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og deres stedfortrædere

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Til underretning for Folketingets Europaudvalg vedlægges EU konceptpapir om forbedring af WTO's tvistbilæggelsessystem. Konceptpapiret er blevet cirkuleret i WTO som vedlagte dokument af 13. marts 2002.

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Contribution of the EUROPEAN COMMUNITIES and its Member States to the improvement of the WTO Dispute Settlement Understanding

Communication from the European Communities

The following communication has been received from the Permanent Delegation of the European Commission.

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Introduction

The experience of the last six years (244 cases as of 4 February 2002) has revealed that the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "DSU"), while generally working in a satisfactory manner, can and sometimes needs to be improved on a number of issues.

In recognition of this fact, the 4th Ministerial Conference decided that:

> *"30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter."*

Among the work done so far are the discussion papers submitted by the EC on 21 October 1998 and 23 July 1999, and the text co-sponsored by the EC and its member States before the Third Ministerial Conference, circulated as document WT/MIN(99)/8 of 22 November 1999.

While these documents were produced in the context of the Decision on the Application and Review of the DSU, which is no longer relevant for the mandate given at Doha, the EC and its member States believe that they remain to a large extend relevant for possible improvements to the DSU. In particular, the EC and its member States continue to support the substance of the text that they sponsored before the 3rd Ministerial Conference, unless otherwise indicated below.

It should be recalled at the outset that the purpose of a dispute settlement procedure is the amicable – and quick – resolution of a dispute. In this context, the WTO Members should always endeavour to solve the dispute at the earliest possible stage, if possible at the consultation stage but also via recourse to good offices or mediation by the Director-General, as provided in Article 5 of the DSU. The EC and its member States consider that any improvements of the DSU sho te towards this overall goal of facilitating the earliest possible resolution of disputes. Should early resolution or timely compliance not prove possible, preference should be effectively given to trade compensation over trade-restrictive suspensions of concessions.

This contribution describes by main themes the issues for which the EC and its member States believe that an improvement is still required. Proposed textual amendments are included in the Annex. These proposals are without prejudice to further submissions that may be presented in the course of the negotiations.

Moving from *ad hoc* to more permanent panelists

Reasons for change

The EC and its member States are of the view that changing the way panelists are selected and providing them a more permanent basis for their work is likely to lead to faster procedures and increase the quality of the panel reports.

The first reason is that there is a growing quantitative discrepancy between the need for panelists and the availability of *ad hoc* panelists.

On the demand side, it is now clear that there are many more panels under the WTO than under the GATT. Furthermore, the total duration of the cases is increasing, because of the frequent recourse to compliance panels and to arbitration on the suspension of concessions, procedures which are now normally handled by the original panelists.

On the supply side, it has proved more and more difficult to find qualified panelists who are not nationals of Members involved, be it as a complainant, a defendant or a third party.

The result of the discrepancy between demand and supply has been an increasing delay in the selection of panelists, and an increasing recourse to the Director-General of the WTO for the appointment of panelists.

The time that can be gained in constituting the panel could be allocated to other parts of the procedure.

Second, recent developments concerning the actual consideration of cases by panelists put a greater strain on panelists selected on an *ad hoc* basis. Indeed, the actual conduct of a dispute settlement procedure has become much more sophisticated than before and has substantially increased the workload of panelists.

It is not only because of procedural developments, such as preliminary rulings and the handling of business confidential information, that cases take more time to handle. It is also due to the increased complexity of the substance of the cases brought before the panels, both from a factual and a legal point of view, and because of the increased complexity of the assessment conducted by panelists.

Moving to a system of permanent panelists would most likely result in less reversals of panel reports by the Appellate Body than is currently the case, thereby reducing the total timeframe of the procedure, the workload of the Appellate Body and the costs for all the parties.

Thirdly, it would enhance the legitimacy and credibility of the panel process in the eyes of the public, as the possibility of conflicts of interests would be eliminated and the independence of the panelists would be protected as is the case in domestic proceedings or in the Appellate Body.

Fourthly, it would increase the involvement of developing countries in the panel process. Under the current system, only 35% of the panelists having served since 1995 come from a developing country. Such a figure would increase with a more permanent roster of panelists that, as is the case with the Appellate Body[1], would be broadly representative of the WTO Membership.

In conclusion, moving from a system of ***ad hoc*** selection of panelists to a more permanent selection process would lead to faster proceedings and better and more consistent rulings.

It would not constitute a radical change from the principles of the DSU: in effect, it would amount to reducing the size of the "roster of panelists" and to streamlining the selection process on the basis of that roster. In addition, it would be fully in line with the evolution of the dispute settlement system since the Uruguay Round.

Moving to a system of permanent panelists

In its October 1998 document, the EC made reference to a roster of between 15 and 24 permanent panelists. Given the level of panel activity, these figures are still broadly accurate and are based on a reasonable estimate of the overall expected workload of panels in any given year and the time permanent panelists would actually devote to panel work.

On this latter point, it seems preferable at this stage to provide for a full-time activity, in order to ensure panelists of high quality and expertise and avoid as far as possible potential problems of conflict of interest.

As far as qualifications are concerned, permanent panelists should have either demonstrated expertise in international trade law, economy or policy, and/or past experience as a GATT/WTO panelist.

