

**PROPOSAL TO REVIEW ARTICLE 22.7 OF THE UNDERSTANDING
ON RULES AND PROCEDURES GOVERNING
THE SETTLEMENT OF DISPUTES**

Communication from the Philippines and Thailand

The following communication, dated 19 March 2002, is being recirculated to Members at the request of the Permanent Missions of the Philippines and Thailand. The original communication can be found in WT/MIN(01)/W/3 and Corr.1.

I. RATIONALE

1. In the view of the Government of the Philippines and the Royal Thai Government, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is a workable instrument that provides predictability and stability to the WTO multilateral trading system. This instrument, however, may be further improved by the Members so as to enhance and strengthen its multilateral character.

2. The two Governments are further of the view that some aspects of the DSU require urgent attention and priority action. One such aspect is the relationship between Articles 21 and 22 or the so-called "sequencing" issue. Among the questions that may be raised in this regard, there is one in particular that needs to be carefully reflected upon by the Members. This is the crucial question of the level of suspension of concessions or other obligations authorized under Article 22 of the DSU. Since this suspension is considered as an exceptional, last resort measure as opposed to the withdrawal of the measure found to be inconsistent with a covered agreement or compensation in lieu thereof¹, there is a need to ensure that the level of suspension is strictly equivalent, *in law and in practice*, to the level of the nullification or impairment of the complaining party in a given case. This is essential for maintaining fairness and the credibility of the WTO dispute settlement system. The existing mechanism in the current DSU, however, does not allow the DSB to ensure such equivalence.

II. PROPOSAL

3. Paragraph 7 of Article 22 of the DSU shall be amended to read as follows:²

"7 (a) The arbitrator¹⁶ acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also

¹Article 3.7 of the DSU.

² In the event it is decided to amend the DSU on the basis of the proposal made by 11 Members on 28 September 2000 (WT/GC/W/410), paragraph 6, the words "Article 22.6" in sub-paragraph (b) below shall be deleted and the words "Article 22.6(a)" shall be inserted in place thereof.

determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3.

(b) To determine whether the level of suspension proposed under Article 22.6 is equivalent to the level of nullification or impairment, the arbitrator shall first determine the level of the nullification or impairment of the benefits accruing to the complaining party under the WTO Agreement in accordance with the recommendations and rulings of the DSB. The complaining party shall provide sufficient trade information and data to enable the arbitrator to determine such level.

(c) Consistent with the level of nullification or impairment determined pursuant to subparagraph (b) and with due respect to paragraph 3 of Article 22, the complaining party shall submit to the arbitrator a detailed proposal containing a list of the concessions or other obligations it intends to suspend. The arbitrator shall determine whether the level of suspension resulting from the list of concessions or other obligations contained in the proposal is equivalent to the level of nullification or impairment determined pursuant to subparagraph (b). In the event the arbitrator considers that the level of suspension is not equivalent to the level of nullification or impairment, the complaining party shall modify the list of concessions or other obligations until the arbitrator determines that the level of suspension resulting therefrom is equivalent to the level of nullification or impairment determined pursuant to subparagraph (b).

(d) The DSB shall be informed promptly of the decision of the arbitrator. The parties shall accept such decision as final and shall not seek a second arbitration.

(e) Consistent with the decision of the arbitrator and with due respect to paragraph 3 of Article 22, the complaining party shall submit a request to the DSB for an authorization to suspend concessions or other obligations. The DSB shall grant authorization to suspend concessions or other obligations where the request is consistent with the determinations made by the arbitrator pursuant to subparagraphs (b) and (c), unless the DSB decides by consensus to reject the request.

(f) The complaining party shall not suspend concessions or other obligations other than those contained in the list of concessions or other obligations on the basis of which the arbitrator has determined pursuant to subparagraph (c) that the level of suspension is equivalent to the level of nullification or impairment. Such a list shall not be modified except by mutual agreement between the complaining party and the Member concerned or pursuant to subparagraph (g).

(g) Anytime after authorization by the DSB, the complaining party may submit a request to the arbitrator for an adjustment, for technical purposes, of the list of concessions or other obligations on the basis of which the arbitrator has determined pursuant to subparagraph (c) that the level of suspension is equivalent to the level of nullification or impairment. Such requests shall be accompanied by a detailed proposal containing an adjusted list of concessions or other obligations. The arbitrator shall determine whether the level of suspension resulting from such a list is equivalent to the level of nullification or impairment determined pursuant to subparagraph (b). In the event the arbitrator considers that the level of suspension is not equivalent to the level of nullification or impairment the complaining party shall modify the adjusted list of concessions or other obligations until the arbitrator determines that the level of suspension resulting therefrom is equivalent to the level of

nullification or impairment determined pursuant to subparagraph (b). The DSB shall be informed promptly of the decision of the arbitrator and the parties shall accept such decision as final. Consistent with the decision of the arbitrator and with due respect to paragraph 3 of Article 22, the complaining party shall submit a request to the DSB for an authorization to adjust the list of concessions or other obligations for technical purposes. The DSB shall grant authorization to adjust the list of concessions or other obligations for technical purposes where the request is consistent with the determinations made by the arbitrator pursuant to subparagraph (b) and this subparagraph, unless the DSB decides by consensus to reject the request. After authorization by the DSB, the complaining party shall not suspend concessions or other obligations other than those contained in the list of concessions or other obligations on the basis of which the arbitrator has determined pursuant to this subparagraph that the level of suspension is equivalent to the level of nullification or impairment.

(h) In its determination pursuant to subparagraphs (c) and (g), the arbitrator shall take due account of any time-period necessary for trade in the affected sectors to adjust itself prior to and during the suspension of concessions or other obligations, and to regain its normal course thereafter."

¹⁶The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.