

**Dispute Settlement Body
Special Session**

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**NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF
THE DISPUTE SETTLEMENT UNDERSTANDING**

Proposal by Mexico

The following communication, dated 31 October 2002, has been received from the Permanent Mission of Mexico.

**IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE
SETTLEMENT UNDERSTANDING**

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I. DESCRIPTION OF THE PROBLEM AND PROPOSAL

Mexico believes that the current DSU represents a highly significant step forward in the settlement of trade disputes, particularly in comparison with the rules applied in the GATT days. In our opinion, there are two types of improvements and clarifications that can be made to this Agreement: (i) structural improvements, which require amendments to the text; and (ii) accessory improvements, which ought to be achieved either through interpretations, through DSB decisions, or simply by improving current practice. Bearing this in mind, we propose focusing on the first of these categories by addressing what, in our opinion, is the central problem in the functioning of the DSU.

Mexico considers that the fundamental problem of the WTO dispute settlement system lies in the period of time during which a WTO-inconsistent measure can be in place without the slightest consequence.

On 1 January 1995, all original WTO Members undertook to ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the covered Agreements.¹ Every time an illegal measure is unilaterally introduced, or as long as it is maintained in force, this principle is violated and the delicate balance of concessions or other obligations achieved in the Uruguay Round is upset.

There is currently no mechanism available for a Member challenging a WTO-inconsistent measure to recover the losses resulting from that measure. Illegal measures may be in place for **more**

¹ Article XVI:4 of the Marrakesh Agreement Establishing the WTO.

than three years before a complaining party can obtain compensation or suspend concessions or other obligations.²

Furthermore, based on past experience, we estimate the average amount lost by the complaining party from the establishment of the Panel to the date on which it can obtain compensation or suspend concessions or other obligations at close to **370 million US dollars per case**.³

This amounts to a *de facto* waiver in which a Member can maintain a WTO-inconsistent measure which unduly harms exporters, service suppliers or holders of intellectual property rights of other Members and seriously undermines the objectives of security and predictability that the DSU seeks to pursue.

In this unilateral circumvention of WTO obligations, it is not uncommon for the illegitimate benefits obtained by the Member imposing the illegal measure to far surpass the costs incurred in the litigation itself, thereby eliminating any incentive for reaching swift solutions.

Mexico believes that the best way to improve the DSU is to address this central problem. It therefore proposes that Members resolve it in these negotiations.

II. APPLICATION

In order to help with the discussions, Mexico would like to share some ideas which, in our opinion, would help to achieve the objective stated in the previous paragraph.

(a) Early determination and application of nullification and impairment

The current text of the DSU provides for arbitration to determine the level of nullification or impairment after the expiry of the reasonable period of time (and, presumably, after completion of the proceedings under Article 21.5 of the DSU).⁴ We believe that it would benefit the system to have this determination, as well as the right to request compensation or authorization to suspend benefits, take place at the earliest stage possible.

One way of achieving this goal would be to “incorporate” the Article 22.7 procedure into the original Panel process. The arbitration proceedings could then start after the interim Panel report has been transmitted to the parties and be conducted on the basis of the Panel's interim findings and conclusions.

In this scenario, the level of nullification or impairment as determined by the Panel/arbitrator:

- (a) Could be upheld, modified or reversed by the Appellate Body; or
- (b) could remain confidential until the circulation of the Appellate Body report, in which case, the Panel/arbitrator could modify its estimates on the basis of that report.

² A review of all cases involving procedures under Article 21.5 shows an average duration of 1067 days between the date of establishment of the Panel and the date of adoption of the Panel/Appellate Body report pursuant to Article 21.5. This calculation does not take account, however, of the period preceding the date of the establishment of the original Panel or the time taken between such adoption and the date on which the DSB has actually granted the complaining party authorization to suspend concessions or other obligations.

³ Our calculation is based on a three-year estimate per case. We deliberately excluded the case 'US – FSC' (DS108). However, if we took it into account, the figure would go up to 2,049 million US dollars per case.

⁴ Article 22.6 of the DSU.

The DSB could authorize the suspension of benefits upon adoption of the Panel/Appellate Body report(s).