The EC and its member States consider that on balance, it is not necessary to require that panelists cover specifically all possible sectors of expertise existing under the WTO Agreements. Indeed, even if one was able to define in advance the exact expertise that will be required (and not simply "trade in goods" as is currently the case for the indicative list of panelists), it would mean that the few panelists selected for a specific field would always be the only ones to adjudicate those issues, and that others would risk being underemployed if no cases involving their speciality were brought.

Furthermore, the allocation of a too large number of panelists among "micro-chapels" would be at odds with the need to ensure consistency in the rulings of the panels.

In line with the rules applicable to the members of the Appellate Body, government affiliation should not be permitted.

Further, it should be provided that panelists should not participate in the consideration of any disputes that would create a direct or indirect conflict of interest, along the lines of Article 17.3 DSU.

Decisions on including an individual in the roster of permanent panelists would be taken by the DSB, upon proposal by the Members. A selection process will have to be defined. To better preserve the independence of the panelists, a non-renewable term of six years for example could be considered, with appropriate phase-in provisions for the first panelists. Ideally, the respective terms of the panelists and of the Appellate Body members should not coincide.

Obviously, the parties to the dispute will not at all be involved in the selection of the three panelists sitting in a specific case. In line with the practice of the Appellate Body, panelists would be appointed by lottery, depending on the availability of candidates. In case of a direct or indirect conflict of interests, the panelist would have to disqualify himself from the procedure, and a new drawing would be made.

Implementation issues

The relationship between Article 21.5 and Article 22 DSU

A first item that had attracted a lot of attention in 1999 is the "***sequencing***" issue, ***i.e.*** the chronological order in which the multilateral determination of consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB on the one side, and the multilateral procedure for the suspension of concessions or other obligations on the other side, takes place.

In light of the practice followed consistently since then, it would appear that Members now broadly agree that completing the procedure established under Article 21.5 DSU is a pre-requisite for invoking the provisions of Article 22 DSU, in case of disagreement among the parties about implementation. The problem is therefore clearly less acute than in the past.

With this in mind, the EC remains however in favour of clarifying the language of the DSU, to ensure legal certainty and predictability of the system for all its Members.

This clarification should be done first by taking into account the practice followed by the Members when dealing with the sequencing issue. The EC and its member States therefore consider that, in accordance with the consistent practice of all WTO Members, the compliance procedure must include a systemic right of appeal against rulings of compliance panels.

Furthermore, the EC and its member States believe that consultations are an essential part of any dispute settlement procedure, and that therefore consultations should be held before any request for the establishment of an Article 21.5 panel.

Making trade compensation a more realistic alternative to suspension of concessions or other obligations

Under Article 3.7 DSU, the first objective of the dispute settlement mechanism in the absence of a mutually agreed solution to a dispute is to secure the withdrawal of WTO-inconsistent measures. That key objective should never be forgotten.

If however immediate compliance is not possible, Article 3.7 DSU gives preference to temporary trade-enhancing compensation over trade-restricting suspension of concessions or other obligations.

It is logical that trade compensation should always be preferred to suspension of concessions or other obligations, which is only a last-resort instrument: the authorization to suspend concessions runs against a basic principle of the WTO, ***i.e.*** predictability of the trading system.

Therefore, the use of suspension of trade concessions involves a cost not only for the defending party, but also for the economy of the complaining Member. As shown by past experience, this is especially the case when that complaining Member is a developing country.

However, the reality is that trade compensation is currently not a realistic option before the application of trade sanctions.

Indeed, the structure of the DSU is such that Members are induced to request suspension of concessions first. First, Article 22.2 DSU gives only 20 days after the end of the reasonable period of time to conclude negotiations of compensation. More importantly, it is only in requesting the suspension of concessions and in triggering an Article 22.6 DSU arbitration that the parties will know the level of nullification and impairment: in other words, the main element for the negot iation of compensation can only be obtained in requesting the authorization to apply sanctions.

A substantial improvement of the DSU should be possible on this point.

One possibility would be to allow the complaining party to obtain an independent decision from a WTO arbitrator about the level of nullification and impairment before the request for suspension of concessions is submitted.

An arbitration on the level of nullification and impairment may thus happen:

– before the end of the reasonable period of time, when the non-complying party indicates that it will not be able to comply with the recommendations and rulings of the DSB, and the complaining party requests arbitration on the level of nullification and impairment, or

– after the end of the reasonable period of time, when both parties agreed that there has not been implementation, or after the compliance panel established under Article 21.5 DSU has completed its task and has found that the implementing party has not complied with its WTO obligations.

If, in the absence of an agreement on compensation, the complaining party requests ultimately the authorization to suspend concessions, an arbitration under Article 22.6 DSU would still take place, but the task of the arbitrator would be limited to verifying whether the level of the proposed suspension of concessions is equivalent to the pre-determined level of nullification and impairment and/or whether the rules on cross-retaliation have been respected. As the performance of that ac tivity would not be time-consuming, the time gained in that part of the procedure could be used for the earlier quantification exercise.

