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NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING

Proposal by Japan

The following communication, dated 14 October 2002, has been received from the Permanent Mission of Japan.

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1. Re-submission of the Joint Proposal (WT/MIN(01)/W/6) (please see attachment)

The Joint Proposal (WT/MIN(01)/W/6) was a result of the continued efforts by volunteer Members to elaborate the outcome of the DSU review process (1998-99). The proposal was tabled to the Doha Ministerial Conference by 14 Members joined by other 2 Members, and referred to in the Ministerial Declaration *as the work done thus far.*

Since the Joint Proposal is an outcome of extensive discussions focussing on the "sequencing", Japan believes that it will be a significant contribution to this negotiation especially with respect to this issue. For this reason, Japan hereby re-submits the attached Joint Proposal with some revisions. As for the sequencing issue, the basic idea and many elements of the Joint Proposal are adopted in the EC Proposal, and Japan appreciates the support given by the EC in this regard. It should be noted, however, that the two proposals have differences in some aspects, such as whether consultations should be prerequisite for requesting the establishment of a compliance panel, whether the Member concerned should be obliged to submit a compensation proposal and whether the arbitration to decide the level of the nullification and impairment should be front loaded. Therefore, the re-tabling of the Joint Proposal is necessary and useful as a basis for further negotiations.

The Joint Proposal (WT/MIN(01)/W/6) originally contained provisions to address some other issues than sequencing. Such issues include, for instance, timeframe, third party rights and S&D. In the attached proposal, these provisions have been revised, taking into consideration the post-Doha discussions. Transitional provisions concerning the application of amended articles have been omitted.

2. In addition to above, Japan proposes these negotiations to consider the following:

(a) True "equivalence" between the levels of the suspension of concessions and of the nullification or impairment caused by an WTO-inconsistent "mandatory law"

Issue

Article 22.4 of the DSU provides that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment" resulting from the WTO-inconsistent measure at issue. Under the current practice, "the level of the nullification or impairment" for such a measure is determined on the basis of trade distorting effects actually generated.

This current practice, although seemingly reasonable, does not at least provide full remedy with respect to the so-called "mandatory law", i.e. those laws and regulations which "mandate" the application of WTO-inconsistent measures, and thus, are found WTO-inconsistent as such. For other WTO-inconsistent measures all trade-distorting effects that they are generating are taken into consideration, and consequently, the level of retaliatory measures would be adequate for providing the Member concerned with enough incentives to bring the inconsistent measures into conformity. To this extent, the "equivalence" principle under Article 22.4 is effectively ensured; the level of retaliatory measures is adjusted to have, to the maximum, the same impact as the inconsistent measure would have. In contrast, for a "mandatory law" (e.g. an anti-dumping related law), only part of its trade effect is taken into consideration. The basis for determining "the level of the nullification or impairment" of a "mandatory law" would include only trade effects of existing measures taken in its application (e.g. anti-dumping orders under the law), but not those of similar measures that may be taken in the future. As a result, the level of a retaliatory measure would be underestimated and the Member concerned would not be effectively encouraged to bring the WTO-inconsistent "mandatory law" into conformity.

If such a law is left uncorrected after a retaliatory measure is authorized, WTO-inconsistent measures may still continue to be applied, creating more trade distorting effects than those addressed by the authorized retaliatory measure. In such a situation, the Member concerned might prefer maintaining the WTO-inconsistent law to complying only to avoid ineffective retaliations. While similar subsequent measures can be challenged when they are actually taken, it is obviously insufficient. Finding "mandatory law" WTO-inconsistent as such would be rendered virtually meaningless, unless authorization is given to retaliatory measures that could deny the government an incentive to maintain such "mandatory law" on the basis of the aforesaid calculation.

As described above, with respect to the "mandatory law", the current practice does not effectively ensure an "equivalence" required under Article 22.4 between the level of the nullification and impairment of a WTO-inconsistent measure, and the trade impact of an authorized retaliatory measure. This practice should be changed so that, with respect to a legislation that mandates WTO-inconsistent measures, not only trade effects generated by existing measures taken under the legislation but also those generated by similar subsequent measures that may be taken under the legislation should be taken into account.

