WORLD TRADE ORGANIZATION

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Negotiating Group on Rules

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DISPUTE SETTLEMENT

Communication from Canada

The following communication, dated 29 June 2005, is being circulated at the request of the Delegation of Canada.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/129), also be circulated as a formal document.

Members will recall that, at the April 2005 session of the Negotiating Group, Canada presented a paper on "Dispute Settlement" (circulated as informal document JOB(05)/45 and document TN/RL/GEN/37). Having had the benefit of Members' views, Canada is submitting this revised version of the proposal set out in that paper.

Original Proposal

Canada's original submission rested on two basic propositions, i.e:

1. immediately upon the application/imposition of antidumping or countervail measures having been ruled by the DSB to be WTO-inconsistent, the Member concerned should be prohibited from continuing to apply/impose such inconsistent measures; and

2. after bringing a measure found to be inconsistent with a covered agreement into compliance, the Member concerned should be obliged to apply the compliant measure to all past entries and, where application of the compliant measure yielded lower duty liability, to refund all excess anti-dumping and/or countervailing duties collected pursuant to the original WTO-inconsistent measure. (If, however, the duty assessed under the compliant measure were to be greater than that imposed under the WTO-inconsistent measure, the difference would not be collected).

Although both of these elements formed part of Canada's originally proposed framework of "special and additional" dispute settlement provisions for antidumping and countervail measures, each can stand largely independently of the other as a separate and distinct basis for improving existing antidumping and countervail rules and disciplines. In this regard, and in light of concerns expressed by several delegations regarding the second element, Canada has narrowed the scope of its original proposal, which it believes would continue represent a significant improvement to the *status quo*.

Revised Proposal

As explained in its original submission, Canada believes that consideration should be given to the inclusion of a new provision in both the ADA and ASCM whereby, immediately upon the application/imposition of an antidumping or countervailing measure having been ruled by the DSB to be WTO-inconsistent, all enforcement actions (e.g., demands for cash deposits to cover estimated duties, the assessment of definitive duties on prior unliquidated entries, and the prospective application of definitive duties) in respect of that measure would be suspended until such time as the measure was brought into compliance with the DSB's ruling. Because DSB recommendations and rulings do not enjoy direct effect in the legal systems of most Members, it is recognised that the suspension obligation would likely have to make some allowance for a relatively brief "administrative period" (e.g., 30 days) to allow the domestic authorities of a Member to effect the suspension of enforcement of the non-compliant measure.

In short, Members would no longer be allowed to enforce WTO-inconsistent antidumping and countervail measures under cover of the reasonable period of time for compliance (RPT) established under Article 21.3 of the DSU.[1] At the same time, however, complaining Members would still be precluded from seeking authorization to retaliate during the RPT. In order to ensure that the intent of this new rule was not frustrated by inadequate compliance action on the part of an implementing Member, a measure would only be considered WTO-compliant where:

1. the parties to the dispute agree that the measure complies with the recommendations and rulings of the DSB (i.e., acknowledged compliance);

- or -

2. a prescribed period of time has elapsed after:

   (a) a declaration of compliance to the DSB by the implementing Member, or

   (b) expiration of the RPT,

   without the initiation of compliance proceedings under Article 21.5 of the DSU (i.e., deemed compliance);[2]

- or -

3. the DSB has adopted an Article 21.5 panel or Appellate Body report that has determined the measure to be compliant (determined compliance).[3]

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[1] It is conceivable that certain enterprises might take advantage of this period and import massive amounts of the subject goods into the country only to disappear before any retroactive duty enforcement under a WTO-compliant measure can occur – leaving no one around to pay duties found to be properly owing. Such scenarios would, of course, need to be addressed. In this regard, Members might consider the appropriateness of providing the implementing Member with the option of requiring the posting of bonds.

[2] The prescribed period would be of sufficient duration (e.g., 60 days) to afford the complaining Member(s) a reasonable opportunity to assess the adequacy of the compliance action taken. Where the complaining Member decided that the compliance action was sufficient, the prescribed period would simply be allowed to lapse and the measure would be deemed compliant. If, however, the complaining Member considered that the compliance action was inadequate, it would have recourse to Article 21.5 of the DSU.