Another possibility to enhance compensation would be to encourage the non-complying party to offer to the prevailing party a compensation package for a value equal to the level of nullification and impairment, provided that the complainant decides to present such a request (such request should normally be made after a quantification of the level of nullification and impairment has taken place). Further refinements of this procedural step could be considered, such as the presentation o f a

compensation package whose value is higher than the level of nullification and impairment, so as to allow the complaining party to choose within that package up to the level of nullification and impairment. Such a procedural step should however be limited in time, so as to avoid any unreasonable delay in the overall procedure and therefore any weakening of the objective of compliance.

exempting goods en route from the scope of the suspension of concessions or other obligations

Because the suspension of trade concessions usually takes the form of prohibitive duties, it would be appropriate to provide for a specific exemption for goods *en route*. For example, Canada exempted from the 100% duties the goods in transit to Canada on or before the date of entry into force of the suspension of concessions in the *EC – Hormones (DS48)* case.

Modification of the suspended concessions or other obligations after the authorization by the DSB

The EC and its member States remain firmly convinced that any amendment to the DSU should address the "*carousel*" issue.

Indeed, there must be a specific provision in the DSU that makes clear that a Member does not have the ability to modify unilaterally the list of concessions or other obligations for which a DSB authorization has been granted under Article 22.7 DSU.

The text sponsored by the EC and its member States before the 3rd Ministerial Conference included a provision to that effect ("footnote 11").

Thailand and the Philippines have recently submitted a proposal as document WT/MIN(01)/W/3, which provides a useful contribution for further discussions on this issue.

In any event, any amendment of the DSU must achieve the key objective of the EC and its member States. Additional proposals may be presented as the negotiations proceed.

Termination of the suspension of concessions or other obligations after the authorization by the DSB

The current text of the DSU does not provide any specific procedure in case a Member implements the recommendations and rulings of the DSB after another Member has been authorized to suspend concessions or other obligations.

An expedited compliance panel procedure should be provided to that effect, as proposed in the text sponsored by the EC and its member States before the 3rd Ministerial Conference.

That text should be completed by a specific arbitration procedure for the re-computation of the level of nullification and impairment, should the panel conclude that the Member concerned has not fully implemented the recommendations and rulings of the DSB.

Transparency

Dispute settlement mechanisms established under international public law normally provide for public access to their proceedings. This is the case for the International Court of Justice, the International Tribunal for the Law of the Sea or the European Court of Human Rights for example. The WTO dispute settlement mechanism differs from the international practice on this issue.

Because "*the aim of the dispute settlement mechanism is to secure a positive solution to a dispute*" (Article 3.7 DSU), continuing to keep panel or Appellate Body proceedings not accessible to the public should not be *a priori* excluded, to the extent one of the parties to a dispute consider that this can help to resolve the dispute, for the same reasons that consultations can remain confidential. It should indeed be remembered that some disputes have found a solution befo re the circulation of the panel report.

The DSU should therefore provide sufficient flexibility for parties to decide whether certain parts of the proceeding before the panel or the Appellate Body should be open to the public for attendance. At the same time, third parties should also have the right to decide whether their interventions should take place in open or closed sessions.

The precise modalities for opening panel and Appellate Body proceedings to the public would have to be developed but in any event, the panel or the Appellate Body should be able to impose limited and justified restrictions on the opening of the proceedings, especially when dealing with business confidential information.

regulation of amicus curiae submissions

The DSU as interpreted by the Appellate Body now allows the submission of *amicus curiae* briefs on a case by case basis[2].

The EC and its member States consider that it is necessary to define better the framework and the conditions for allowing such *amicus curiae* briefs in potentially all cases. Indeed, the acceptance of *amicus curiae* submissions should not lead to a delay in the proceeding, nor create substantial additional burdens for the developing Members. At the same time, sufficient time should be given for the *amicus curiae* submissions to be meaningful and for the parties to r eview those briefs to the extent they were accepted by the panel or the Appellate Body.

Moreover, the procedural two-stage approach described by the Appellate Body should be retained, *i.e.* an application for leave and an effective submission. *Amicus curiae* submissions should be directly relevant for the factual and legal issues under consideration by the panel, or the legal issues raised in the appeal.

More generally, this does not prevent panels from being more pro-active in seeking information relevant for an objective assessment of the matter. The EC and its member States are indeed of the view that recourse by panels to the expertise of competent international organizations is of utmost importance for the proper functioning of the WTO dispute settlement system. Panels should be encouraged, in such circumstances, to make full use of their right to seek information, including thro ugh the use of existing cooperation mechanisms with these organizations.

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Further clarifications and modifications of the DSU

Experience has revealed that other, more technical issues should be addressed.

- In Article 4 DSU, a provision should be added to enable a Member to formally withdraw a request for consultations. Furthermore, consultations which have not been followed by a request for the establishment of a panel within a certain time frame (*e.g.* 18 months) should be considered as withdrawn.

    The purpose of these proposals is to allow Members to "clean" dormant cases which are still technically open but where parties do not want to proceed any further.

- The withdrawal of the request for the establishment of a panel should also be provided explicitly and regulated in Article 6 DSU.

• As a way to make early settlements more attractive, it would seem appropriate to provide that compliance with mutually agreed solutions can be examined via the procedures of Articles 21.5 (or proposed *21bis)* and 22 DSU to the extent that they have been notified in full to the DSB. For the complaining party, this would have the advantage of avoiding to restart a complete procedure in case the non-respect of a mutually agreed solution constitutes a violation of the covered agreements.

