

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

Communication from Australia

The following communication, dated 27 June 2002, has been received from the Permanent Mission of Australia.

Australia has identified a number of areas where we consider that improvements and/or clarifications of the Dispute Settlement Understanding (DSU) are required. These are:

- (a) The need to address anomalies in procedural time-frames for dispute settlement on safeguards compared to subsidies;
- (b) the need to ensure that the rights of non-parties to a dispute are respected, particularly in relation to compensation arrangements;
- (c) the need to ensure that the actual level of retaliation imposed by a complaining party is consistent with the level of retaliation authorized by the Dispute Settlement Body (DSB);
- (d) the potential for possible time savings in the dispute settlement procedure;
- (e) the usefulness of adopting a consolidated understanding on agreed procedures under Articles 21 and 22 of the DSU to replace the current need for ad hoc bilateral agreements.

Australia considers that these improvements and clarifications of the DSU can be put in place through adoption of decisions on agreed practice by the DSB. There is no need for formal treaty amendments to the DSU to introduce these clarifications.

- (a) Anomalies in procedural time-frames for dispute settlement on safeguards compared to subsidies

Issue

- Disputes relating to prohibited or actionable subsidies benefit from accelerated dispute settlement procedures under the Agreement on Subsidies and Countervailing Measures (Articles 4 and 7).

- A list of these accelerated procedures, with comparisons with the standard timeframes under the DSU, is provided at Annex A.
- Disputed safeguard actions taken under the Agreement on Safeguards (SA), Agreement on Textiles and Clothing (ATC) and Agreement on Agriculture (AOA) are not subject to any such accelerated dispute settlement procedures but must operate according to the standard time-frames under the DSU.
 - In the case of safeguard actions under the ATC, the timeframe for dispute settlement is actually considerably longer than the standard DSU procedure (by at least 90 days). This is because a disputed safeguard action must be examined by the Textiles Monitoring Body (TMB) before reference to the DSB (see Annex B).
- The fact that safeguard actions are not subject to similar accelerated dispute settlement procedures as provided for prohibited and actionable subsidies is an anomaly for the following reasons:
 - safeguard actions have similar adverse trade effects as prohibited and actionable subsidies; and
 - safeguard actions are by definition time-limited¹, with the result that implementation of a panel/Appellate Body decision that a safeguard action is WTO-inconsistent will often not occur until the time-frame for that safeguard action has expired.

Proposal

Adoption of a DSB decision that:

- Expedited procedures will be instituted for dispute settlement on all safeguard matters brought under the DSU, including:
 - A request for establishment of a panel may be made 30 days (rather than 60 days) after the request for consultations if the consultations fail to settle the dispute (this is merely adopting agreed practice under Article 4.7 DSU).
 - The panel will be established at the first DSB meeting following the request (again, merely adopting agreed practice on what parties are already free to agree under Article 6.1 DSU).
 - All time-frames in the Working Procedures in Appendix 3 will be halved for disputes on safeguard action, unless the parties otherwise agree (again, adopting agreed practice on what panels are already free to agree, after consultation with the parties, under Article 12.1 DSU).

¹ The maximum duration of any safeguard measure under the Agreement on Safeguards, and the Agreement on Textiles and Clothing is four years. Under the Agreement on Agriculture, the duration for volume-based special safeguards is the end of the calendar year, while price-based special safeguards are applied on a shipment-by-shipment basis.

- If one or more of the parties to a dispute is a developing country, then the developing-country party may request and receive the application of standard DSU time-frames.

(b) Compensation arrangements and rights of non-parties to a dispute

Issue

- The DSU provides that compensation arrangements are temporary measures in the event that implementation is not achieved within a reasonable period of time (Articles 3.7, 22.1 and 22.8).
- It also provides that these compensation arrangements must be consistent with the covered agreements (Article 22.1). This includes MFN provisions.
- We are concerned by a recent trend toward bilateral compensation deals agreed between parties which have no timetable for implementation and which are not offered to other Members whose rights and obligations have also been nullified and impaired.
- If Members are forced to initiate their own complaints to acquire compensation rights, when it has already been proven that the Member concerned is in breach of its WTO obligations, this will place enormous pressure on the WTO dispute settlement system and will lead to a waste of valuable resources.

Proposal

Adoption of a DSB decision that:

- Members will fully observe the requirement in Article 3.7 of the DSU that the provision of compensation is a temporary measure pending the withdrawal of a measure found to be WTO-inconsistent.
 - Members will not enter into compensation arrangements that in effect constitute a waiver of their obligations.
- Members will observe the requirement in Article 22.1 of the DSU that compensation must be consistent with the covered agreements.
 - In acknowledging that any compensatory measures need to be available on an *erga omnes* basis, Members will seek, to the extent feasible, to agree on measures that are generally available to other WTO Members.
- Members agree that, in circumstances where it is not feasible to apply compensatory measures that are generally available, a non-implementing Member will, on request, agree to expedited arbitration under Article 25 of the DSU that would serve to determine the right of a third party to negotiate compensation, as well as the level of that compensation.