Proposal

To ensure a true "equivalence" between the level of the nullification and impairment caused by a WTO-inconsistent measure and the level of an retaliatory measure with respect to a "mandatory law", Article 22.4 of the DSU should be expanded to make clarification to that effect.

(b) Prevention of repeated application of WTO-inconsistent measures under a "discretionary law"

Issue

The so-called theory of "discretionary law" has been established as part of the GATT/WTO dispute settlement findings. Those laws that permit a Member to choose between WTO-consistent and WTO-inconsistent measures would not be found WTO-inconsistent as such; only measures taken in their application can be found WTO-inconsistent.

However, no complete solution would be provided for disputes over certain types of measures if the DSB can find only the application of measures under the "discretionary law" to be WTO-inconsistent, and thus recommend them to be brought into conformity. For example, if trade remedy measures are abused, trade would be affected only by the initiation of an investigation. Also, it would be practically difficult to remove subsidies after they have been granted, or to reverse government procurement after the tendering procedures have been completed. Concerning these measures in particular, a Member may not hesitate to apply WTO-inconsistent measures with a view to protecting domestic producers at least until the DSB recommendations and rulings, or in anticipation that they would not be required to repeal the discretionary law. This may result in a "hit-and-run" situation.

To close this loophole for potential abuses and "hit-and-run" tactics, it is worthwhile to consider taking a "preventive" approach by, for example, making an exception to the application of the "discretionary law" theory. The "discretionary law" theory could encourage abuses or "hit-and-run" tactics by permitting Members to maintain the authority to take WTO-inconsistent measures without any effective restriction.

Proposal

To prevent Members from repeating the same violation or from engaging in "hit-and-run" tactics under the "discretionary law", Japan proposes to make an exception to the application of the "discretionary law" theory when repetition of the same violation is highly probable. This should be limited to such cases, for example, as those where it is evident that, in exercising the authority granted under the "discretionary law", a Member has intentionally applied the same measure that was found WTO-inconsistent through the dispute settlement procedure. In such cases, panels or the Appellate Body may find the "discretionary law" inconsistent with the WTO Agreement, and thus, may recommend that necessary steps be taken to prevent, under the "discretionary law", the repetition of WTO-inconsistent measures. (However, the Member concerned should be given discretion as to how to restrict the authority properly. For example, it may suffice to establish administrative guidelines preventing the recurrence of such WTO-inconsistent application if they are effectively binding on competent domestic authorities, instead of amending the text of the law.) Such an exception of the "discretionary law" theory could be established through amendments in the DSU, or may be more appropriately done in any other form, including the adoption of an authoritative interpretation on Article XVI:4 of the Marrakesh Agreement Establishing the WTO in accordance with Article IX:2 thereof.

In this regard, it may be useful to consider making a rule that, where a measure under a discretionary law was found to be WTO-inconsistent, and a similar measure has been taken under the same law, the latter would be presumed WTO-inconsistent. Accordingly, the burden of proof would be shifted to the Member taking the measure. Such a dispute over repeated violation would be better handled and concluded expeditiously by the panel or the Appellate Body division that dealt with the original case. If the panel or the Appellate Body is obliged to decide on the dispute in a shorter period of time, and recommends the respondent to prevent the repetition of WTO-inconsistent measures, it would also effectively address repeated violation or hit-and-run tactics under a "discretionary law".

(c) An increase in the number of the Appellate Body members

Issue

Many of panel reports are appealed to the Appellate Body and legal issues appealed have become more and more complicated. It is widely recognized that, under the current workload, it would be extremely difficult to continue to secure a high level of quality of its work with "seven persons" provided in for in Article 17.1 of the DSU. In order to address the increment of each member's workload, and to prevent delay of issuance of the Appellate Body's reports while maintaining their quality, the number of the Appellate Body members should be increased.