BENEFITS

- Prompt compliance: this approach would create incentives for the Members concerned to comply “immediately” or “in the shortest period possible within its legal system”, since they would be subject to payment of compensation or suspension of benefits from the date of adoption of the Panel/AB report. Furthermore, fewer arbitrations for the determination of the reasonable period of time would be needed.
- Satisfactory solutions: If the Member concerned were to bring its measure into conformity, compensation or suspension would be automatically terminated. However, where there was disagreement as to the existence or consistency with a covered agreement of the measures taken to comply with the recommendations and ratings, the “lifting” of suspension might have to await the Article 21.5 termination of proceedings.
- Negotiations: the approach would foster and facilitate negotiations, since Members would be aware of the level of nullification and impairment *even before* the original Panel/AB report was adopted.
- Lightening of the burden on the dispute settlement system: Members might assess the real value of a case before submitting to the dispute settlement system and, if it turns out not to be substantial, they might be inclined to negotiate rather than litigate.
- Fairer allocation of benefits: The time during which an illegal measure could be maintained without consequences would be greatly reduced.
- Time saving: More efficient use could be made of the time following the issuance of the interim Panel report. Furthermore, there would be no need to look for the members of the original panel or to appoint new ones.

(b) **Retroactive determination and application of nullification or impairment**

Under current practice, Members are only compensated or only exercise their right to suspend benefits prospectively. This means that an illegal measure will have been maintained “for free” throughout the dispute settlement proceedings at least. If we introduce the notion of “retroactivity”, Members will be able to benefit fully from the concessions and rights obtained as a result of the Uruguay Round, and the effects of this *de facto* waiver will be eradicated.

International law already incorporates the concept of “retroactivity”.⁵ Customary rules of State responsibility and the general principles of law enshrined in the ICJ Statute require the elimination, as far as possible, of all of the consequences of the illegal act, and the restoration of the situation which would, in all probability, have existed had the act not been committed.

⁵ See for example, Statute of the International Court of Justice, Article 36(2)(d).

In fact, the WTO Anti-Dumping and SCM Agreements also include the notion of “retroactivity” as part of investigations⁶; and many judicial systems of the WTO Members incorporate the notion of retroactivity to help balance the rights of complainants and defendants.

Retroactive determination would require that nullification or impairment be calculated for a period which could start at any of the following moments:

- (a) The date of imposition of the measure;
- (b) the date of the request for consultations; or
- (c) the date of establishment of the Panel.

This calculation could include lawyer’s fees and litigation expenses.⁷

To further enhance these benefits, it would be advisable to agree on the criteria for determining the level of nullification or impairment.

BENEFITS

- Fairer allocation of benefits: This approach would ensure that the balance of concessions and rights granted under the Uruguay Round was fully respected, since the complaining party would have a right to negotiate compensation and recover all losses incurred as a result of the illegal measure, or to suspend benefits for an amount equivalent to those losses.
- Time saving: There would no longer be any incentive for a Member complained against to delay proceedings artificially (for example, by requiring the panel to be established at the second DSB meeting), since all the time gained would potentially count towards compensation/suspension.
- Negotiations: Negotiations would be facilitated by the removal of incentives to prolong proceedings.

(c) Preventive measures

Under the current system, there is no recourse for Members to deal with the situations in which the challenged measure is causing damage that would be difficult to repair. In practice, some Members might feel tempted to take WTO-inconsistent measures to address those problems. Mexico believes that the system would benefit from the introduction of a right to request suspension of the challenged measure or to take preventive measures in those exceptional situations.

The right to take provisional measures to address emergency situations is well established in the WTO law. For example, Article 7 of the Anti-Dumping Agreement and Article 17.1 of the SCM Agreement provide for the application of provisional measures when “the authorities concerned judge such measures necessary to prevent injury being caused during the investigation”. The

⁶ Article 10 of the AD Agreement and Article 20 of ASCM.

⁷ See, for example, Article 64 of the Statute of the ICJ.