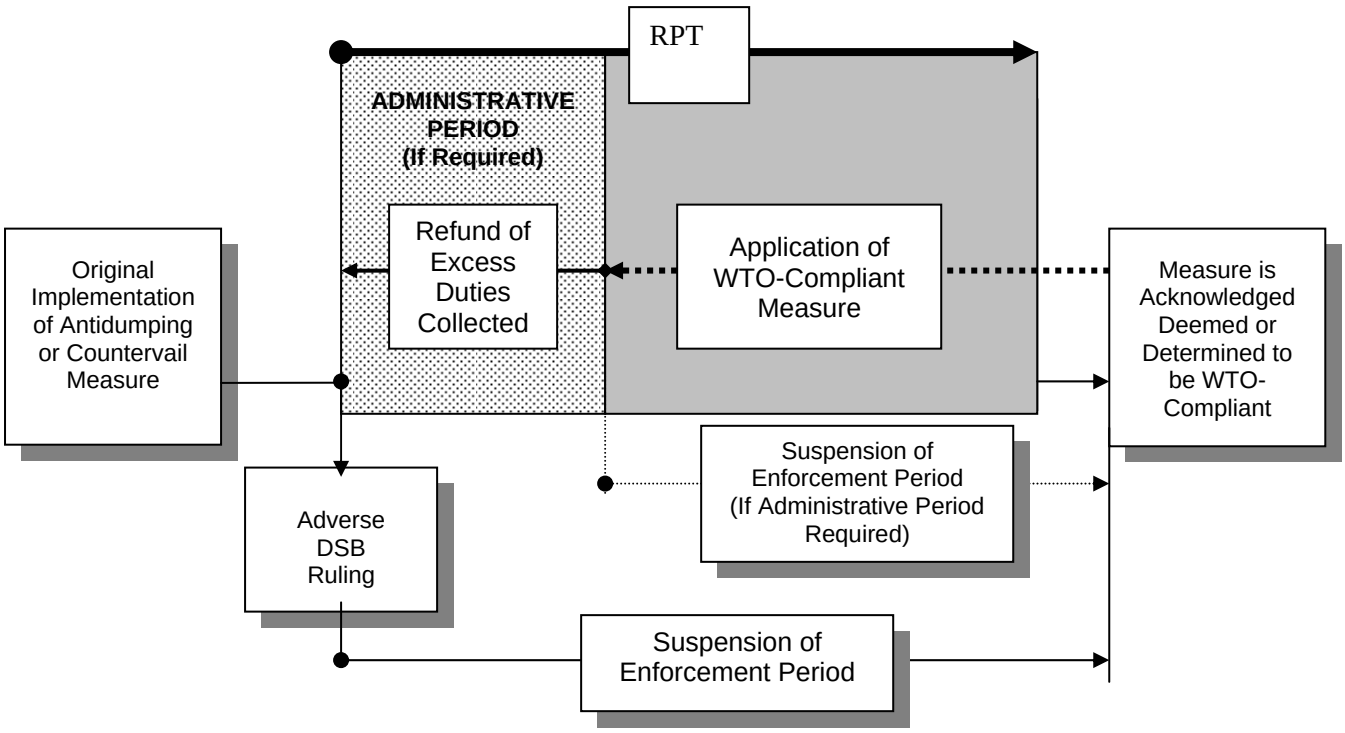
[3] Canada recognises that certain collateral issues concerning the relationship between its proposed special/additional dispute settlement provisions and retaliation rights under Article 22 of the DSU would have to be clarified (e.g.: the refusal of a Member to suspend the application of anti-dumping/countervailing measure after an adverse DSB ruling should deprive that Member of the benefit of the RPT and entitle the complaining Member to request the immediate suspension of concessions pursuant to Article 22.2 of the DSU).

Once the WTO-inconsistent measure was acknowledged, deemed, or determined to have been brought into compliance with the DSB's recommendations and rulings:

1. the complying Member would be permitted to enforce the newly compliant measure retrospectively in respect of products under consideration imported during the period between the beginning of the RPT and the date on which the measure was acknowledged, deemed or determined to be compliant[4] and to take other theretofore suspended enforcement actions (e.g., the liquidation of prior unliquidated entries) on the basis of the compliant measure; and

2. excess duties collected during the brief "administrative period" would be refunded. If, however, the duty assessed under the compliant measure were to be greater than that imposed under the WTO-inconsistent measure during such administrative period, the difference would not be collected.[5]

Schematic Depiction of Revised Proposal



Annex A elaborates on how this revised proposal might be implemented in the ADA and ASCM.

