

**AMENDMENT OF THE UNDERSTANDING ON RULES AND PROCEDURES
GOVERNING THE SETTLEMENT OF DISPUTES**

Proposal by Japan

The following communication, dated 15 January 2003, has been received from the Permanent Mission of Japan.

1. Results of coordination with the EC on the "sequencing" issue

Japan had close and constructive consultations with the EC to narrow the differences in their proposals on the matters related to the "sequencing" issue as much as possible. Japan has consequently incorporated some parts of the EC proposal.

(a) Early determination of the level of nullification or impairment

Although Japan maintains its position that compensation does not need to be equivalent to the level of nullification or impairment, it acknowledges that early determination of the level of nullification or impairment may assist the parties' negotiations if they are interested in a "mutually acceptable compensation". For this reason, paragraph 24 of the EC proposal (TN/DS/W/1), which allows the parties to a dispute, based on their agreement, to request an arbitration to determine the level of nullification or impairment at any point of time before the request for authorisation for suspension of concessions or other obligations, is incorporated in paragraph 5 of the attached proposal.

(b) Exemption of "en route" products from application of the suspension of concessions or other obligations

Japan supports this element of the EC proposal. It is therefore incorporated in paragraph 8 of the attached.

2. Proposed legal texts of Japan's earlier conceptual proposals

Japan resubmits the conceptual proposals included in TN/DS/W/22 in the form of legal texts. Japan of course remains flexible to modify these texts taking account of opinions that may be expressed by other Members.

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

Please see paragraph 21 of the attachment.

The so-called "mandatory law" is a law or regulation which "mandates" the application of WTO-inconsistent measures, and therefore is found WTO-inconsistent as such. In case of the mandatory law, if the level of the suspension of concessions or other obligations is determined solely based on the trade effects generated by existing measures taken under the law, the level of a retaliatory measure would be underestimated. Thus, the Member concerned would not be effectively encouraged to bring the WTO-inconsistent mandatory law into conformity. It is Japan's view that the trade effects generated by similar subsequent measures that may be taken under the law should also be taken into account. In order to realize this, the proposed amendment is to add a new footnote to paragraph 4 of Article 22, to allow consideration of possible nullification or impairment that may occur under a mandatory law illegally maintained after the reasonable period of time (RPT.)

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

Please see paragraph 22 of the attachment.

In accordance with the theory of the so-called "discretionary law," a law or regulation that permits a Member to choose between WTO-consistent and WTO-inconsistent measures would not be found WTO-inconsistent as such. However, as long as such a discretionary law is maintained, there remains a risk that the same violation would be repeated thereunder. The purpose of Japan's proposal is to prevent the repetition of the same violation under a discretionary law which itself cannot be found inconsistent under the discretionary law theory. The proposed footnote to paragraph 1 of Article 19 provides that when a panel or the Appellate Body considers that the repetition of the same violation is highly probable, the panel or Appellate Body may recommend that the Member concerned take necessary steps to prevent the repetition of WTO-inconsistent measures under the discretionary law.

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

Please see paragraph 20 of the attachment.

The proposed text provides that the number of Appellate Body members will be decided and may be modified by the General Council. In the earlier proposal, Japan presented an option for the DSB to decide the number. However, since such a decision involves budgetary implications, Japan considers the General Council is the proper organization to decide on such a matter.

In the attachment, Japan also proposes a draft DSB decision to maintain the present number of Appellate Body members until it is modified by the General Council.

- (d) Access to submissions

Please see paragraphs 18 and 19 of the attachment.

Written submissions to the panel or the Appellate Body must be treated by the parties and third parties as confidential. However, after the meeting of a panel or oral hearing for which the written submission was filed, any Member will be allowed to request any party or third party to provide the written submission. The requested party or third party must provide a non-confidential version of its written submission that could be disclosed to the public, within two weeks after the date of such a request. Accordingly, paragraph 2 of Article 18 and paragraph 3 of Appendix 3 of the DSU

should be amended. Japan notes that it has tried to draft this text taking into consideration various views expressed so far in the negotiations, and that it remains open to further discussions on this subject. Having diverse views of the Members in mind, Japan has retained the legal text from the Joint Proposal (WT/MIN(01)/W/6) amending the same provisions only with regard to non-confidential summary (please see paragraph 15 of the attached.)

ATTACHMENT

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

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.

"(b) The Member concerned shall report on the status of its implementation of the recommendations or rulings of the DSB at each DSB meeting¹, 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.

"(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.

"(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

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

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 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.

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.

"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 meeting⁴, 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.

(The following text is identical to the paragraph 24 of the EC proposal (TN/DS/W1)

At any point of time before the submission of the request for authorization for suspension of concessions or other obligations referred to in paragraph 2 of this Article, the parties may

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.

agree to request an arbitration to determine the level of nullification or impairment caused by the measure found to be inconsistent with a covered agreement.

