Contribution by the United States

In the joint proposal by Chile and the United States (TN/DS/W/28), several elements were proposed to ensure that WTO dispute settlement contributes to resolving disputes and remains sufficiently flexible to accommodate parties' needs. One of those elements was item (f), which read:

"*f) providing some form of additional guidance to WTO adjudicative bodies concerning i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and ii) rules of interpretation of the WTO agreements.*

"[To be supplied after further discussions with Members.]"

Following are some questions in this regard that may help to facilitate those discussions with Members. Additional questions or topics may also be appropriate.

Some Questions for Consideration

Judicial economy

- Panels and the Appellate Body have frequently explained that they will not make findings in particular areas as part of the application of "judicial economy."

- What is Members' understanding of the concept of "judicial economy"?

- When does it assist Members for a panel or the Appellate Body to exercise "judicial economy"? Conversely, when would the exercise of "judicial economy" not be helpful to Members in resolving a dispute? For example, could the exercise of "judicial economy" ever result in "false economy"?

- What are the benefits to the dispute settlement system of exercising "judicial economy"?

Use of public international law

- Article 3.2 of the DSU provides for clarifying the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law." Accordingly, it is accepted that panels and the Appellate Body may have recourse to public international law for purposes of using the customary rules of interpretation, and it is accepted that those rules are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Some Members have relied on other aspects of public international law in presenting their claims or arguments, and panels and the Appellate Body have cited to other aspects of public international law in support of their findings.

- What is the relationship between:

  (1) the function served by the WTO dispute settlement system, which Article 3.2 of the DSU states 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 customary rules of interpretation of public international law" and

  (2) public international law other than customary rules of interpretation?

- Is it appropriate for a panel or the Appellate Body to refer in a report to public international law other than customary rules of interpretation? If so, then:

  - under what circumstances and for what purpose?

  - what would comprise public international law?

- Are there any customary rules of interpretation other than those found in Articles 31, 32 and 33 of the VCLT?

Interpretive approach ("gap filling")

- 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." The Appellate Body has stated that:

    - "The legitimate expectations of the WTO Members are reflected in the language of the *WTO Agreement* itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Articles 31 and 32 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[1]

    - "It is not the task of either panels or the Appellate Body to amend the *DSU* or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the covered agreements or to adopt such interpretations. Determining what the rights and obligations under the covered agreements ought to be is not the responsibility of panels and the Appellate Body; it is clearly the responsibility solely of the Members of the WTO."[2]

- What is the significance of the fact that the covered agreements are the result of negotiations among sovereign nations and autonomous customs territories?

    - Should the interpretive approach toward a covered agreement be the same as that for domestic regulation or legislation?

    - What significance should attach to the fact that some provisions of the covered agreements are imprecise and susceptible to more than one interpretation?

- Where an agreement is silent on an issue, is it appropriate for a panel or the Appellate Body to "fill in the gap" in the agreement text?

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[1] *See* Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

[2] *See* Appellate Body Report, *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, para. 92.

Measure under review

- The Appellate Body has found that the "matter" 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.[3]

- 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*.

    - Is there a proper order of analysis in this situation?

    - Does it matter if the panel begins with the question of what the measure does?

    - Is it appropriate for a panel or the Appellate Body to make findings concerning the scope of a provision of a covered agreement other than in connection with a particular measure?

    - Is the question of what the measure does a factual question or a legal question?

- The Appellate Body has recently stated that "instruments of a Member containing rules or norms *could* constitute a 'measure'"[4] for purposes of a dispute settlement challenge. It may be useful for Members to provide greater clarity of when an "instrument" in fact *is* a "measure." For example:

    - Under what circumstances is something an "instrument"? For example, does it matter what legal status it may have under a Member's domestic legal system?

    - Under what circumstances does an instrument "contain rules or norms"?

    - Under what circumstances is an instrument a "measure"?

- What significance should attach to whether a measure mandates particular action versus provides authorities with discretion that could be exercised in a manner consistent with the covered agreements?

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[3] *E.g., Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998 , para. 72.

[4] *United States - Corrosion Resistant Steel Sunset Review*, para. 82 (emphasis added).