It should be noted that depending on the evolution of the volume of work, flexibility to adjust the number might be needed in the future. From time to time, the number of the Appellate Body members may need to be changed as required, which is currently difficult because it must be done by an amendment to Article 17.1.

Proposal

Article 17.1 of the DSU should be amended so that the number of the Appellate Body members could be modified as required, by a decision of the DSB or the General Council. At the same time, a process should be established for considering adequacy of the number and making recommendations to the DSB or the General Council on its modification, taking account of all related factors such as workloads and implication on the budget.

(d) Access to submissions

Issue

Since arguments by parties and third parties contained in their submissions may affect the WTO dispute settlement findings, these are valuable information for other Members too. Especially, for a Member that itself is considering the possibility of resorting to the dispute settlement procedure on a similar case, arguments and rebuttals are resources of great importance. Such information should be shared with all Members regardless of whether they are non-parties or non-third parties to a dispute. Furthermore, in order to improve transparency of the WTO, such information should be made accessible to the public at an appropriate time.

Proposal

Except for confidential information, the submissions of parties and third parties should be made accessible to all Members and the public within two weeks from the date of each meeting of a panel or oral hearing of the Appellate Body.

ATTACHMENT

Proposal by Japan on the Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

The relevant parts of the following proposal are based on the proposal that Japan submitted jointly with Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela as contained in the document WT/MIN(01)/W/6. It has been revised where deemed appropriate taking into account the recent discussions.

1. The following footnote shall be added to the third sentence of paragraph 3 of Article 21 after the term "reasonable period of time":

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

2. Paragraph 5 of Article 21 is amended to read as follows:

> "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. When such consultations are entered into, each party to the dispute shall afford to any third party, which so requests, an adequate opportunity to express its views."

3. Paragraph 6 of Article 21 is amended to read as follows:

> "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.
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> "(b) The Member concerned shall report on the status of its implementation of the recommendations or rulings of the DSB at each DSB meeting[1], where any Member may raise any point pertaining thereto, beginning at the half point of the length of the reasonable period of time or 6 months after the date of adoption of the recommendations or rulings of the DSB, whichever is the earlier, until the parties to the dispute have mutually agreed that the issue is resolved or until the DSB finds pursuant to Article 21*bis* 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.
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> "(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.
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> "(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

[1] The parties to the dispute may agree to waive this requirement for a particular DSB meeting.

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 Member 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."

4. The following new Article shall be inserted after Article 21:

"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.[2] [2bis]

"2. The complaining party may request the establishment of a Compliance Panel consisting of the members of the original panel at any time after:[3]

"(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.

"3. While consultations between the Member concerned and the complaining party are desirable, they are not required prior to a request for a Compliance Panel under paragraph 2.

"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

[2] This is without prejudice to the right of the parties to have recourse to normal dispute settlement procedures under this Understanding or to the procedures under Article 5 or Article 25.

[2bis] The procedures provided for in this Article shall apply to measures referred to in paragraph 9 (as amended) of Article 22.

[3] If any member of the original panel is not available, the Director-General shall appoint a replacement within 5 days after the date of establishment of the Compliance Panel, unless the Director-General has been requested not to do so by the parties to the Compliance Panel.

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 apply 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[4], 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 party 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, 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.

"10. The Compliance Panel shall establish its own working procedures. The provisions of Articles 1 through 3, 8 through 14 (other than paragraph 5 of Article 8), 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."

5. The following sentence shall be added at the end of paragraph 1 of Article 22:

"If, assessing the detailed status report provided under paragraph 6(b) of Article 21, the complaining party considers that the Member concerned is unable to implement the recommendations and rulings within the reasonable period of time, the complaining party may request negotiations with the Member concerned, with a view to developing mutually acceptable compensation. The Member concerned shall, if so requested, enter into negotiations with the complaining party within 20 days from the date of the request, unless it declares its confidence in full compliance within the reasonable period of time."

[4] In the case of a Compliance Panel established pursuant to paragraph 9 of Article 22, the DSB shall establish the Compliance Panel at the meeting requested by the Member concerned pursuant to that paragraph.

