

**CONTRIBUTION OF THE EUROPEAN COMMUNITIES AND ITS MEMBER STATES  
TO THE IMPROVEMENT AND CLARIFICATION OF THE WTO DISPUTE  
SETTLEMENT UNDERSTANDING**

Communication from the European Communities

The following communication, dated 20 January 2003, has been received from the Permanent Delegation of the European Commission.

**I. INTRODUCTION**

1. At the Special Session of the DSB held in Geneva on 16-17 December 2002, the EC indicated that it would provide a revised version of its initial proposal for the clarification and improvement of the DSU (Doc. TN/DS/W/1). To this purpose, we would like to put to the Members' attention the present document, which modifies several proposals included in Doc. TN/DS/W/1 by taking into account the suggestions and comments received by the other Members during these last months of discussions and common analysis.

2. In some cases, the EC has withdrawn prior proposals in order to support similar proposals presented by other WTO Members. In these cases, modifications are presented as amendments to the Members' proposals in question. Those EC proposals that were included in Doc. TN/DS/W/1, and do not appear in the present document, remain unaltered.

3. The document follows the structure of Doc. JOB(02)/42 (compilation of proposals) and Doc. JOB(02)86 (checklist of issues).

**II. ESTABLISHMENT AND COMPOSITION OF PANELS**

**A. ESTABLISHMENT OF THE PANEL AT THE FIRST REQUEST (*ARTICLE 6.1 AS AMENDED*)**

4. The EC original proposal suggested amending Paragraph 1 of Article 6 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".*

5. We also proposed to retain the existing footnote to Article 6.1 at the end of paragraph 1.

6. Japan proposed to introduce a second footnote to Article 6.1 after the word "requests", which reads 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."*

7. The EC would agree on the need to provide greater flexibility in the case of a complaint against a developing country and could, therefore, support the Japanese proposal, in addition to its own.

B. PROCEDURES FOR MULTIPLE COMPLAINTS

8. Article 9 of the DSU on procedures for multiple complainants provides that a single panel should be established to examine multiple complaints whenever feasible and that where more than one panel is established the timetable for the panel process should be harmonized.

9. Experience has shown that this often leads to delay in the resolution of disputes. One way of limiting this problem and thus accelerating procedures, would be to provide that Members that have either participated in consultations requested by another Member or requested their own consultations on the same matter should be entitled to become parties to a panel proceeding when a panel is established without having to wait for the requirements of the DSU to be met before requesting the establishment of a panel.

10. Such an amendment could be effected by introducing a new paragraph 3 into Article 9 as follows:

*3. In order to facilitate the establishment of single panels to consider multiple complaints, any Member that has participated pursuant to Article 4.11 in consultations requested by another Member may join in any request to establish a panel under Article 6.1 without having to request its own consultations and any Member that has held consultations concerning the same matter may make a request for the establishment of a panel for consideration at the same meeting of the DSB even if 60 days have not elapsed from the date that it requested the consultations.*

C. WITHDRAWAL OF REQUEST TO ESTABLISH A PANEL (**NEW ARTICLE 6.3**)

11. In Doc. TN/DS/W/1 the EC proposed to insert a new paragraph 3 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".*

12. Some questions have been raised as regards the time range for withdrawal, which could leave room to abuses (i.e.: withdrawal of the request just after the interim panel report). Moreover, some questions were put on the relation between the proposed withdrawal and the already existing possibility to suspend under Article 12.12 of the DSU.

13. The EC would therefore like to modify its proposal so as to include the provision for termination of panel proceedings in Article 12 as follows:

A new paragraph 13 shall be added to Article 12:

*"13. A panel proceeding may be terminated by the complaining party at any point of time before the issuance of the interim panel report. Thereafter, the panel proceeding may only be*

*terminated before the adoption of the final panel report at the joint request of the main parties."*

#### D. PERMANENT PANELISTS

14. The EC welcomes the very detailed discussions in the DSB Special Session of its proposal to establish a roster of permanent panelists. Many valuable comments and suggestions have been put forward, which would contribute towards improving our proposal. In particular, the EC sees merit in addressing the following issues:

- Several WTO members have indicated that, while permanent panelists would contribute to greater effectiveness, speed and consistency of panel proceedings, there is a risk that in some cases, panelists from the roster would lack sufficient expertise on the specific subject matter of the dispute. While the EC is convinced that panelists selected by the DSB for a 6-year term and with a professional dedication to the panel work would have the necessary expertise, it should be possible to address any potential concerns in this regard. We, therefore, envisage that if the parties so desire, up to two panel members could be chosen, on the basis of expertise, outside the roster.
- It has been pointed out that a permanent roster of panels would benefit from having, among its members, government officials with broad experience of WTO affairs. Moreover, requiring that permanent panelists lack any form of government affiliation could make it difficult for developing countries and other WTO members to present candidates for the permanent roster. We have, therefore, modified our proposal so that for persons on temporary leave from their government may serve as permanent panelists. We also propose that rules of conflict of interest be developed by the DSB within 3 months of the establishing of the initial roster. Such rules would provide, *inter alia*, that members of the roster which retain government affiliation should disqualify themselves from disputes involving their own government, unless the parties to the dispute agree otherwise.
- In general, it would appear appropriate to leave flexibility for the DSB and the General Council to decide (and adapt if necessary over time), on the size and conditions of employment of the permanent roster. In light of the above, the EC would like to modify its proposal to amend Article 8 as follows:
  1. *Panels shall be composed of individuals included on the roster of panelists established by the DSB. The panellists shall be appointed by the DG on a random basis within 5 days from the establishment of the panel.*
  2. *Notwithstanding paragraph 1, the parties may agree at the time of the establishment of the panel that panels may include up to two individuals from outside the roster with particular expertise on the subject matter of the dispute. The Chairman of the panel shall always be an individual included on the roster of panelists and will be appointed by the DG on a random basis within 5 days from the establishment of the panel. The parties may agree on the individuals outside the roster to serve on the panel or request the Director-General, in consultation with the parties and the Chairman of the panel to nominate these individuals. If no agreement has been reached on the panellists from outside the roster or no request for their nomination to the DG has been made within 10 days from the establishment of the panel, at the request of a party, those members of the panel shall be drawn from the roster by the DG on a random basis.*

3. *The roster shall include a number of persons as determined from time to time by the General Council. 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]. The roster should 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 shall stay abreast of dispute settlement activities and other relevant activities of the WTO.*
4. *Within three months after establishment of the initial roster, the panelists included on the roster shall draw up rules on conflict of interests to be applicable to the permanent panelists in the exercise of their duties and in determining their suitability to serve in any particular dispute. Such rules 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 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.*
6. *The panelists included on the roster may draw up additional 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.*
7. *Panelists shall be provided with appropriate administrative and legal support as required.*
8. *The expenses of panelists 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.*

### **III. THIRD PARTIES**

15. Costa Rica presented a very comprehensive proposal (TN/DS/W/12) on third-party rights. The EC suggests most of the ideas put forward in this proposal and it is ready to accept it, with some minor changes. The EC can, in particular, accept Costa Rica's amendments to Article 12, 17 and 18 on third-party rights. We consider that further reflection is necessary on whether there should be an automatic right to join consultation under Article XXII. We do not support Costa Rica's proposal on Article 15, since we consider that the interim report should only be addressed to the main parties to the dispute (except for factual summaries of the arguments of third parties).

16. As regards Costa Rica's proposal on Article 10.3, we propose to retain instead the similar proposal presented by the EC and Japan, which reads 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. 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.*

#### **IV. PANEL PROCEDURES – ARTICLE 12**

17. A consequential amendment to Article 12.1 is necessary to take account of the existence of additional panel procedures envisaged by the EC's redraft of Article 8. Flexibility in panel procedures can be assured by providing panels in the Working Procedures with the possibility of deviating certain working procedures and with the possibility of making *ad hoc* additional rulings (in a similar manner to that provided to the Appellate Body in Rule 16 of the Working Procedures for Appellate Review). Article 12.1 should be amended to read:

*"1. Panels shall follow the Working Procedures in Appendix 3 as well as any additional working procedures established under Article 8."*

Appendix 3 should be amended to include a new paragraph 12 as follows:

*"12. In the interests of fairness and orderly procedure in the conduct of a panel proceeding, where a procedural question arises that is not covered by these Working Procedures or the Additional Working Procedures, a panel may adopt an appropriate procedure for the purposes of that proceeding after consultation with the parties and the third parties. Such procedure shall not be inconsistent with the DSU, the other covered agreements and these Working Procedures or the Additional Working Procedures".*

#### **V. APPELLATE BODY AND APPELLATE REVIEW**

##### **A. PROCEDURE TO MODIFY THE NUMBER OF AB'S MEMBERS (ARTICLE 17.10 AS AMENDED)**

18. The EC maintains its original proposal to amend the second sentence of paragraph 1 of Article 17 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".*

19. The EC also supports India's proposal that all future appointments of Appellate Body members (i.e. any appointment which would be effected on or after 1 January 2004) should be for a non-renewable fixed term. The first sentence of Paragraph 2 of Article 17 shall be amended as follows:

*2. The DSB shall appoint persons to serve on the Appellate Body for a six-year term which shall be non-renewable.*

##### **B. REMAND PROCEDURE (ARTICLE 17.12 AS AMENDED AND NEW ARTICLE 17BIS )**

20. The EC proposal of creating a remand procedure would appear to have been generally well received by Members. However, the debate showed the need for further refinement, notably to avoid the risk of excessive extensions in the DSU procedure.