- In Article 10.2 DSU, the time frame for notifying a third party interest should be mentioned explicitly, *i.e.* 10 days. This would clarify the current situation based on "past practice". It should be noted that short time limits are necessary in the current system, because the notification of third parties interests is a pre-requisite for the composition of the panel (because panelists may not be nationals of third parties). This would of course change with permanent panelists.<
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- Additional improvements enabling the Appellate Body to cope with its workload would have to be considered. In view of the volume of its work and on the basis of past experience, it would appear desirable to convert the mandate of the Appellate Body Members into a full-time appointment for a given period of time.

- Recent experience makes clear that the DSU must contain a remand authority for the Appellate Body, as it is the task of panels to establish clearly and unequivocally issues of facts. The proposal made by the EC and its member States in 1998 needs therefore to be further considered.

- The time frame for the completion of the arbitration under Article 21.3(c) DSU should start from a more logical date than the date of the adoption of the report, for example by providing a 45-day period from the date of the appointment of the arbitrator.

- Article 22.6 DSU contains a 60-day deadline for the completion of an arbitration on suspension of concessions starting from the end of the reasonable period of time. A new starting point for the time period should be provided in case no such reasonable period of time exists.
- More generally, the Working Procedures could be more developed, on the basis of the experienced gained so far, in order to ensure increased consistency in the way panels conduct the proceedings. As for the Appellate Body, Annex 3 could be wholly or partially converted into Working Procedures for panels, which could be modified by the DSB.

AMENDMENT OF CERTAIN PROVISIONS OF

THE UNDERSTANDING ON RULES AND PROCEDURES

GOVERNING THE SETTLEMENT OF DISPUTES

A new paragraph 13 will be added to Article 3 (first sentence of the amendment already contained in WT/MIN(99)/8)

Any time period in this Understanding may be extended by mutual agreement of the parties to the proceeding concerned. In that context, Members shall give special attention to the particular problems and interests of developing country Members.

In paragraph 7 of Article 4, the numeral "*60*" shall be deleted wherever it occurs and the numeral "*30*" shall be inserted in its place. The following footnote shall be inserted at the end of this paragraph (<u>amendment already contained in WT/MIN(99)/8</u>) :

Where one or more of the parties is a developing country Member, the time period established in paragraph 7 of Article 4 shall, if the parties agree, be extended by up to 30 days. Any other party to the dispute shall accord sympathetic consideration to a request by a developing country Member for such an extension.

In paragraph 10 of Article 4, the word "should" shall be deleted and the word "shall" shall be inserted in place thereof (<u>amendment already contained in WT/MIN(99)/8</u>).

A new paragraph 12 will be inserted in Article 4, which reads as follows :

12. A request for consultations may be withdrawn at any point of time. A request for consultations shall be deemed to have been withdrawn by the complaining party if that Party has not submitted a request for the establishment of a panel within 18 months after the date of receipt of the request for consultations by the defending party.

Paragraph 1 of Article 6 shall be amended to read as follows (<u>amendment already contained in WT/MIN(99)/8</u>):

1. If the complaining party so requests, the DSB shall establish a panel at the meeting at which the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel.

The existing footnote to Article 6.1 shall be retained at the end of paragraph 1.

A new paragraph 3 will be inserted in Article 6, which reads as follows :

3. A request for the establishment of a panel may be withdrawn at any point of time by the complaining party before the issuance of the final report. If the request is withdrawn, the authority for establishment of the panel shall lapse.

Article 8 is amended to read as follows :

1. Panels shall be composed of three individuals included on the roster of panelists established by the DSB.

The roster shall include a number of persons as determined from time to time by the General Council, which number shall not be less than 20 persons, three of whom shall serve on any one case. Panelists shall serve on panels in rotation. Such rotation shall be determined in the working procedures of panels referred to in paragraph 4.

2. The DSB shall include persons on the roster for six-year terms and no person shall be re-appointed. However, the terms for the initial inclusion on the roster shall be either [three, four, five or six years], with an equal number appointed for each period, as determined by lot [and with those appointed for [three or four] years eligible exceptionally for re-appointment to six- year terms].

3. The roster shall comprise persons of recognized authority, with demonstrated expertise in international trade law, economy or policy and the subject matter of the covered agreements generally, and/or past experience as a GATT/WTO panelist. It shall be broadly representative of membership in the WTO. All persons included on the roster will perform their task on a full-time basis, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

They shall be unaffiliated with any government.

> *Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organisation. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.*
>
> *4. Within three months after establishment of the initial roster, the panelists included on the roster shall draw up working procedures for panels as necessary to the extent not already provided for in the DSU. Such procedures shall be drawn up in consultation with the Chairman of the DSB and the Director-General, and submitted to the DSB for adoption.*
>
> *5. Panelists shall be provided with appropriate administrative and legal support as it requires.*
>
> *6. The expenses of panelists, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.*

In paragraph 2 of Article 10, the terms "*within 10 days*" shall be inserted after "*to the DSB*".

Paragraph 3 of Article 10 shall be amended to read as follows (amendment already contained in WT/MIN(99)/8):

3. Each third party shall receive a copy of all documents or information submitted to the panel, at the time of submission, except for certain factual confidential information designated as such by the disputing party that submitted it, and except for any submission following the interim panel report. Without prejudice to paragraph 2 of this Article, a third party may observe any of the substantive meetings of the panel with the parties, except f or portions of sessions when such factual confidential information is discussed.

