) Theme 2 of Canada discussion paper
8) Nature of AB membership	Provide that membership of AB is a full time job. Currently, pursuant to DSB decision WT/DSB/1, it is a part time job.	N/A	Provide that membership of AB is the exclusive occupation of AB members (currently, pursuant to the DSB decision WT/DSB/1, it is a part time job). This would be accompanied by appropriate changes in the employment conditions. This would not preclude AB members from academic or scientific activities, consistent with the nature of their functions.	N/A
9) Term of AB members	A single but longer term for AB members (6-8 years)	N/A	Same as proposal contained in EU concept paper.	N/A
10) Automatic launch of selection process to replace outgoing AB members	N/A	N/A	It is clarified that the selection process to replace outgoing AB members shall be automatically launched no later than X [e.g. 6] months before the expiry of their term of office.	N/A
11) Legal instrument to affect changes	DSU amendment to be adopted by GC pursuant to Art IV:2 and X:8 of WTO Agreement (simpler amendment procedure)	Same as proposal contained in EU concept paper. But if impracticable, other appropriate legal instruments	Same as proposal contained in EU concept paper.	N/A

Specific substantive issues raised only in Canada discussion paper

Issue	JOB/GC/201 (24 Sep) Theme 2 of Canada discussion paper	EU Concept paper on WTO modernisation (pp 13-17)
Increased use of alternative dispute settlement	<p>Rationale – ‘Adjudication has taken on a more prominent role than originally envisaged, in some cases substituting for renegotiation’</p> <ul style="list-style-type: none"> • Renewed commitment to self-restraint • Important and use of alternative mechanisms such as mediation • Narrow the scope or exclude certain types of disputes or issues from WTO dispute settlement 	<p>EU proposes that substantive issues could be addressed at a second stage once the AB appointment process has been unblocked:</p> <p>“.. the US takes issue with the interpretations developed by the Appellate Body (“overreach”) especially, but not exclusively, in the trade defence field.</p>
Streamlining adjudicative procedures (Panel and AB)	<p>‘The adjudicative procedures could be made more flexible and adaptable to the diverse nature of disputes. This might include developing alternative procedures tailored to specific kinds of disputes, supplementary procedures for specific features of existing proceedings and a mechanism for more interaction between panel and appeal levels (i.e., remand’. High-level endorsement of the need to streamline the dispute settlement system and make it more adaptable would generate momentum in the stalled discussions of improvements.</p>	<p>Without prejudice to the EU position on the alleged “overreach” by the Appellate Body, it is pointed out that the substantive rules as such can be modified or interpreted by the WTO Membership in accordance with the relevant procedures.</p> <p>In the second stage, once the AB appointment process has been unblocked, WTO Members would engage in discussions on such possible changes or authoritative interpretations.”</p>
Guidance by WTO Members to adjudicative bodies on specific issues	<p>‘..mechanisms might be developed that allow Members more opportunity to provide. This might include holding thematic discussions of issues that arise in disputes, and developing a formal pathway for some of these discussions to progress to the adoption, by consensus, of “authoritative interpretations” of the WTO obligations in question.</p>	
Remand	<p>Mechanism for more interaction between panel and appeal levels (i.e., remand).</p>	
Minority views	<p>Promote a more robust adjudicative dialogue by allowing for the expression of minority views in panel and AB reports</p>	