

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

Proposal by Mexico

The following communication, dated 13 July 2007, is circulated at the request of the delegation of Mexico.

I. DESCRIPTION OF THE PROBLEM AND PROPOSAL

As the dispute settlement mechanism has evolved, disputes have become more sophisticated, by covering subject matters falling under more than one covered agreement, or requiring analysis of "grey-area zones", or simply requiring analysis of ever increasing amounts of evidence. This has resulted in longer procedures, in terms of consultations, panel process and implementation. At the same time, all of this makes compliance more difficult. In any event, longer procedures mean more time with an illegal measure in place and its negative consequences.

On 1st January 1995, all original WTO Members undertook to ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the covered Agreements.¹ Every time an illegal measure is unilaterally introduced, or as long as it is maintained in force, this principle is violated and the delicate balance of concessions or other obligations achieved in the Uruguay Round is upset. The longer it takes to secure compliance, the longer nullification or impairment will remain in place, to the detriment of the complaining party.

However, the current rules of the Dispute Settlement Understanding that address this matter are, at best, imperfect. There is currently no mechanism available for a Member challenging a WTO-inconsistent measure to recover the losses resulting from that measure, even after Panel or Appellate Body reports have ruled its inconsistency. This allows illegal measures to remain in place for **more than three years** before a complaining party may obtain compensation or suspend concessions or other obligations.² In some cases, losses amount to millions of dollars each day an illegal measure is maintained. This has prompted Members to recognise that the issue of compliance needs to be addressed.³

¹ Article XVI:4 of the Marrakesh Agreement Establishing the WTO.

² An estimated average from the composition of a panel up to the authorization to suspend benefits could take from 3 years up to 4 years. (In the Byrd Amendment case it took 3 years and 1 month for a country like Mexico to obtain such an authorization. (with information taken from www.worldtradelaw.net statistics).

³ See for example, minutes of the Special Session Meeting of the Dispute Settlement Body, 13-15 November 2002 (TN/DS/M/6).

We consider that the fundamental problem of the WTO dispute settlement system lies in the period of time during which a WTO-inconsistent measure can be in place without the slightest consequence.

This amounts to a *de facto* waiver in which a Member can maintain a WTO-inconsistent measure which unduly harms exporters, service suppliers or holders of intellectual property rights of other Members and seriously undermines the objectives of security and predictability enshrined in the DSU.

At the same time, proposals to substantially streamline Members' right to suspend benefits have not enjoyed consensus so far. Some believe that only a handful of Members might be in a position to effectively enforce this right, while others emphasize the usefulness of improving rules allowing Members to obtain compensation. Some proposals have already been presented in this respect.

II. PROPOSAL – CONCEPT AND TEXT

Bearing in mind the above, we propose to improve the incentives for effective compliance which would reduce the time in which a WTO-inconsistent measure might be maintained "for free", while at the same time would not constitute a radical departure from the current system.

In this respect, we believe that the most viable way –at this stage- to achieve these objectives is to improve Members' opportunities to obtain timely and effective compensation. In fact, although it has rarely been used, this is already provided for in Article 3.7 of the DSU, which states:

"(...) The provision of compensation should be resorted to **only if the immediate withdrawal of the measure is impracticable** and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. (...)"
[Emphasis added]

Additionally, it has been recognised that a means to meaningfully allow Members – especially developing country Members – to effectively enjoy compensation, is to encourage (not force) that compensation for developing countries be made in cash. It should be borne in mind that the reasonable period of time is one of the longest stages of a dispute settlement procedure, counting for 11.8 months in average.⁴

To give effect to this provision, we would need to amend Article 22 in the following manner:

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented **immediately in the case of compensation or** within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements. **Compensation to developing country Members will be monetary unless otherwise agreed**⁵.

⁴ Arbitrations to determine the reasonable period of time have granted an average of 11.82 months. However, when the reasonable period of time has been agreed to, this average is 9.22 months. Source: www.worldtradelaw.net statistics.