The following new Article shall be inserted after Article 13:

Article 13bis

Amicus curiae submissions

> *1. The panel or the Appellate Body may permit unsolicited amicus curiae submissions, provided that the panel or the Appellate Body have determined that they are directly relevant to the factual and legal issues under consideration by the panel or the Appellate Body and that they comply with the rules of this Article. In such a case, the panel or the Appellate Body shall consider the submissions in question, while not being obliged to address, in its report, the factual or legal arg uments made in such briefs.*
>
> *2. Any person, whether natural or legal, other than a party or third party to the dispute, wishing to make an amicus curiae submission to the panel or the Appellate Body, must apply for leave to file such a submission from the panel or the Appellate Body within 15 days from the date of the composition of the panel or within 5 days from the date of the notice of appeal, respectively.*

3. An application for leave to file such a submission shall:

> *(a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;*

(b) be in no case longer than three typed pages;

(c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;

(d) demonstrate the direct interest that the applicant has in the factual or legal issues raised in the dispute;

(e) identify the specific issues of facts and law which the applicant intends to address in its submission and, in the case of a application submitted to the Appellate Body, the legal interpretations developed by the panel that are the subject of the notice of appeal;

(f) indicate why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the panel or Appellate Body to grant the applicant leave to file a submission in this appeal; and

(g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

4. The panel or the Appellate Body will review and consider each application for leave to file a submission and will, within 7 days from their receipt in the case of a panel, and within 3 days in the case of the Appellate Body, render a decision whether to grant or deny such leave. That decision shall be notified forthwith to the applicant by facsimile or electronic mail.

5. Any person, other than a party or a third party to this dispute, granted leave to file an amicus curiae submission, must make its submission to the panel within 15 days from the date of receipt of the notification, and to the Appellate Body within 3 days from such date.

6. A submission filed with the panel or the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the submission;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and

(c) set out a precise statement, strictly limited to legal arguments in the case of a submission to the Appellate Body, supporting the applicant's position on the issues of facts and law with respect to which the applicant has been granted leave to file a submission.

7. The parties and the third parties to the dispute shall be given 10 days from the date of receipt of any submission filed by an applicant granted leave under this Article to comment on and respond to such submissions.

Paragraph 1 of Article 15 shall be deleted and paragraphs 2 and 3 of Article 15 shall be renumbered as paragraphs 1 and 2. In the first sentence of the present paragraph 2 of Article 15, the first sentence shall be amended to read as follows (amendment already contained in WT/MIN(99)/8):

2. The panel shall issue an interim report to the parties, including the descriptive sections and the panel's findings and conclusions.

Present paragraph 2 of Article 15 shall be amended by deleting therefrom the sentence "*At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments.***" (amendment already contained in WT/MIN(99)/8)**

In paragraph 1 of Article 17, the second sentence shall be amended to read as follows:

It shall be composed of at least seven persons, three of whom shall serve on any one case. The total number of Appellate Body members may be modified from time to time by the General Council.

In paragraph 10 of Article 17, the first sentence shall be amended to read as follows:

The proceedings of the Appellate Body shall be confidential. However, the parties may agree within 5 days from the date of the notice of appeal that the hearing shall be open to the public in whole or in part.

Paragraph 12 of Article 17 shall be amended to read as follows :

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding. If the report of the panel or compliance panel does not contain sufficient undisputed factual findings so as to enable the Appellate Body to perform its task, the

Appellate Body shall remand the case to the panel or, where appropriate, the compliance panel, with the necessary findings of law and/or directions so as to ena ble the panel to perform is task. The request shall be forwarded to the Chair of the DSB.

The following new Article shall be inserted after Article 17 :

Article 17 bis

Remand procedure

When the Appellate Body makes a remand under paragraph 12 of Article 17, the DSB shall establish the panel, consisting of the members of the original panel, within 10 days after the request has been forwarded to the Chair of the DSB.

The terms of reference of the panel established under this paragraph shall be

> *"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB under paragraph 12 of Article 17 in document ... and to make such findings, in accordance with the findings of law and/or directions made by the Appellate Body under that provision, as will assist the DSB in making the recommendations or in giving the rulings provided in that/those agreement(s)".*
>
> *ons so as to ena*

In paragraph 2 of Article 18, the last sentence shall be amended to read as follows (amendment already contained in WT/MIN(99)/8):

Each party and third party to a proceeding shall also, if requested by a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public, no later than 15 days after the date of either the request or the submission, whichever is later, or such other deadline as is agreed by the party and the requesting Member.

In paragraph 2 of Article 21, the word "should" shall be deleted and the word "shall" shall be inserted in place thereof (amendment already contained in WT/MIN(99)/8).

Sub-paragraph (c) of paragraph 3 of Article 21 shall be amended to read as follows :

(c) a period of time determined through binding arbitration. Any party may request such arbitration within 60 days after the date of the adoption of the recommendations and rulings by the DSB. If the parties cannot agree on an arbitrator within 10 days after referring the matter to arbitration, the arbitrator shall be appointed from the roster of panelists provided for in Article 8 by the Director-General within a further 10 days, after consultin g the parties. The arbitrator shall issue its award to the parties within 45 days from the date of its appointment. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

The following footnote shall be added to the third sentence of paragraph 3 of Article 21 after the term "reasonable period of time" (amendment already contained in part in WT/MIN(99)/8) :

For purposes of this Understanding, the 'reasonable period of time' shall include the time-period specified under paragraph 7 of Article 4 and paragraph 9 of Article 7 of the Agreement on Subsidies and Countervailing Measures.

