

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

Proposal by Ecuador

The following communication, dated 20 November 2002, has been received from the Permanent Mission of Ecuador.

Drawing from the discussions held and the comments made by delegations, during the formal and informal meetings of the DSB, on its proposal circulated in document TN/DS/W/9, and specifically on the timely determination of the level of nullification or impairment, Ecuador is now submitting a specific drafting input for the amendment of Article 21 of the DSU (see Annex hereto - paragraphs 3 *bis* and 3 *ter*).

In an effort to bring together different proposals, especially those which have the support of a large number of Members, Ecuador is submitting additional paragraphs as a supplement to Article 21 of the amendment set forth in document WT/MIN(01)/W/6, which was included in the proposal by Japan circulated as document TN/DS/W/22.

This drafting proposal takes account of similar proposals by other Members which, like Ecuador, consider that the timely determination of the level of nullification or impairment could take place as soon as it is clear that prompt compliance is impracticable. In Ecuador's view, this means as from the moment at which the Member concerned informs the DSB that it is not feasible to comply immediately with its recommendations and rulings, and it would therefore be up to the complaining party to decide at what moment, for the purposes of settling the dispute, arbitration should be requested to determine the level of nullification or impairment.

In the course of the negotiations, a number of arguments were submitted concerning the benefits of timely determination of the level of nullification or impairment, the most important of which mention that timely knowledge of that level could effectively foster compliance, and possibly, in case of failure to comply, offer better conditions for the parties to the dispute to negotiate acceptable and fair compensation.

Ecuador's drafting proposal also provides the possibility of adjusting the level determined by the arbitrator according to the result of the finding on compliance under Article 21 *bis* of the proposal contained in document TN/DS/W/22.

The timely determination of the level of nullification or impairment is extremely useful in helping to make the process more serious, since not only can it foster compliance, but by knowing this

level to be greater or less than what the parties normally claim, the parties will proceed with greater caution in the later stages of the dispute, since both the Member concerned and the complaining party will be acting in the full knowledge of the actual injury being caused. This would undoubtedly contribute to the settlement of the dispute without having to resort to the suspension of concessions or other obligations.

An important element in the reformulation of Ecuador's proposal is the effort to make the process more flexible, in that the complaining party would reserve the right to request this determination during the entire compliance phase.

Ecuador considers the appropriate arbitrator for the determination of the level of compliance to be the original Panel. The time-limits for reaching this determination would be those currently provided for in Article 22.6 of the DSU, unless the complaining party decides to request that the determination of compliance provided for in Article 21 *bis* should simultaneously cover compliance and the level of nullification or impairment.

I would be grateful if you would ask the Secretariat to circulate this new proposal by Ecuador to Members.

ANNEX

**ARTICLE 21 OF THE DSU WITH THE AMENDMENTS PROPOSED IN DOCUMENT  
WT/MIN(01)/W/6 CONTAINED IN THE PROPOSAL BY JAPAN TN/DS/W/22.  
THIS ANNEX INCLUDES THE DRAFTING PROPOSAL OF ECUADOR  
FOR PARAGRAPHS 3 *BIS* AND 3 *TER***

*Article 21*

*Surveillance of Implementation of Recommendations and Rulings*

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.
2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.
3. At a DSB meeting held within 30 days<sup>1</sup> after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time<sup>2</sup> shall be:
  - (a) The period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval;
  - (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement;
  - (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.<sup>3</sup> In such arbitration, a guideline for the arbitrator<sup>4</sup> 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.

***3 bis*** Where the Member concerned cannot comply immediately with the recommendations and rulings of the DSB, at any moment prior to the invocation by a complaining party of Article 22.2 and as from the meeting of the DSB referred to in paragraph 3 above in which the Member concerned informs the DSB of its intentions in respect of implementation of the recommendations and rulings, a complaining party may request arbitration to determine the annual level of nullification or impairment caused by the non-compliance of the Member concerned. Such arbitration shall be carried out by the original panel, if Members are available,

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<sup>1</sup> If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

<sup>2</sup> For the 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.

<sup>3</sup> If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

<sup>4</sup> The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

or by an arbitrator<sup>5</sup> appointed by the Director-General, and shall be completed within 60 days after the date on which the arbitrator is summoned. If the complaining party has requested such arbitration before the reasonable period of time for compliance with the recommendations and rulings of the DSB has been set and the parties to the dispute have not reached an agreement on such reasonable period of time, the arbitration may also determine the reasonable period of time within the 90 days stipulated in paragraph 3(c) above.

***3 ter.*** The annual level of nullification or impairment may be definitively revised by the arbitrator responsible for its determination at the request of one of the parties to the dispute, and only on the basis of the determination of compliance made under Article 21 *bis*. Such arbitration shall be requested within the 20 days following the circulation of the determination of compliance made under Article 21 *bis*. The arbitrator shall have a period of 45 days to issue its decision. The parties shall accept the said decision as definitive, and shall not try to obtain a second arbitration.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. 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.

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<sup>6</sup>, where any Member may raise any point pertaining thereto, beginning at the half point of the length of the reasonable period of time or six 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 ten 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.

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<sup>5</sup> The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

<sup>6</sup> The parties to the dispute may agree to waive this requirement for a particular DSB meeting.

- (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 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.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

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