

WORLD TRADE ORGANIZATION

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PROPOSAL TO AMEND CERTAIN PROVISIONS OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU) PURSUANT TO ARTICLE X OF THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

Submission by Canada, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru,
Switzerland and Venezuela for Examination and Further Consideration by the General Council

The following communication, dated 28 September 2000, addressed to the Chairman of the General Council has been received from the Permanent Mission of Japan.

I have the honour to formally send you herewith the paper mentioned above on behalf of my Government and the Governments of those co-sponsoring. The attached proposal, co-sponsored by the following Members: Canada, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland and Venezuela, is being submitted for examination and further consideration by the General Council.

It would be appreciated if this item could be placed on the agenda for the October General Council meeting, and also if the present communication could be circulated as an official WTO document.

PROPOSAL TO AMEND CERTAIN PROVISIONS OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU) PURSUANT TO ARTICLE X OF THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

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Note: The decision by the Members to amend the DSU would also require appropriate transitional provisions.

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 meeting,¹ where any Member may raise any point pertaining thereto, beginning 6 months after the date of adoption of the recommendations or rulings of the DSB, 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

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

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.”

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

“2. The complaining party may request the establishment of a compliance panel referred to in paragraph 6 of this Article 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.

³ A compliance panel may also be established pursuant to paragraph 9 of Article 22.

“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 meeting,⁴ the DSB shall establish a compliance panel, unless the DSB decides by consensus not to establish such a panel.

“6. (a) The compliance panel shall consist of:

“(i) the members of the original panel, where the report of the original panel had not been appealed,⁵ or

“(ii) the members of the Appellate Body that considered the appeal, where the report of the original panel had been appealed.⁶

“(b) A compliance panel composed pursuant to paragraph 6 (a)(ii) may seek information or advice from the original panel concerning the facts of the case, the procedural history of the case, or legal issues that were not appealed. The compliance panel shall provide the parties to the compliance panel proceeding the opportunity to review and comment on any such information or advice.

“7. The compliance panel shall circulate its report to the Members within 90 days of the date of its establishment.

“8. The complaining party shall not request authorization to suspend concessions or other obligations under paragraph 9 of this Article until the compliance panel has circulated its report to the Members.⁷

“9. (a) 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 the DSB decides by consensus not to adopt the report. A report of a compliance panel pursuant to this Article is not subject to appeal. This adoption procedure is without prejudice to the right of Members to express their views on a compliance panel report.

“(b) If the compliance panel 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, then:

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.

⁵ 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 proceeding.

⁶ If any member of the Appellate Body that considered the appeal is not available, the Appellate Body shall appoint a replacement within 5 days after the date of establishment of the compliance panel, unless the Appellate Body has been requested not to do so by the parties to the compliance panel proceeding.

⁷ This paragraph does not apply in the case of a compliance panel established pursuant to paragraph 9 of Article 22.

“(i) The Member concerned shall not be entitled to any further period of time for implementation following adoption by the DSB of the compliance panel’s report; and

“(ii) After circulation of the compliance panel report, the complaining party that was a party to the compliance panel proceeding may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements pursuant to Article 22. The DSB shall grant authorization to such request only after the adoption of the report of the compliance panel.

“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 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. 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 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 DSB 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.⁸ The parties to the dispute are encouraged to consult before the meeting to discuss a mutually satisfactory solution.”

6. 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 9 of Article 21*bis* or paragraph 2 of this Article, the DSB shall grant 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.

⁸ In the case of paragraph 2 (ii) above, such DSB meeting shall not be convened before the expiry of the reasonable period of time.

“(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. The complaining party shall not suspend concessions or other obligations during the course of the arbitration.”

7. 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 Article 21*bis*. If the compliance panel finds that the measures taken to comply are not 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, 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 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 do so.¹¹

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

8. In paragraph 7 of Article 4, the numeral “60” shall be deleted wherever it occurs and the numeral “30” shall be inserted in its place. Insert at the end of this paragraph the following footnote:

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.

¹¹ 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.

“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 Member 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.”

9. 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 Article 6.1 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."

The existing footnote to Article 6.1 shall be retained at the end of paragraph 1.

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

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

(1)	complaining party:	_____	3-4 weeks ¹²
(2)	party complained against:	_____	4-5 weeks”

11. In Appendix 3, the following paragraph shall be inserted following paragraph 10. Paragraphs 11 and 12 shall be renumbered as 12 and 13 respectively.

“11. The descriptive part of the panel report shall include a brief summary of the facts and the procedural history of the case. The documents submitted by the parties and third parties to the panel shall be attached to the panel report, except for certain factual confidential information designated as such by the disputing party that submitted it.¹³”

12. Paragraph 1 of Article 15 shall be deleted and paragraphs 2 and 3 of Article 15 shall be renumbered as paragraphs 1 and 2. In the first sentence of the present paragraph 2 of Article 15, the first sentence shall be amended to read as follows:

“2. The panel shall issue an interim report to the parties, including the descriptive sections and the panel's findings and conclusions.”

13. Present paragraph 2 of Article 15 shall be amended by deleting therefrom 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. The following conforming changes on time frames need to be made in light of the other changes in the text.

¹² Up to 6 weeks if the complaining party is a developing country Member.

¹³ Documents of an administrative or procedural nature, annexes, and exhibits need not be attached.

"Present paragraph 12 of Appendix 3 shall be amended as follows:

"(1) Items (e) and (f) shall be deleted and the following items redesignated accordingly.

"(2) Item (g) (prior to redesignation) shall be amended by deleting "2-4 weeks" and inserting "4-8 weeks".

"(3) Item (h)(prior to redesignation)shall be amended by deleting "1 week" and inserting "10 days"

"(4) Item (i)(prior to redesignation) shall be deleted and the following items redesignated accordingly.

"(5) Item (j) (prior to redesignation)shall be amended by deleting "2 weeks" and inserting "10 days"

"(6) Item(k) (prior to redesignation)shall be amended to be to read as follows:

“(k) Circulation of the final report to the Members: ____ 3 days”

Based on a total reduction of time (up to approximately 47 days), the time frames in Article 20 (the reference to "nine months" and to "12 months"), the periods in 21.4 (the reference to "15 months" and to "18 months") shall be reduced by one month.

15. A new paragraph 13 will be added to Article 3:

“Any time period in this Understanding may be extended by mutual agreement of the parties to the proceeding concerned.”

16. 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.”

17. The following sentence shall be added after current paragraph 6 of Appendix 3:

“In establishing the working procedures to be followed the panel may take into consideration any special circumstances of a third party that are closely related to the matter under dispute.”

18. 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.”

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

19. In paragraph 10 of Article 4, the word “should” shall be deleted and the word “shall” shall be inserted in place thereof.

20. In paragraph 2 of Article 21, the word “should” shall be deleted and the word “shall” shall be inserted in place thereof.

21. 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.”

23. Paragraph 4 of Article 25 is amended to read as follows:

"Articles 21, 21*bis* and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards."

24. The new footnotes shall be inserted into the text of the DSU at the places indicated above and all footnotes shall be renumbered accordingly.