Paragraph 5 of Article 21 is amended to read as follows (amendment already contained in WT/MIN(99)/8) :

During the reasonable period of time, each party to the dispute shall accord sympathetic consideration to any request from another party to the dispute for consultations with a view to reaching a mutually satisfactory solution regarding the implementation of the recommendations or rulings of the DSB.

Paragraph 6 of Article 21 is amended to read as follows (amendment already contained in WT/MIN(99)/8) :

6. (a) The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption.

(b) The Member concerned shall report on the status of its implementation of the recommendations or rulings of the DSB at each DSB meeting, where any Member may raise any point pertaining thereto, beginning 6 months after the date of adoption of the recommendations or rulings of the DSB, until the parties to the dispute have mutually agreed that the issue is resolved or until the DSB finds pursuant to Article 21bis that the Member concerned has complied. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a detailed written status report concerning its progress in the implementation of the recommendations or rulings.

(c) (i) Upon compliance with the recommendations or rulings of the DSB the Member concerned shall submit to the DSB a written notification on compliance.

(ii) If the Member concerned has not submitted a notification under subparagraph (c)(i) by the date that is 20 days before the date of expiry of the reasonable period of time, then not later than that date the Member concerned shall submit to the DSB a written notification on compliance including the measures that it has taken, or the measures that it expects to have taken by the expiry of the reasonable period of time. Where the notification refers to measures that the Membe r concerned expects to have taken, the Member concerned shall submit to the DSB a supplementary written notification no later than the expiry of the reasonable period of time, stating that it has, or has not, taken such measures, and indicating any changes to them.

(iii) Each notification under this subparagraph shall include a detailed description as well as the text of the relevant measures the Member concerned has taken. The notification requirement of this subparagraph shall not be construed to reduce the reasonable period of time established pursuant to paragraph 3 of Article 21.

The following new Article shall be inserted after Article 21 (amendment already contained in WT/MIN(99)/8, except for the consultation and appeal steps):

Article 21bis

Determination of Compliance

1. Where there is disagreement between the complaining party and the Member concerned as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings of the DSB, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in this Article. [2bis]

2. The complaining party may request consultations under this Article at any time after:

"(i) the Member concerned states that it does not need a reasonable period of time for compliance pursuant to paragraph 3 of Article 21;

"(ii) the Member concerned has submitted a notification pursuant to paragraph 6(c) of Article 21 that it has complied with the recommendations or rulings of the DSB; or

"(iii) ten days before the date of expiry of the reasonable period of time;

whichever is the earlier. Such request shall be made in writing.

The Member to which the request is made shall, unless otherwise agreed, reply to the request within 5 days after the date of its receipt and shall enter into consultations in good faith within 12 days from the date of circulation of the request so as to allow third parties to request to join the consultations.

3. If the Member does not respond or does not enter into consultations within the time periods mentioned in paragraph 2, or if at the end of the consultations referred to in the same paragraph, either party consider that the consultations have failed to settle the dispute, the complaining party may immediately request the establishment of a compliance panel consisting of the members of the original panel.

4. When requesting the establishment of a compliance panel, the complaining party shall identify the specific measures at issue and provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. Unless the parties to the compliance panel proceeding agree on special terms of reference within 5 days from the establishment of the compliance panel, standard terms of reference in accordance with Article 7 shall ap ply to the compliance panel.

5. The DSB shall meet 10 days after such a request unless the complaining party requests that the meeting be held at a later date. At that meeting, the DSB shall establish a compliance panel, unless the DSB decides by consensus not to establish such a panel.

6. The compliance panel shall circulate its report to the Members within 90 days of the date of its establishment.

7. On or after the date of circulation of the report of the compliance panel, any party to the compliance panel proceeding may request a meeting of the DSB to adopt the report, and the DSB shall meet 10 days after such a request unless the party requesting the meeting requests that the meeting be held at a later date. At that meeting, the compliance panel report shall be adopted by the DSB and unconditionally accepted by the parties to the compliance panel proceeding unless a p arty to the compliance panel proceeding formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. This adoption procedure is without prejudice to the right of Members to express their views on a compliance panel report.

8. In case the report of the compliance panel is appealed, the Appellate Body proceedings, as well as the adoption of the Appellate Body report, shall be conducted in accordance with Article 17.

9. If the compliance panel or the Appellate Body report finds that the Member concerned has failed to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations or rulings of the DSB in the dispute within the reasonable period of time, then :

> *(i) the Member concerned shall not be entitled to any further period of time for implementation following adoption by the DSB of the report of the compliance panel and, where the report of the compliance panel has been appealed, the report of the Appellate Body; and*
>
> *(ii) after circulation of the compliance panel or the Appellate Body report, a complaining party that was a party to the compliance proceeding may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements pursuant to Article 22. The DSB shall grant authorization to such request only after the adoption of the compliance panel or Appellate Body report.*

10. The compliance panel shall establish its own working procedures. The provisions of Articles 1 through 3, 8 through 14, 18, 19, 21.1, 21.2, 21.7, 21.8, 23, 24, 26 and 27.1 of the DSU shall apply to the compliance panel proceedings except to the extent that (i) such provisions are incompatible with the time frame provided in this Article, or (ii) this Article provides more specific provisions."