6. Paragraph 2 of Article 22 shall be amended to read as follows:

"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 21*bis* 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; then

a complaining party may request authorization from the DSB[5] 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 purpose 10 days after the request, unless the complaining party requests that the meeting be held at a later date.[6] [7] The parties to the dispute are encouraged to consult before the meeting to discuss a mutually satisfactory solution."

7. Paragraph 6 of Article 22 shall be amended to read as follows:

"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 forth 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] within 5 days after the matter is referred to the arbitration, after consulting with the parties to the arbitration.

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[5] The complaining party that was a party to the Compliance Panel proceedings shall not request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements until after the circulation of the panel or the Appellate Body report.

[6] In the case of paragraph 2(ii) above, such DSB meeting shall not be convened before the expiry of the reasonable period of time.

[7] The DSB shall not consider the request for the authorization to suspend the application to the Member concerned of concessions or other obligations until after it has adopted the report of the Compliance Panel and, where the report of the Compliance Panel had been appealed, the report of the Appellate Body.

[8] In order to avoid delay, the Director-General shall make this determination sufficiently in advance of the DSB meeting at which the matter is to be referred to arbitration.

[9] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

"(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. The complaining party shall not suspend concessions or other obligations during the course of the arbitration."

8. Article 22 is amended by inserting the following paragraph after paragraph 8. The existing paragraph 9 shall be renumbered as paragraph 10.

"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 request 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 21*bis*. If as a result of recourse to the dispute settlement procedures provided for in Article 21*bis*, the measures taken to comply by the 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."

9. In paragraph 7 of Article 4, the numerical "60" shall be deleted wherever it occurs and the numerical "30" shall be inserted in its place. Insert at end of this paragraph the following footnote:

"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. If the parties do not agree to such an extension, the developing country Member may have recourse to paragraph 10 of Article 12."

[10] In the case of an appeal, the DSB shall meet for this purpose on or after the date of the adoption of the Appellate Body report pursuant to Article 17.14.

[11] The DSB shall not consider the request for the withdrawal of the authorization for the suspension of concessions until after it has adopted the report of the Compliance Panel or the Appellate Body.

[*Note: As for the time-frame, balanced solutions should be discussed taking into the account of the views expressed by developing country Members in this negotiation.]

10. Paragraph 1 of Article 6 shall be amended to read as follows:

"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."

A new footnote shall be added to the paragraph 1 of Article 6 after the word “requests”, the text of which shall read as follows:

"In a case involving a complaint against a developing country Member, the complaining party shall accord sympathetic consideration to a request from that Member to postpone the establishment of a panel due to particular circumstances."

[*Note: As for the time-frame, balanced solutions should be discussed taking into the account of the views expressed by developing country Members in this negotiation.]

The existing footnote to paragraph 1 of Article 6 shall be retained at the end of the paragraph.

11. Paragraph 12(a) of Appendix 3 shall be amended to read as follows:

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

(1)	complaining party:	3-4 weeks[12]
(2)	party complained against:	4-5 weeks"

12. 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."

13. Paragraph 3 of Article 10 shall be amended to read as follows:

"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.[13] 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 for portions of sessions when such factual confidential information is discussed."

14. In paragraph 2 of Article 18 and in paragraph 3 of Appendix 3, the last sentence of each of these paragraphs shall be amended to read as follows:

"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."

[12] Up to 6 weeks if the complaining party is a developing country Member.
[13] Documents of an administrative or procedural nature need not be provided.

15. Paragraph 6 of Article 3 shall be amended by inserting the following footnote after the word "notified":

> "It is the obligation of both parties to notify any mutually agreed solution promptly and in no event more than two months after the solution is agreed. The notification shall describe the terms of the mutually agreed solution related to the WTO obligations in sufficient detail to enable other Members to understand and evaluate it."

16. Paragraph 4 of Article 25 shall be amended to read as follows:

> "Article 21, 21bis and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards."