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## **1 ARTICLE 2**

### **1.1 Text of Article 2**

#### **Article 2**

##### *Administration*

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.<sup>1</sup>

*(footnote original)*<sup>1</sup> The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

### **1.2 General**

#### **1.2.1 Legal effect of statements made by Members at DSB meetings**

1. In *US – Gambling*, the Panel suggested that the United States was "bound" by certain statements it had made at DSB meetings:

"During two successive DSB meetings, the United States stated that a prohibition on the 'cross-border supply of gambling and betting services under US laws' exists in the

United States.<sup>1</sup> The panel's decision in *US – Section 301 Trade Act* appears to support the view that the United States should be bound by these statements.<sup>2</sup> The statements were made by representatives of the United States to express their understanding of US law. They were made in the context of a formal WTO meeting for the record. The United States has not argued that the representatives were acting outside the authority bestowed upon them in making these statements."<sup>3</sup>

2. In *EC – Bananas III (Article 21.5 – US) / EC – Bananas III (Article 21.5 – Ecuador II)*, the European Communities argued that the Understandings on Bananas between the European Communities and Ecuador and the United States legally barred those Members from initiating Article 21.5 proceedings. The Panel rejected that argument for several reasons, one of which was that the parties had made conflicting statements to the DSB concerning the nature of the Bananas Understandings, and in particular whether they were properly characterized as a "mutually agreed solution" within the meaning of Article 3.6 of the DSU.<sup>4</sup> In this regard, the Appellate Body stated that:

"We consider that these statements may be taken into account where the interpretation of the Understandings is not clear from the language used in its context. However, where the text of the Understandings is clear, these statements have limited relevance, if any, for the purpose of interpreting the Understandings. The parties' obligations must first and foremost be determined on the basis of the text of the Understandings. In any event, *ex post* communications of the parties concerning the Understandings have, at best, slight evidentiary value.

...

[W]e conclude that the Panel erred in placing the relevance it did on the conflicting statements of the parties at the meeting of the DSB, because, what the Panel was required to do was to provide an interpretation of the text of the Understandings. Only once it had done so, could it then consider conflicting statements to the DSB for the limited purpose of either seeking confirmation of the Panel's interpretation, or determining the meaning because the textual interpretation left the meaning ambiguous or led to manifestly absurd results."<sup>5</sup>

3. In the same case, the European Communities argued that even if the complainants were not legally barred from bringing a case, the complaint did not fall within the scope of Article 21.5 of the DSU because the measures being challenged were not "measures taken to comply" with the original DSB recommendations and rulings in *EC – Bananas III*. In this regard, the European Communities argued that the *EC – Bananas III* dispute had ended before the introduction of the new measures. The European Communities argued that this was evidenced, among other things, by the fact that *EC – Bananas III* was removed as a DSB agenda item in February 2002, and by the fact that the United States had terminated its suspension of concessions at that time. The Panel relied on certain contemporaneous statements made by the United States (and Ecuador and Honduras) at a DSB meeting held on 1 February 2002 for the purpose of demonstrating that the complainants did not consider these actions as amounting to a final solution to the dispute.<sup>6</sup> In this regard, the Appellate Body considered that "the Panel was correct in taking into account the United States' statement at the DSB meeting held on 1 February 2002 in assessing whether the United States' termination of the suspension of concessions could be regarded as a final solution to the dispute".<sup>7</sup>

4. In *US/Canada – Continued Suspension*, the Appellate Body concluded that the Panel in that case erred in its treatment of statements that the United States and Canada made at DSB

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<sup>1</sup> (footnote original) WT/DSB/M/151, para. 47 (24 June 2003); WT/DSB/M/153, para. 47 (21-23 July 2003).

<sup>2</sup> (footnote original) Panel Report on *US – Section 301 Trade Act*, paras. 7.118–7.125.

<sup>3</sup> Panel Report, *US – Gambling*, para. 6.161.

<sup>4</sup> Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 7.136–7.137.

<sup>5</sup> Appellate Body Reports, *EC – Bananas III (Article 21.5 – US) / EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 216 and 222.

<sup>6</sup> Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 7.417.

<sup>7</sup> Appellate Body Reports, *EC – Bananas III (Article 21.5 – US) / EC – Bananas III (Article 21.5 – Ecuador II)*, para. 250.

meetings. The Panel had concluded – on the basis of the statements made by Canadian and United States delegates at two DSB meetings – that the United States and Canada had reached "a more or less final decision" that the EC measure at issue was inconsistent with the SPS Agreement and failed to implement the DSB's recommendations and rulings in *EC – Hormones*. Such statements, in the Panel's view, constituted a "determination" under Article 23.2(a) of the DSU and, because the determination was made unilaterally without recourse to the DSU, it breached Article 23.2(a). In the context of reversing the Panel's finding and reasoning, the Appellate Body explained that:

"DSB statements are not intended to have legal effects and do not have the legal status of a definitive determination in themselves. Rather, they are views expressed by Members and should not be considered to prejudice Members' position in the context of a dispute. As the United States rightly points out, '[s]tatements made by Members at DSB meetings, especially those expressing a view as to the WTO consistency of another Member's measures or actions, are generally diplomatic or political in nature' and 'generally have no legal effect or status in and of themselves'.

The Panel's finding that DSB statements could constitute a definitive determination concerning the WTO-inconsistency of a Member's measure could adversely affect WTO Members' ability to freely express their views on the potential compatibility with the covered agreements of measures adopted by other Members.<sup>8</sup> This would result in a 'chilling' effect on those statements, because Members would refrain from expressing their views at DSB meetings regarding the WTO-inconsistency of other Members' measures lest such statements be found to constitute a violation of Article 23. If this were the case, the DSB would be inhibited from properly carrying out its function, pursuant to Article 21.6 of the DSU, to keep under surveillance the implementation of its recommendations and rulings."<sup>9</sup>

### 1.2.2 Legal effect of DSB "taking note" of statements made at DSB meetings

5. In *EC – Bananas III (Article 21.5 – US)*, discussed above, the Panel stated that:

"As mentioned above, at its meeting of 1 February 2002 the DSB 'took note of the statements' made in the context of the 'Surveillance of implementation of recommendations adopted by the DSB' in the *EC – Bananas III* dispute. In this regard the United States argues that:

'The DSB simply 'took note' of the statements and did not take a decision on this issue. The fact that other Members did not request that this matter be on the agenda of subsequent meetings presumably reflects that little would have been gained by keeping this matter on the DSB agenda until the EC took the next step on January 1, 2006.'

The Panel notes that under the agenda item 'Surveillance of implementation of recommendations adopted by the DSB', the DSB would usually both 'take note of the statements made' and explicitly 'agree to revert to the matter at its following regular meeting' in situations where no Member contests that compliance has not yet been achieved by the complainant or the dispute is not yet settled.

Under the agenda item 'Surveillance of implementation of recommendations adopted by the DSB', the DSB would merely 'take note of the statements made' without explicitly agreeing to revert to the matter in various types of situations. In some cases, it seems that the DSB would merely take note of the statements made because no Member contests that compliance has been achieved. However, there are also numerous instances where, under the agenda item 'Surveillance of implementation of recommendations adopted by the DSB', the DSB would merely take note of

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<sup>8</sup> (*footnote original*) We note the United States' concern that "[t]he Panel has thereby made the bold and novel move of transforming the minutes of DSB, other WTO committee meetings, and even Trade Policy Review meetings into a fertile source of comments that ... could constitute 'determinations' actionable under Article 23.2(a)." (*Ibid.*, para. 94)

<sup>9</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 398-399.

statements contesting whether compliance has been achieved, without explicitly agreeing to revert to the matter.

Therefore, the Panel cannot consider the mere fact that the DSB only took note of the statements made at its meeting of 1 February 2002 as an indication that the original DSB recommendations in the *EC – Bananas III* dispute were fully complied with, nor as an indication that those recommendations were not fully complied with.

The Panel notes in this context that, on at least one occasion, the DSB discussed the 'Surveillance of implementation of recommendations adopted by the DSB' and merely took note of statements contesting whether compliance had been achieved, and subsequently agreed to establishing a compliance panel pursuant to Article 21.5 of the DSU. In *EC – Bananas III*, at the DSB meeting of 25 November 1998 the DSB Members expressed diverging opinions as to the first EC attempt to comply referred to in a status report of the European Communities achieves compliance. The DSB merely took note of the statements made, without explicitly agreeing to revert to the matter at its next regular meeting. This did not prevent the DSB from establishing, at a later meeting, the first compliance panel requested by Ecuador in *EC – Bananas III*.<sup>10</sup>

6. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the European Communities requested the Panel to rule that the information-gathering procedure provided for in Annex V of the SCM Agreement had been initiated in this dispute, and that the United States was therefore under an obligation to respond to certain questions put to the United States by the European Communities. The Panel denied the European Communities' request, and declined to rule that the Annex V procedure had been initiated. In the circumstances of that case, the Panel found that the fact that the DSB "merely 'took note'" of the statements was highly significant:

"The Panel is unable to rule that an Annex V procedure was initiated in this dispute. Paragraph 2 of Annex V of the SCM Agreement provides that, in cases where matters are referred to the DSB under Article 7.4 of the SCM Agreement, and serious prejudice has to be demonstrated, 'the DSB shall, upon request, initiate the procedure' envisaged in Annex V. In this case, the European Communities requested that an Annex V information-gathering process be initiated. However, the United States refused, for various reasons, to consent to the initiation of an Annex V procedure in this dispute. It is clear from the minutes of the DSB meetings where this matter was discussed that the DSB never took any action to initiate an Annex V procedure, or to designate a DSB representative pursuant to paragraph 4 of Annex V. Rather, the DSB merely 'took note' of the statements made by Members at those meetings."<sup>11</sup>

7. As discussed further below, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus.<sup>12</sup>

### **1.3 Article 2.1**

#### **1.3.1 Relationship between first and second sentence of Article 2.1**

8. In *US – Stainless Steel (Mexico)*, the Appellate Body explained the function of the term "Accordingly" in the context of the second sentence of Article 11 of the DSU, and noted a parallel with the function of the term "Accordingly" in the second sentence of Article 2.1 of the DSU:

"Mexico stated at the oral hearing that its claim focuses on the first sentence of Article 11 of the DSU. However, we observe that the second sentence of Article 11 begins with the term 'Accordingly'. This term creates a link between the first and the second sentence of Article 11<sup>307</sup>; it ties the second sentence to the general description contained in the first sentence. The second sentence enunciates two specific 'functions' of panels, namely, the duty 'to make an objective assessment of the matter

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<sup>10</sup> Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 7.425-7.429.

<sup>11</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.21.

<sup>12</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 480-549.

before it' and 'to make such other findings as will assist the DSB in making the recommendations or in giving the rulings' under the covered agreements.

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(*footnote original*)<sup>307</sup> The word 'accordingly' is used in a similar way in Article 2 of the DSU. There, the first sentence establishes the DSB. In the second sentence, starting with the word 'accordingly', the DSB is provided with 'the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.'"<sup>13</sup>

## 1.4 Article 2.4

### 1.4.1 Actions under the DSU which occur automatically in the absence of DSB decisions

9. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus.<sup>14</sup> The Appellate Body stated that "to the extent that there is a conflict [with the DSU], those provisions of the SCM Agreement identified in Appendix 2 to the DSU prevail, including over Article 2.4 of the DSU".<sup>15</sup> In the course of its analysis, the Appellate Body stated:

"We are of the view that, taken together, the above considerations make clear that the first sentence of paragraph 2 of Annex V to the *SCM Agreement* must be understood as requiring the DSB to take action, and that such action occurs automatically when there is a request for initiation of an Annex V procedure and the DSB establishes a panel.<sup>16</sup> This provision does not conflict with Article 2.4 of the DSU; rather, it establishes the conditions which, when satisfied, necessarily result in the initiation of an Annex V procedure by the DSB."<sup>17</sup>

10. In *US – COOL (Article 22.6)*, the Arbitrator found that the text of Article 22.6 of the DSU does not explicitly require referral to arbitration by the DSB, and that it is not necessary for the DSB to have an active role in all dispute settlement procedures for them to occur.<sup>18</sup> In the course of its analysis, the Arbitrator stated that:

"The difference in explicit procedural requirements, as well as the difference in designation between 'arbitration' and 'panel', is consistent with Article 2 of the DSU, which sets out the functions and authority of the DSB. In particular, although the DSB has 'the authority to establish panels', Article 2 makes no specific reference to the role of the DSB in relation to arbitrations. Further, it does not necessarily follow from its authority 'to administer these rules and procedures' or other general functions that the DSB must carry out the specific act of referral to arbitration under Article 22.6, or under Articles 21.3(c) and 25."<sup>19</sup>

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<sup>13</sup> Panel Reports, *US – Stainless Steel (Mexico)*, para. 156 and footnote 307.

<sup>14</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 480-549.

<sup>15</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 509.

<sup>16</sup> (*footnote original*) One Member of the Division wishes to qualify this understanding of paragraph 2 of Annex V to the *SCM Agreement*. In the opinion of this Member, to initiate an Annex V procedure, an act of the DSB is required. The DSB's initiation of an Annex V procedure in the manner described above can occur only when the complaining Member's request for an Annex V procedure forms an integral part of that Member's request for the establishment of a panel.

<sup>17</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 524.

<sup>18</sup> Decision of the Arbitrator, *US – COOL (Article 22.6)*, paras. 2.1-2.18.

<sup>19</sup> Decision of the Arbitrator, *US – COOL (Article 22.6)*, para. 2.13.