The following sub-paragraphs shall be inserted at the end of paragraph 1 in Article 22:

At any point of time before the submission of the request for authorization for suspension of concessions or other obligations referred to in paragraph 2 of this Article, the parties may agree to request an arbitration to determine the level of nullification or impairment caused by the measure found to be inconsistent with a covered agreement.

Such arbitration shall be carried out by the original panel, if members are available. The Director-General shall determine whether the members of the original panel are available. If any members of the original panel are not available, and the parties to the arbitration do not agree on a replacement, at the request of any party the Director-General shall appoint a replacement arbitrator from the roster of panelists provided for in Article 8 within 5 days after the matter is re ferred to the arbitration, after consulting with the parties to the arbitration.

The arbitration shall be completed and the decision of the arbitrator shall be circulated to Members within 45 days after the date of the request. The award of the arbitrator shall be final, and parties shall accept it as the level of nullification and impairment for purposes of future proceedings under paragraph 6 of this Article related to that measure.

Paragraph 2 of Article 22 shall be amended to read as follows (amendment already contained in WT/MIN(99)/8, except for the mutually agreed solutions and the compensation step) :

2. If:

> *(i) the Member concerned does not inform the DSB pursuant to paragraph 3 of Article 21 that it intends to implement the recommendations or rulings of the DSB;*
>
> *(ii) the Member concerned does not submit within the required time period a notification pursuant to paragraph 6(c) of Article 21 stating that the Member concerned has complied; or*

(iii) the compliance panel or the Appellate Body report pursuant to Article 21bis finds that the Member concerned has failed to bring the measures found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations or rulings of the DSB;

(iv) the compliance panel or the Appellate Body report pursuant to Article 21bis finds that the Member concerned has acted inconsistently with a covered agreement by not complying comply with those terms and conditions of a mutually agreed solution notified under Article 3.6 that are subject to the disciplines of a covered agreement; then

such Member shall, if so requested by the complaining party, enter into consultations with a view to agree on a mutually acceptable trade compensation.

Within 30 days from the request, the Member concerned shall submit to the other Member a proposal for mutually acceptable trade compensation. When an arbitration referred to in paragraph 1 has taken place, such proposal shall be consistent with the award of the arbitrator.

If no proposal for compensation has been submitted within the time period referred to in the previous sub-paragraph or if no agreement has been reached within 30 days from the submission of the proposal for a mutually acceptable compensation, the complaining Party shall be entitled to request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements. A meeting of the DSB shall be convened for this pu rpose 10 days after the request, unless the complaining party requests that the meeting be held at a later date. The parties to the dispute are encouraged to consult before the meeting to discuss a mutually satisfactory solution.

Paragraph 6 of Article 22 shall be amended to read as follows (amendment already contained in WT/MIN(99)/8, except for the shorter deadline in paragraph c):

6. (a) When the complaining party has made a request for authorization to suspend concessions or other obligations pursuant to paragraph 2 of this Article, the DSB shall grant authorization to such request at the meeting requested by the complaining party unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set fort h in paragraph 3 have not been followed where the complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration.

(b) Such arbitration shall be carried out by the original panel, if its members are available. The Director-General shall determine whether the members of the original panel are available.[8] *If any members of the original panel are not available, and the parties to the arbitration do not agree on a replacement, at the request of any party the Director-General shall appoint a replacement arbitrator*[9] *from the roster of panelists provided for in Article 8 within 5 days after the matter is referred to the arbitration, after consulting with the parties to the arbitration.*

(c) The arbitration shall be completed and the decision of the arbitrator shall be circulated to Members within 45 days after the referral of the matter, except when an arbitration procedure under paragraph 1 of this Article has taken place, in which case the report shall be circulated within 30 days. The complaining party shall not suspend concessions or other obligations during the course of the arbitration.

Paragraph 8 of Article 22 is amended by inserting the following sentence after the first sentence :

Products which were en route on or before the date of application of the suspension of concessions or other obligations shall be exempted from the application of the domestic measure implementing such suspension.

Article 22 is amended by inserting the following paragraph after paragraph 8. The existing paragraph 9 shall be renumbered as paragraph 10 (amendment already contained in WT/MIN (99)/8, except sub-paragraph d).

9. (a) After the DSB has authorized the suspension of concessions or other obligations pursuant to paragraph 6 or 7 of this Article, the Member concerned may request a termination of such authorization on the grounds that it has eliminated the inconsistency or the nullification or impairment of benefits under the covered agreements identified in the recommendations or rulings of the DSB. The Member concerned shall include with any such reques t a written notice to the DSB describing in detail the measures it has taken, providing the text of the relevant measures, and requesting a meeting of the DSB.

The DSB shall meet 20 days after such a request unless the Member concerned requests that the meeting be held at a later date. At such meeting the DSB shall withdraw the authorization for suspension of concessions and other obligations unless the DSB decides by consensus not to withdraw the authorization, or unless the complaining party objects to such withdrawal, in which case subparagraph (b) shall apply.

