

**NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF
THE DISPUTE SETTLEMENT UNDERSTANDING**

Further Contribution of the United States on Improving Flexibility
and Member Control in WTO Dispute Settlement

Communication from the United States

Addendum

The following communication, dated 24 October 2005, is being circulated at the request of the delegation of the United States.

III(B). Draft Parameters Concerning the Interpretive Approach to Use in WTO Dispute Settlement

In light of the questions posed in TN/DS/W/74 and the useful and enlightening discussion with other Members to date, it is suggested that the following parameters reflect a proper interpretive approach to use in WTO dispute settlement:

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, when 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.¹ 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.

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

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 provision²

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

¹ See for example Article 32(a) of the VCLT.

² 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."

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 plausibly meanings, a WTO adjudicative body should 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.
