

Dispute Settlement Body
Special Session

Original: English

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 10 July 2002, has been received from the Permanent Mission of the Republic of Korea.

I. INTRODUCTION

On 21 May 2002, 15 co-sponsors submitted a concept paper on the issue of sequencing. The concept paper, JOB(02)/45, was designed to clarify the basic principle that a multilateral determination on the WTO-consistency of an implementation measure should precede any request for the authorization of suspension of concessions by the DSB.

This paper has been prepared by Korea to complement the concept paper and deals with issues closely related with "sequencing". This does not represent the collective view of the 15 co-sponsors. The textual changes of the DSU reflecting the ideas expressed in this paper shall be proposed at a later stage when a broad agreement on the scope of the issues to be included in the final package would emerge.

II. GUIDELINE

It is generally accepted that the DSU has been functioning without serious problems during the last seven and half years since its entry into force. Based on such an assessment, Korea interprets the mandate given by Ministers at Doha, namely, "to conduct negotiations to improve and clarify the DSU" as meaning to do so on the basis of the basic principles of the DSU. More specifically, the following basic principles would apply in this paper:

- Prompt settlement of a dispute situation (Article 3.3)
- Prompt compliance with recommendations or rulings of the DSB (Article 21.1)

III. ISSUES

The co-sponsors, in their concept paper, introduced the possibility of an appeal into the compliance panel process in line with Article 17 of the DSU. This appeal procedure, if resorted to, will result in adding two-three additional months to the implementation process. Therefore, it would be advisable to offset this delay by making changes to other parts of the implementation stage.

A. STRENGTHENING THE DISCIPLINE AT THE INITIAL STAGE OF IMPLEMENTATION

Korea believes strengthening disciplines on the initial stage of implementation can be a good starting point. Such a need is demonstrated by the number of days usually taken to fix the reasonable period of time (RPT) through binding arbitration under Article 21.3(c).

The statistics based on the working schedules of the past 14 RPT arbitration cases show that it took from the date of adoption of the Panel/Appellate Body report(s) on average 137 days to issue an award, while Article 21.3(c) stipulates that the determination of the RPT by the arbitrator should be completed within 90 days. It should be noted that the situation is worsening these days as the average number of days between the adoption of the Panel/Appellate Body reports and the scheduled issuance of an award extended to 157 days since 2000, surpassing the 90-day time frame by as long as 67 days.

A major cause for such a delay is that, as a practice, no substantive efforts are made for implementation in the 30 day period between the adoption of panel and/or Appellate Body reports and the declaration of Member's intention under the chapeau of Article 21.3.

Since each day that passes without the implementation of the DSB ruling means another day of lost trade opportunities for legitimate exporters, the complaining party should be given the explicit right to engage the responding party in bilateral discussions on the RPT immediately after the adoption of the Panel/Appellate Body reports. If the parties to the dispute fail to agree on a mutually acceptable RPT or an arbitrator until the DSB meeting held within 30 days after the adoption of the reports, the complaining party should be allowed at that DSB meeting to announce its intention to request the Director-General to appoint an arbitrator within 10 days if the complaining party so wishes. This would ensure that, in normal cases, arbitration award would be made within 90-day deadline under Article 21.3(c), in line with the principle of prompt compliance stipulated in Article 21.1.

In this connection, it should be recalled that panel reports are adopted after 20 and within 60 days from the date of their circulation and that Appellate Body reports are adopted within 30 days from the date of circulation. The Members concerned can take advantage of these periods for conducting preparatory studies for implementation. Thus, 30 days from the date of adoption of reports by the DSB would provide sufficient time for the Members concerned to reach an agreement on either the RPT or the arbitrator.

B. DETERMINATION OF THE LEVEL OF THE NULLIFICATION / IMPAIRMENT AT AN EARLY STAGE

During the surveillance phase of the implementation of recommendations and rulings, two kinds of disputes often arise among parties. One is a dispute over the existence of, or consistency with, a covered agreement of measures taken to comply with the recommendations and rulings (Article 21.5). The other is a dispute over the (1) level of suspension proposed, and/or (2) whether the principles and procedures concerning cross-retaliation have been followed or not (Article 22.6).

Korea believes that, if an Article 21.5 panel were required to determine the level of the nullification or impairment, it would importantly facilitate the implementation of the rulings of the Article 21.5 panel either without or with reference to Article 22.6 arbitration.

As the compliance panel is mandated to examine in detail the existence or consistency of measures taken to comply with the DSB rulings, the compliance panel would not be overburdened if it were charged with the additional task of determining the level of the nullification or impairment. It should also be recalled that both the compliance panel and the arbitration panel are to be composed of the members of the original panel.

The advantages of "frontloading" the determination of the level of the nullification or impairment would be:

- (a) As the Member concerned would have a clear picture of the consequences of non-compliance by the end of the compliance panel/Appellate Body procedure, it would provide a stronger incentive for the Member to bring the measure into conformity.
- (b) Since the level of the nullification or impairment has already been decided, it will substantially facilitate the negotiation for compensation.
- (c) Even in cases where the Members concerned fail to agree on compensation and a complaining party seeks suspension of concessions, the Article 22.6 arbitration panel procedure may not be necessary in many instances, since the level of the nullification or impairment is already known.

ATTACHMENT: STATISTICS ON RPT ARBITRATION

Dispute	WT/DS Number	Number of Days Between Adoption of Panel/Appellate Body Report(s) and Scheduled Issuance of Award*
Japan – Alcoholic Beverages II	8/10/11	105
EC – Bananas III	27	90
EC – Hormones	26/48	103
Indonesia – Autos	54/55/59/64	137
Australia – Salmon	18	109
Korea – Alcoholic Beverages	75/84	110
Chile – Alcoholic Beverages	87/110	140
Canada – Pharmaceutical Patents	114	146
Canada – Autos	139/142	109
US – Section 110(5) Copyright Act	160	183
US – 1916 Act	136/162	155
Canada – Patent Term	170	139
Argentina – Hides and Leather	155	206
US – Hot-Rolled Steel	184	180
Average since 1995		136.57
Average since 2000		157.25

* Not necessarily same date as circulation to all Members.