21. The following alternative text takes into account the observations put forward by Members.

12. *The Appellate Body shall address each of the claims and issues raised in accordance with paragraph 6 during the appellate proceeding. In so far as the report of the panel or compliance panel does not contain sufficient factual findings so as to enable the Appellate Body to resolve the dispute, the Appellate Body shall explain in detail in its report the specific insufficiencies of the factual findings in order to allow any party to the dispute to request a remand of the matter or part thereof to the original panel. The Appellate Body shall also state the necessary findings of law and other directions so as to enable the panel to fully perform its task. The Parties can request the remand to the original Panel within 10 days from the adoption of the AB report by the DSB.*

*The AB shall recommend a period of time it considers necessary for the remand panel to complete its work.*

The following new Article 17bis shall be inserted after Article 17:

*Article 17bis*

*Remand procedure*

*The following special procedures shall apply for the remand procedure:*

- (1) *When, following the adoption by the DSB of the Appellate Body report under paragraph 12 of Article 17, a remand is requested, the DSB shall establish the panel, consisting of the members of the original panel<sup>1</sup>, within five days after the request has been forwarded to the Chair of the DSB.*
- (2) *The terms of reference of the remand 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 (reference to the Appellate Body's communication) 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)".*
- (3) *The remand panel shall circulate its report to the Members within the timeframe specified by the Appellate Body in its report under Paragraph 12 of Article 17. When the panel considers that it cannot issue its report within such timeframe, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the remand panel to the circulation of the report to the Members exceed six months.*
- (4) *On or after the date of circulation of the report of the remand panel, any party to the remand 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 remand*

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<sup>1</sup> If any member of the original panel is not available, a replacement shall be appointed within 5 days after the date of establishment of the panel from the roster of panellists provided for in Article 8.

*panel report shall be adopted by the DSB and unconditionally accepted by the parties to the remand panel proceeding unless a party to the remand 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 remand panel report.*

- (5) *In case the report of the remand 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.*

## **VI. SURVEILLANCE AND IMPLEMENTATION OF RECOMMENDATIONS OF THE DSB**

### **A. TIME-FRAME FOR THE COMPLETION OF THE ARBITRATION UNDER ARTICLE 21.3(C) DSU (ARTICLE 21.3 AS AMENDED)**

22. The objective of the EC proposal on this point was to streamline the procedure for fixing the reasonable period of time (RPT) through binding arbitration. In this regard, the EC noted with interest the Korean proposal on the same issue, and would be open to discuss a wording on the basis of the ideas set forth in document TN/DS/W/11. In order to facilitate the discussion, the EC has drafted a text which builds up on the Korean proposal.

23. Accordingly, the EC would like to amend its proposal on paragraph 3 of Article 21 to read as follows:

(...)

(b) *a period of time mutually agreed by the parties to the dispute; or, in the absence of such agreement,*

(c) *a period of time determined through binding arbitration. Any party may request such arbitration after 30 days from the date of the adoption by the DSB of the recommendations and rulings. If the parties cannot agree on an arbitrator within 10 days after referring the matter to arbitration, the arbitrator shall be drawn from the roster of panelists provided for in Article 8. 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.*

### **B. SEQUENCING**

24. In order to facilitate more general support on "sequencing" – and taking into account the proposal presented by Japan - the EC wishes to introduce two changes to its proposal.

- (i) *DSB surveillance and reports on status of implementation (Article 21.6 as amended)*

25. The EC put forward an amendment to Paragraph 6 of Article 21. The Japanese proposal (TN/DS/W/22) differs in one aspect from the EC text in subparagraph (b), which should read as follows:

"(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>2</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 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".

26. The EC can agree to the Japanese formulation, although it would also be open to consider a shorter period than six months.

(ii) *Determination of compliance (new Article 21bis)*

27. The original EC proposal was referring to consultations to be held before compliance panels under Article 21.5. The EC noted that some Members consider that this could unnecessarily delay the process. The EC remains convinced that meaningful consultations should take place before a request for the establishment of a compliance panel; nevertheless, in order to address the above concern, it suggests to provide for the possibility of requesting these consultations 30 days prior to the end of the RPT. Since the EC has proposed that consultations should be held within 20 days, this implies that (as in the Japanese proposal) a compliance panel could be requested 10 days prior to the end of the reasonable period of time. On this basis, paragraph 2 of the new Article 21bis should read as follows:

#### *Article 21bis*

##### *Determination of Compliance*

1. (...)

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) 30 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 five days after the date of its receipt and shall enter into consultations in good faith within 20 days from the date of circulation of the request so as to allow third parties to request to join the consultations.*

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<sup>2</sup> The parties to the dispute may agree to waive this requirement for a particular DSB meeting.



*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. (...)

C. ARBITRATION TO DETERMINE THE LEVEL OF NULLIFICATION AND IMPAIRMENT

28. The EC wishes to stress that, as stated in its Communication of 13 March 2002, 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 the DSB authorization has been granted under Article 22.7 of the DSU. In this connection, the EC considers that the proposal presented by Thailand and the Philippines in Doc. TN/DS/W/3 constitutes a good basis for negotiations.

29. The EC also notes the recent proposal from Ecuador as regards an early determination of the level of nullification and impairment (TN/DS/W/26). The proposal has many elements in common with the EC proposal contained in paragraph 24 of TN/DS/W/1. We are ready therefore to work constructively with Ecuador and other WTO Members with a view to establish a generally acceptable text on this issue.

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