Agreement on Textiles and Clothing, the SPS Agreement, the TBT Agreement, the TRIPS Agreement and the Agreement on Safeguards also contain preventive measures.⁸

Preventive measures also play an important role in the domestic judicial and administrative systems of most, if not all, WTO Members; and they are present in the international courts as well.⁹ They prevent damage to the complainant which it would be difficult to repair, thus ensuring the effectiveness of the proceedings.

In the context of the DSU, if a complaining party considers that the challenged measure is causing or threatening to cause damage which it would be difficult to repair, it should have the right to ask the Panel to request the defending Member to suspend the application of the challenged measure (or rather, its harmful effects) for a certain period. If the defending Member does not suspend the measure or its application within a short period (for example, one month), then the Panel would, in exceptional circumstances, be able to authorize the complaining party to take measures to prevent the damage that it would be difficult to repair. Preventive measures could be maintained for the duration of the dispute settlement proceedings and must not affect the rights of third parties.

If the final level of nullification or impairment turns out to be lower than that of the preventive measures authorized (either because the measure is considered not to be WTO-inconsistent or because the level of a certain inconsistency is less than what was originally expected), the party complained against should be entitled to compensation for such excessive application of preventive measures, which would restore the original balance of rights and concessions.

Members with small and vulnerable industries might find these measures particularly helpful, since their industries are more likely to suffer damage which the current WTO proceedings are unable to remedy.

BENEFITS

- Adequate level of protection during the proceedings: Members facing damage which it is difficult to repair would have the opportunity to have the challenged measure suspended or otherwise to prevent the damage.
- Safeguarding the balance of rights and obligations: The proposed change would eliminate all “temptations” on the part of Members to respond to the challenged measure by imposing other measures which could, in their turn, adversely affect third country Members.

(d) Negotiable remedies

The suspension of concessions phase poses a practical problem for the Member seeking to apply such suspension. That Member may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests.¹⁰ There may be other Members, however, with the capacity to effectively suspend concessions to the infringing Member.

⁸ See Article 6.11 of the Textiles Agreement; Annex B of the SPS Agreement; Articles 2.10, 2.12, 5.7, 5.9 and Annex 3 of the TBT Agreement; Article 31(b) and Part III, Section 3 of the TRIPS Agreement and Article 6 of the Agreement on Safeguards.

⁹ See, for example, Statute of the International Court of Justice, Article 41.

¹⁰ While the problem is even more evident for developing countries and least-developed countries, it also greatly affects small countries whose industry is concentrated in one or only a few sectors and whose main imports are primary goods.

Members should be allowed to “negotiate” the right to suspend concessions or other obligations towards another Member. In other words, if the infringing Member has not negotiated acceptable compensation, the complainant may agree with a third Member the transfer of the right to suspend concessions in exchange for a negotiated benefit (i.e., “A” may agree with “B” the transfer of the right to suspend concessions or obligations to “C” in exchange of a mutually agreed benefit, which may even take the form of cash).

“Negotiable rights” are an economic concept, and should be tradeable. Furthermore, many domestic legislations, in recognition of the need to provide effective remedies for complaining parties, allow them to “negotiate” their rights with third parties. In Mexico’s opinion, this concept might help address the specific problem facing Members that are unable to suspend concessions effectively.

BENEFITS

- Incentive for compliance: Facing a more realistic possibility of being the subject of suspended concessions, the infringing Member will be more inclined to bring its measure into conformity.
- Better readjustment of concessions, since the affected Member would be able to obtain a tangible benefit in exchange for its right to suspend.

III. MODALITIES

Mexico considers that in order to achieve the objective contained in this proposal, Articles 6, 7, 11, 12, 19 and 22 of the DSU would have to be amended.

IV. CONCLUSION

The problem identified by Mexico is of great importance and needs to be addressed on an urgent basis. Every case brought before the DSB implies losses of millions of dollars for the industries damaged by the illegal measures. We are proposing a system that ensures greater fairness in finding more effective ways of solving disputes and, more importantly, a system which will create incentives for Members to comply with their obligations or to seek mutually agreed solutions. If implemented, this proposal will benefit all WTO Members and will improve the dispute settlement system by focusing attention on the truly significant disputes and producing results that are clearer to all.
