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1.1 Text of Rule 23bis

Amending Notices of Appeal

- 23bis* (1) The division may authorize an original appellant to amend a Notice of Appeal or an other appellant to amend a Notice of Other Appeal.
- (2) A request to amend a Notice of Appeal or a Notice of Other Appeal shall be made as soon as possible in writing and shall state the reason(s) for the request and identify precisely the specific amendments that the appellant or other appellant wishes to make to the Notice. A copy of the request shall be served on the other parties to the dispute, participants, third participants and third parties, each of whom shall be given an opportunity to comment in writing on the request.
- (3) In deciding whether to authorize, in full or in part, a request to amend a Notice of Appeal or Notice of Other Appeal, the division shall take into account:
- (a) the requirement to circulate the appellate report within the time-period set out in Article 17.5 of the DSU or, as appropriate, Article 4.9 of the *SCM Agreement*; and,
- (b) the interests of fairness and orderly procedure, including the nature and extent of the proposed amendment, the timing of the request to amend a Notice of Appeal or Notice of Other Appeal, any reasons why the proposed amended Notice of Appeal or Notice of Other Appeal was not or could not have been filed on its original date, and any other considerations that may be appropriate.
- (4) The division shall notify the parties to the dispute, participants, third participants, and third parties of its decision. In the event that the division authorizes an amendment to a Notice of Appeal or a Notice of Other Appeal, it shall provide an amended copy of the Notice to the DSB.

1.2 2005 Amendment of the Working Procedures creating Rule 23bis

1. The original Working Procedures did not address the question of whether an appellant could amend its Notice of Appeal once it had been filed. The issue subsequently arose in several appeals, including *US – Countervailing Measures on Certain EC Products*¹ and *EC – Sardines*.² In the fourth revision of the Working Procedures³, which took effect on 1 January 2005, the Appellate Body created Rule 23bis to address this issue. In a communication to the DSB Chairman dated 8 April 2004, the Appellate Body explained the reasons for doing so:

"The present rules do not provide procedures for amending a Notice of Appeal. In the light of issues that have arisen in certain appeals⁴, we consider that it is in the interests of orderly procedure for the *Working Procedures* to be modified to clarify

¹ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 64.

² Appellate Body Report, *EC – Sardines*, paras. 150-151.

³ WT/AB/WP/5.

⁴(*footnote original*) See, for example, Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, *supra*, paras. 58-75 and Appellate Body Report, *EC – Sardines*, *supra*, paras. 137-152.

whether, and in what circumstances, an appellant can supplement the Notice of Appeal.

We consider it essential to preserve the Notice of Appeal as the single, key document that defines the scope of appeal. At the same time, we wish to avoid confusion that may arise when an appellant seeks to file different documents elaborating on or adding to its Notice of Appeal. For these reasons, we believe that it may be useful to provide for the possibility that an appellant may be authorized to amend its Notice of Appeal.⁵

We emphasize that we are not considering an unfettered right to change the Notice of Appeal. This could prejudice the interests of participants as well as create difficulties for the Appellate Body. Rather, we are considering making any appellant or other appellant's ability to amend its Notice of Appeal contingent upon the receipt of leave from the Division hearing the appeal. In order to obtain leave to amend the notice, an appellant or other appellant will be required to show cause. What is required to show cause will depend upon the circumstances of each case. Factors that we would expect to take into account in assessing any request to amend a Notice of (Other) Appeal would include the nature and extent of the proposed amendment, due process, the timing of the request to amend the Notice of (Other) Appeal, and any reasons why the proposed amended Notice was not or could not have been filed on its original due date. Changes to the appeals timetable would be minimized and, in any event, the 90-day period within which an appeal is to be completed would not be extended.

The Appellate Body would afford all participants and third participants an opportunity to comment on the justification for the proposed amendments before reaching a decision on whether to accept an amended Notice."⁶

2. In a communication to the DSB Chairman dated 7 October 2004 explaining the final version of the amendment to Rule 23bis, the Appellate Body explained that:

"We are of the view that the adoption of a rule allowing for the amendment of Notices of Appeal would remedy an existing gap in the *Working Procedures* and have included such an amendment as new Rule 23 bis.

We also recognize the concern expressed by certain Members regarding the criteria to be considered by a Division when addressing a request for authorization to amend a Notice of Appeal. Accordingly, paragraph (3) of the original draft new Rule has been modified to specify, in non-exhaustive terms, the types of considerations that will be taken into account by a Division in such a case.

We have also taken note of the concern expressed by Members regarding the impact of a request to amend a Notice of Appeal on the timeframes involved in an appeal. In line with this concern, we have adjusted the amendment to require that requests for authorization to amend be made "as soon as possible". We anticipate that a Division considering any such request will consider the matter promptly, and will fix strict deadlines for comment by other parties. We do not, therefore, consider that the new Rule 23 bis will affect the ability of the Appellate Body to deal expeditiously with the matters that come before it."⁷

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⁵(*footnote original*) The same reasoning applies, *mutatis mutandis*, to Notices of Other Appeal.

⁶ WT/AB/WP/W/8, pp. 5-6.

⁷ WT/AB/WP/W/9, p. 6.