The above does not purport to address all of Canada's concerns with respect to dispute settlement and it reserves the right to make further submissions on the subject.

[4] In accordance with Article 9.1 of the ADA and Article 19.2 of the ASCM, the decision whether or not to impose duties, once the requirements for their imposition had been properly fulfilled, and the decision whether the amount would be the full amount or less, would remain decisions of the authorities of the importing Member.

[5] This would be based on reasoning consistent with that underlying Articles 10.3 of the ADA and 20.3 of the ASCM on the retroactive application of definitive antidumping and countervailing duties for the period during which provisional measures were imposed.

ANNEX A

A. AMEND ARTICLE 17 OF THE ADA AS FOLLOWS:

17.8 Subject to paragraph 9, upon a ruling by the DSB that the application of an antidumping measure is inconsistent with Article VI of GATT 1994 and the terms of this Agreement, the Member concerned shall immediately suspend the application of that inconsistent measure.

17.9 Where the immediate suspension of application of the inconsistent measure is impractical, the Member concerned may avail itself of an administrative period, which shall not exceed 30 days from the date of the DSB ruling referred to in paragraph 8, to effect the suspension of application of the inconsistent measure.

17.10 Prompt compliance with the recommendations or rulings of the DSB, within the meaning of Article 21 of the DSU shall, unless otherwise agreed to by the disputing parties, be deemed to have occurred:

(i) after a period of 60 days from either:

(a) a declaration of compliance made by the Member concerned to the DSB; or

(b) the expiration of the reasonable period of time referred to in Article 21.3 of the DSU;

provided that a party to the dispute has not initiated compliance proceedings under Article 21.5 of the DSU before the expiration of such period.

- or -

(ii) upon adoption by the DSB of the report of a panel, and of the Appellate Body on appeal, concerning the existence and consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB, within the meaning of Article 21.5 of the DSU.

17.11 A Member may apply an antidumping measure that is deemed to be compliant under paragraph 10, to all importations of the product made subsequent to the DSB ruling referred to in paragraph 8.

17.12 Antidumping duty amounts collected during the administrative period referred to in paragraph 9 that are in excess of the amount of antidumping duty payable under a measure that is deemed to be compliant under paragraph 10, shall be refunded.

17.13 Where the amount of the antidumping duty payable under a measure that is deemed to be compliant under paragraph 10 is higher than the amount actually collected during the administrative period referred to in paragraph 9, the difference shall not be collected.

B. AMEND PART V OF THE ASCM AS FOLLOWS:

[New] 24.1 Subject to paragraph 2, upon a ruling by the DSB that the imposition of a countervailing measure is inconsistent with Article VI of GATT 1994 and the terms of this Agreement, the Member concerned shall immediately suspend the imposition of that inconsistent measure.

24.2 Where the immediate suspension of imposition of the inconsistent measure is impractical, the Member concerned may avail itself of an administrative period, which shall not exceed 30 days from the date of the DSB ruling referred to in paragraph 1, to effect the suspension of the imposition of the inconsistent measure.

24.3 Prompt compliance with the recommendations or rulings of the DSB, within the meaning of Article 21 of the DSU, shall, unless otherwise agreed to by the disputing parties, be deemed to have occurred:

(a) after a period of 60 days from either:

(i) a declaration of compliance made by the Member concerned to the DSB; or

(ii) the expiration of the reasonable period of time referred to in Article 21.3 of the DSU;

provided that a party to the dispute has not initiated compliance proceedings under Article 21.5 of the DSU before the expiration of such period;

- or -

(b) upon adoption by the DSB of the report of the panel, and of the Appellate Body on appeal, concerning the existence and consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB within the meaning of Article 21.5 of the DSU.

24.4 A Member mayimpose a countervailing measure that has been deemed to be compliant under paragraph 3 on all importations of the product made subsequent to the DSB ruling referred to in paragraph 1.

24.5 Countervailing duty amounts collected during the administrative period referred to in paragraph 2 that are in excess of the amount of the countervailing duty payable under a measure deemed to be compliant under paragraph 3, shall be refunded.

24.6 Where the amount of the countervailing duty payable under a new measure deemed to be compliant under paragraph 3 is higher than the amount actually collected during the administrative period referred to in paragraph 2, the difference shall not be collected.

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