

**CONTRIBUTION OF THE REPUBLIC OF KOREA TO THE IMPROVEMENT
OF THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO**

Communication from the Republic of Korea

The following communication, dated 20 January 2003, has been received from the Permanent Mission of the Republic of Korea.

I. INTRODUCTION

1. Korea suggested in its submission (TN/DSW/11) dated 11 July 2002 to (1) provide a fast-track option for the prevailing party to request the Director-General to appoint an arbitrator for determination of a reasonable period of time (RPT) at the DSB meeting held within 30 days of the adoption of the Panel/AB report; and (2) front-load the determination of the level of the nullification or impairment by having the Article 21.5 compliance panel determine the level.

2. As the negotiations switch from discussions based on issues to those based on draft legal texts, as agreed at the meeting of the Special Session of the DSB held on 16 December 2002, Korea hereby submits further elaboration on its proposal together with draft legal texts.

II. FAST-TRACK OPTION FOR THE DETERMINATION OF THE RPT

A. HOW KOREA'S PROPOSAL FITS INTO ARTICLE 21.3(C) TIME-FRAME

3. Should the complaining party be allowed to request the Director-General to appoint the arbitrator for the RPT at the DSB meeting held within 30 days of the adoption of the final reports, the arbitrator would be given around 50 days because, out of the 90 day time-frame, 30 days would have been spent for bilateral discussions and another 10 days would have been reserved for the Director-General to select and appoint the arbitrator.

4. According to the normal working schedule of the Article 21.3(c) arbitration, parties to the dispute are given 10 days after the nomination of the arbitrator for preparing written submissions. The oral hearing takes place around 10 days after the deadline for the submissions. After the oral hearing, the arbitrator is left with around 30 days during which he/she can complete his/her task, including the time needed for translation of the report into official languages.

B. PRACTICAL ADVANTAGE OF KOREA'S PROPOSAL IN THE INTEREST OF PROMPT COMPLIANCE.

5. The RPT is determined through either bilateral agreement under Article 21.3(b) or binding arbitration under Article 21.3(c). In the case of RPT determined through binding arbitration, the

shortest RPT so far was 6 months in Canada – Pharmaceutical Patents. This essentially means that the minimum RPT through binding arbitration is 6 months. In contrast, where the RPT is determined through mutual agreement, the RPT can be less than 6 months, depending on the particular circumstances or the lack thereof. The shortest RPT determined through bilateral agreement was 4 months 8 days in Korea – Dairy. Korea’s proposal will be beneficial in cases involving trade remedy measures, like SGs, where implementation can be done through withdrawal of the measure, which can be effected in substantially less than 6 months.

Table 1: Three Shortest RPTs Determined through Binding Arbitration

Dispute	WT/DS Number	Type of measures in dispute	RPT
Canada – Pharm. Patents	114	Patent Protection	6 months
Australia – Salmon	18	Quarantine	8 months
Canada – Auto	139/142	Value-added content requirement	8 months

Table 2: Three Shortest RPTs Bilaterally Agreed

Dispute	WT/DS Number	Type of measures in dispute	RPT
Korea – Dairy	98	Safeguard	4 months, 8 days
US – Wheat Gluten	166	Safeguard	4 months, 14 days
EC – Bed Linen	141	Anti-dumping	5 months, 2 days

C. PROPOSED LEGAL TEXT

6. The following to be added at the end of Article 21.3(b):

Notwithstanding this provision, in the event that the prevailing party considers that there has not been adequate progress made in seeking a mutually agreeable reasonable period of time prior to the DSB meeting to be held within 30 days after the adoption of the Panel or Appellate Body report, the prevailing party may request at that DSB meeting a binding arbitration under subparagraph (c). In this case, the arbitrator shall be appointed by the Director-General within 10 days of the request, after consulting the parties.

III. FRONT-LOADING OF DETERMINATION OF THE LEVEL OF THE NULLIFICATION OR IMPAIRMENT

A. OPTIMAL TIMING FOR DETERMINATION OF THE LEVEL OF THE NULLIFICATION OR IMPAIRMENT

7. Article 22.4 of the DSU stipulates that the level of the suspension of concessions or other obligations authorized by the DSB should be equivalent to the level of the nullification or impairment. The plain reading of Article 22.4 suggests that the drafters were of the view that the determination of the level of the nullification or impairment should take place only after unsuccessful negotiations on a mutually acceptable compensation within the meaning of Article 22.2.

8. A pre-determined level of the nullification or impairment is an essential parameter not only for the suspension of concessions or other obligations but also for the conduct of the compensation negotiations. The lack of a mechanism for establishing the level of the nullification or impairment before the initiation of the compensation negotiations effectively reduces the Article 22.2 compensation negotiations into inutility, since there is no common ground on the basis of which the parties to the dispute could develop a mutually acceptable compensation. Accordingly, Korea is of the view that the optimal timing for the determination of the level of the nullification or impairment should be a point in time between the expiry of the RPT – in consideration of the current remedy structure – and the commencement of the compensation negotiations under Article 22.2 of the DSU.

B. SEQUENCING OF TASKS IN COMPLIANCE PANEL

9. Korea suggested that the compliance panel be entrusted with the task of determining the level of the nullification or impairment in addition to fulfilling its mandate of making a ruling on the existence of or consistency with a covered agreement of measures taken to comply with the recommendations and rulings under Article 21.5 of the DSU.

10. It would be only logical that the compliance panel perform these two tasks in an orderly fashion. The compliance panel would proceed to the task of determining the level of the nullification or impairment only after it is convinced that compliance has not occurred.

C. ADVANTAGES OF KOREA'S PROPOSAL AND RELATED ISSUES

11. The main advantages of Korea's proposal from the institutional point of view are first, it would give a fair chance of success to the Article 22.2 compensation negotiations, and second, even if the compensation negotiations fail, the possibility of dispute as to the level of suspension of concessions or other obligations within the meaning of Article 22.6 of the DSU would be substantially reduced because, in most cases, the main element of contention under the Article 22.6 dispute is whether the proposed level of suspension of concessions or other obligations is equivalent to the level of the nullification or impairment.

D. IMPLICATION ON THE TIME-FRAME PROVIDED FOR IN ARTICLE 21.5

12. Under Korea's proposal, the compliance panel would not be able to meet the 90-day time-frame provided for in Article 21.5 should it proceed to determine the level of the nullification or impairment. Korea believes that an extra 30 days would be appropriate for the compliance panel to determine the level of the nullification or impairment, as implied in Article 22.6 of the DSU.

E. PROPOSED LEGAL TEXT

13. The second sentence of Article 21.5 to be replaced by the following:

The Panel shall circulate its report within 90 days after the date of referral of the matter to it in case of compliance. In the case of non-compliance, the Panel shall proceed to determine the level of the nullification or impairment and circulate its report within 120 days after the date of referral of the matter to it, including the level of the nullification or impairment.

14. The following footnote to be added to the above additional language:

To the extent that the legal findings and conclusions of the Article 21.5 Panel are modified or reversed by the Appellate Body, thereby affecting the level of the nullification or impairment determined by the Article 21.5 Panel, the Appellate Body shall determine the final level of the nullification or impairment.