⁵ **This is without prejudice of the possibility for developed Members to obtain monetary compensation, if so agreed.**

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings **immediately** ~~within the reasonable period of time determined pursuant to paragraph 3 of Article 21~~, such Member shall, if **a complaining party** so requests ~~ed, and no later than the expiry of the reasonable period of time~~, enter into negotiations with ~~[any party having invoked the dispute settlement procedures]~~ **[a complaining party]**, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

(...)

7. The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment, **and if no compensation has been granted or has not been granted as agreed, the arbitrator shall, if so requested, additionally determine the level of nullification or impairment suffered during the reasonable period of time.** The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration⁶. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. **However, in those cases where the level of nullification or impairment includes the level of suspension or impairment suffered during the reasonable period of time as described in paragraph 7, the suspension of concessions or other obligations may remain in force thereafter until such time at which the effect of suspension is equivalent to the level of nullification or impairment suffered during the reasonable period of time.** In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented. **In such cases, Members which have been granted the right to suspend concessions or other**

⁶ **However if the level of nullification or impairment changes after it is set, in order to conform to this change, any party may request the DSB to modify its authorization or a new arbitration may be sought. Such an arbitration may not be sought more frequently than [annually].**

obligations shall notify the DSB and the relevant WTO bodies of all the measures taken as suspension of concessions or other obligations within three months after the DSB has granted such authorization and thereafter every six months, until such time as the suspension ceases to be applied.

[Footnote omitted]

Allowing Members to negotiate and obtain compensation as from the date of adoption of the Panel or Appellate Body reports represents a fairer allocation of burdens and benefits between the parties. Furthermore, by expressly mentioning the possibility of obtaining compensation in "cash", developing countries – and particularly LDC's – may be encouraged to discuss compensations. Moreover, by providing a retrospective element in the authorisation to suspend concessions or other obligations if no compensation was agreed to or if the terms of such compensation were not respected, the Member concerned would also have incentives to provide and respect the terms of the compensation. The calculation will include a prospective and retrospective element, the first of which can be applied immediately, subject to other provisions of the DSU, in particular Article 22.8.

III. BENEFITS

- Greater confidence in the dispute settlement system: Members would perceive the processes after the adoption of the Panel and Appellate Body reports as effective procedural stages, as they would know that the Member concerned would not be obtaining additional time to maintain its measure without consequences if it is not eliminated within the RPT.
- Fairer allocation of benefits: This approach would ensure that the balance of concessions and rights granted under the Uruguay Round was better served, since the complaining party would have a right to negotiate compensation and recover part or all losses incurred as a result of the illegal measure
- Encourages prompt compliance: this approach would create incentives for the Members concerned to comply "immediately" or "in the shortest period possible within its legal system", since they would be subject to payment of compensation from the date of adoption of the Panel/AB report. This would also reduce the "de facto waiver" to a greater extent.
- Satisfactory solutions: The Member concerned has no incentives to explore "grey area" compliance measures, since non-compliance would be followed by retrospective suspension of concessions, unless compensation is provided.
- Lightening of the burden on the dispute settlement system: Members might assess the real value of a case before submitting to the dispute settlement system and, if it turns out not to be substantial, they might be inclined to negotiate rather than litigate.
- Time saving: If a Member concerned grants compensation during the reasonable period of time, it will have no incentives to extend it artificially, since all the time gained would potentially count towards compensation. Time savings will follow naturally, without affecting Members' due process rights during the procedure.
- Facilitating negotiations: By eliminating the incentives to artificially extend the reasonable period of time, the Member concerned would be more inclined to propose a realistic period.

- Harmony: By avoiding radical changes to the current text and structure of the DSU, this text could easily be incorporated into an improved DSU. Furthermore, this proposal does not conflict with any other proposal submitted so far [and contributes to the objectives of other proposals (such as time savings)].