(b) Where there is disagreement between a complaining party and the Member concerned as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings of the DSB in the dispute, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in Article 21bis. If as a result of recourse to the dispute settlement procedures provided for in Article 21bis, the measures taken to comply by t he Member concerned are found not to be inconsistent with a covered agreement and comply with the recommendations or rulings of the DSB in the dispute, then on or after the date of circulation of the report of the Compliance Panel or the Appellate Body, the Member concerned may request a meeting of the DSB to withdraw the authorization for the suspension of concessions or other obligations. The DSB shall meet 10 days[10] after such a request unless the Member concerned requests that the meeting be held at a later date. At such meeting the DSB shall withdraw the authorization for suspension of concessions and other obligations unless the DSB decides by consensus not to do so.[11]

(c) The complaining party shall not maintain the suspension of concessions and other obligations after the DSB withdraws the authorization.

(d) When the situation referred to in sub-paragraph (b) occurs, if the measures taken to comply by the Member concerned are found not to be consistent with a covered agreement or not to comply with the recommendations or rulings of the DSB in the dispute, any party may request an arbitration to determine the level of nullification or impairment caused by the measures concerned.

Such arbitration shall be carried out by the original panel, if members are available. The Director-General shall determine whether the members of the original panel are available. If any members of the original panel are not available, and the parties to the arbitration do not agree on a replacement, at the request of any party the Director-General shall appoint a replacement arbitrator[12] from the roster of panelists provided for in Article 8 within 5 days after the matter is referred to the arbitration, after consulting with the parties to the arbitration.

The arbitration shall be completed and the decision of the arbitrator shall be circulated to Members within 45 days after the date of the request. The award of the arbitrator shall be final. If the level of nullification and impairment determined by the arbitrator under this paragraph differs from the level determined under paragraph 6 of this Article, the Member concerned may request a meeting of the DSB to modify the authorization for the suspension of concessions or other obligatio ns. The DSB shall meet 10 days after such a request unless the Member concerned requests that the meeting be held at a later date. At such meeting the DSB shall accordingly modify the authorization for suspension of concessions and other obligations unless the DSB decides by consensus not to do so.

The complaining party shall bring the suspension of concessions and other obligations into conformity with the authorization of the DSB.

The following new Article shall be inserted after Article 22 :

Article 22bis

Examination of mutually agreed solutions

1. Where there is disagreement between the complaining party and the Member concerned as to whether the latter has acted inconsistently with a covered agreement by not complying with the terms and conditions of a mutually agreed solution notified under Article 3.6 that are subject to the disciplines of a covered agreement, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in Article 21bis.

2. If the compliance panel or the Appellate Body report pursuant to Article 21bis finds that the Member concerned has acted inconsistently with a covered agreement by not complying with the terms and conditions of a mutually agreed solution notified under Article 3.6 that are subject to the disciplines of a covered agreement, the complaining party may request under Article 22 authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

Paragraph 4 of Article 25 is amended to read as follows:

Articles 21, 21bis and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

Paragraph 2 of Appendix 3 shall be amended to read as follows:

In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply. These working procedures may be amended from time to time by the DSB.

Paragraph 2 of Appendix 3 shall be amended to read as follows:

The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

However, the parties may agree within 10 days from the date of establishment of the panel that the panel hearing shall be open to the public in whole or in part.

In paragraph 3 of Appendix 3, the last sentence shall be amended to read as follows (amendment already contained in WT/MIN(99)/8) :

Each party and third party to a proceeding shall also, if requested by a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public, no later than 15 days after the date of either the request or the submission, whichever is later, or such other deadline as is agreed by the party and the requesting Member.

Paragraph 6 of Appendix 3 shall be amended to read as follows :

All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. That session shall be divided in two parts, one open to the public, one closed to the public; each third party shall indicate in which part of the session it wants to present its views within 10 days from the date of establishment of the panel. All third parties may be present during the entirety of this session.

In Appendix 3, the following paragraph shall be inserted following paragraph 10. Paragraphs 11 and 12 shall be renumbered as 12 and 13 respectively (amendment already contained in WT/MIN(99)/8) :

11. The descriptive part of the panel report shall include a brief summary of the facts and the procedural history of the case.

Paragraph 12(a) of Appendix 3 shall be amended to read as follows (amendment already contained in WT/MIN(99)/8):

"(a) Receipt of first written submissions of the parties:

(1) complaining party: ____ 3-4 weeks[13]

(2) party complained against: ____ 4-5 weeks"

The following conforming changes on time frames need to be made in light of the other changes in the text (amendment already contained in WT/MIN(99)/8):

Present paragraph 12 of Appendix 3 shall be amended as follows:

(1) Items (e) and (f) shall be deleted and the following items redesignated accordingly.

(2) Item (g) (prior to redesignation) shall be amended by deleting "2-4 weeks" and inserting "4-8 weeks".

(3) Item (h)(prior to redesignation) shall be amended by deleting "1 week" and inserting "10 days"

(4) Item (i)(prior to redesignation) shall be deleted and the following items redesignated accordingly.

(5) Item (j) (prior to redesignation) shall be amended by deleting "2 weeks" and inserting "10 days"

(6) Item (k) (prior to redesignation) shall be amended to be to read as follows:

(k) Circulation of the final report to the Members: ____3 days"

Based on a total reduction of time (up to approximately 47 days), the time frames in Article 20 (the reference to "nine months" and to "12 months"), the periods in 21.4 (the reference to "15 months" and to "18 months") shall be reduced by one month.

The new footnotes shall be inserted into the text of the DSU at the places indicated above and all footnotes shall be renumbered accordingly.