Such arbitration shall be carried out by the original panel, if members are available. The Director-General shall determine whether the members of the original panel are available. 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 arbitrator⁵ from the roster of panelists provided for in Article 8 within 5 days after the matter is referred to the arbitration, after consulting with the parties to the arbitration.

The arbitration shall be completed and the decision of the arbitrator shall be circulated to Members within 45 days after the date of the request. The award of the arbitrator shall be final, and parties shall accept it as the level of nullification and impairment for purposes of future proceedings under paragraph 6 of this Article related to that measure."

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 DSB⁶ 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.^{7 8} 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

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

⁶ 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.

⁷ In the case of paragraph 2(ii) above, such DSB meeting shall not be convened before the expiry of the reasonable period of time.

⁸ 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.

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.⁹ 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 arbitrator¹⁰ within 5 days after the matter is referred to the arbitration, after consulting with the parties to the arbitration.

"(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, *except when an arbitration procedure under paragraph 1 of this Article has taken place, in which case the report shall be circulated within 30 days.* The complaining party shall not suspend concessions or other obligations during the course of the arbitration."

(The following text is identical to the paragraph 27 of the EC proposal (TN/DS/W1)

8. Paragraph 8 of Article 22 is amended by inserting the following sentence after the first sentence:

"Products which were en route on or before the date of application of the suspension of concessions or other obligations shall be exempted from the application of the domestic measures implementing such suspension."

9. 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

⁹ 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.

¹⁰ The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

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 days¹¹ 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.¹²

"(c) The complaining party shall not maintain the suspension of concessions and other obligations after the DSB withdraws the authorization."

10. 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."

[*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.]

11. 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.

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

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

¹¹ 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.

¹² 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.

(1)	complaining party:	3-4 weeks ¹³
(2)	party complained against:	4-5 weeks"

13. Present paragraph 2 of Article 15 shall be amended by deleting there from 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."

14. 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.¹⁴ 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."

15. 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."

16. 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."

17. 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."

18. *Paragraph 2 of Article 18 shall be amended to read as follows:*

"2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties and third parties to the dispute. The parties and third parties shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. After the date of each meeting of a panel or oral hearing of the Appellate Body, to which the written submission was submitted, each party and third party to a proceeding shall, if requested by any Member, provide a non-confidential version of its written submission that could be disclosed to the public, within two weeks after the date of such request."

¹³ Up to 6 weeks if the complaining party is a developing country Member.

¹⁴ Documents of an administrative or procedural nature need not be provided.

19. Paragraph 3 of Appendix 3 shall be amended as follows:

“The deliberations of the panel and the documents submitted to it shall be kept confidential. The parties and third parties shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. After the date of each meeting of a panel, for which the written submission was submitted, each party and third party to a proceeding shall, if requested by any Member, provide a non-confidential version of its written submission that could be disclosed to the public, within two weeks after the date of such request.”

20. In paragraph 1 of Article 17, the third sentence shall be amended to read as follows:

“Three members of Appellate Body shall serve on any one case. The total number of Appellate Body members shall be decided and may be modified by the General Council.”

*[*Note: the following phrase should be included in a decision to adopt the amendment.*

“Regarding the amendment of the paragraph 1 of Article 17 of the DSU, the DSB has decided that the current number of the Appellate Body members (“seven persons”) will be maintained unless it is modified in accordance with the provision as amended after this amendment goes into effect.”]

21. A new footnote shall be added to the paragraph 4 of Article 22 after the word “impairment”, the text of which shall read as follows:

“With respect to a measure that is found inconsistent with a covered agreement on the ground that it mandates the administration of the Member concerned to administer or implement the measure in a manner inconsistent with the covered agreement, “the level of the nullification or impairment” shall not be limited to the level of nullification or impairment caused by the existing administration or implementation, but include a calculated level of the nullification or impairment which will be caused as a result of further inconsistent administration or implementation that may be taken before the measure is fully brought into conformity. Such calculated level of the nullification or impairment shall be assessed taking account of the frequency of inconsistent administration or implementation having been taken under the measure in the past, or procedures which have been initiated under the measure in the past, degree of the effect of such inconsistent administration or implementation and other relevant information.”

22. A new footnote shall be added to the paragraph 1 of Article 19 after the word “agreement”, the text of which shall read as follows:

“When the panel or the Appellate Body finds that it is likely that such a inconsistent measure will be repeatedly taken based upon an administrative discretion provided by laws or regulations of the Member concerned, it shall recommend that the Member concerned take action necessary to ensure that such a discretion not be exercised in a manner inconsistent with its obligations under the covered agreements.”