(c) DSU surveillance of retaliation

Issue

- There is a need to provide a procedure to ensure that the actual level of retaliation imposed by a complaining party remains consistent with the level of retaliation authorized by the DSB under Article 22.2 of the DSU. The level of retaliation authorized must be equivalent to the level of nullification or impairment incurred by the complainant (Article 22.4 DSU).
- Under Article 22.6 and 22.7 of the DSU, a respondent may request an arbitrator to determine whether the level of concessions or other obligations proposed to be suspended by a complainant is equivalent to the level of nullification or impairment.
- A respondent may seek a further arbitration if the concessions or other obligations are subsequently altered by the complainant and the respondent believes that these measures now exceed the level of nullification or impairment (Article 22.6).
- The need for such further arbitration procedures could be largely avoided if Members undertook to keep to their original proposals for suspension of concessions or other obligations, except to correct technical errors or in exceptional circumstances.

Proposal

Adoption of a DSB decision that, further to the procedures set out in Article 22.6 and 22.7 DSU:

- Members agree that, once an arbitrator has determined that the concessions or other obligations proposed for suspension by a complainant are equivalent to the level of nullification or impairment, they will refrain from varying this list except to correct technical errors or in response to unforeseen circumstances.
- In cases where a complainant does nonetheless seek to vary its concessions or other obligations suspended, a respondent retains the right to seek arbitration under Articles 22.6 and 22.7 of the DSU.

(d) Proposals for saving time on the dispute settlement procedure

Issue

- There is a need to implement time-saving measures to the DSU process to ensure that disputes are dealt with effectively.
- It is important that any time-savings introduced for DSU procedures respect the due process and procedural fairness aspects of the system, do not disadvantage developing countries, and do not significantly alter the balance of rights and obligations between the parties to the dispute.
- Two simple time-saving measures could be adopted at the start of the DSU procedure that satisfy all of the above criteria:

- the establishment of a panel at first request by the complainant (time saving of approximately 3 weeks);
- a requirement that complainants lodge their first written submission at the time of the first panel request (time saving of between 3 to 6 weeks).
- These simple time-savings would benefit developing-country complainants facing substantial damage caused by an allegedly WTO-inconsistent trade barrier and are in keeping with Article 3.12 DSU (which allows a developing-country complainant, in a dispute brought against a developed country, to request accelerated panel procedures).

Proposal

Adoption of a DSB decision that:

- Unless both parties to a dispute agree otherwise, a panel will be established at the first DSB meeting following the request by the complainant (this adopts agreed practice which is consistent with Article 6.1 DSU).
 - Complainants will lodge their first written submissions at the same time as they first request the establishment of a panel on a particular matter (this is what panels are already free to agree, after consultation with the parties, under Article 12.1 DSU).
- (e) "Sequencing" the relationship between Article 21.5 and Article 22
- There is a need to clarify the "sequencing" issue. In simple terms this issue refers to the order in which Articles 21.5 and 22 apply in disputes.
 - Members have responded to issues surrounding the sequencing of Article 21.5 and Article 22 processes by entering into bilateral understandings on a case-by-case basis.
 - The practice developed through these understandings could be consolidated to avoid the need for such understandings on each occasion.
 - An examination of selected bilateral understandings suggests that there are broadly two approaches that Members have taken to the sequencing issue.
 - The first approach allows the procedures in Articles 21.5 and 22 to be initiated simultaneously. The Article 22 retaliation process is then suspended until the Article 21.5 procedure is complete. If the respondent has failed to comply with the panel's recommendation and rulings at the completion of the Article 21.5 procedure, the complainant may commence the previously initiated retaliation procedure under Article 22 (examples of this approach are WT/DS108/12 and WT/DS103/14).
 - The second approach allows the procedures in Articles 21.5 to be initiated before the retaliation process in Article 22. Given that there is a 30 day time-limit on the retaliation process, the respondent must agree that the retaliation process under Article 22 cannot be blocked because the request for authorization is made outside the 30 day time-period (examples of this approach are WT/DS141/11 and WT/DS34/13).

Proposal

Adoption of a DSB decision to:

- Provide an understanding on agreed procedures under Articles 21.5 and 22 of the DSU applicable to all current disputes (unless the parties have already entered into a bilateral understanding for that dispute) and future disputes.
 - This understanding may be adapted for a particular dispute at the agreement of both parties.

(This understanding would be based on bilateral understandings submitted to the WTO to date – Members are invited to indicate examples of such understandings which might serve as a model).

ANNEX A

Summary of Accelerated Dispute Settlement Procedures for Prohibited and Actionable Subsidies under the Agreement on Subsidies and Countervailing Measures (SCM)

(Comparisons are with standard timeframes for other disputes under the DSU)

Prohibited Subsidies

Task	SCM (Article 4)	DSU
<u>Request</u> for establishment of panel after consultations unsuccessful	30 days after request for consultations (Article 4.4)	60 days after request for consultations (Article 4.7)
<u>Actual</u> establishment of panel	Immediate establishment of panel (Article 4.4)	Established no later than the second DSB meeting following the meeting at which the request first appears on the DSU Agenda (Article 6.1)
Final panel report to be circulated to Members after establishment of panel's composition and terms of reference	Within 90 days (Article 4.6)	Within 6-9 months, or in the case of emergency 3 months (Articles 12.8 and 12.9)
Adoption of panel report by DSB	Within 30 days of issuance of panel's report to all Members (Article 4.8)	Within 60 days of circulation of a panel report to Members (Article 16.4)
Appellate Body decisions to be issued	Within 30-60 days from the date a party to the dispute gives notice of its decision to appeal (Article 4.9)	Within 60-90 days from the date a party to the dispute gives notice of its decision to appeal (17.5)
Adoption of Appellate Body reports by DSB	Within 20 days following its issuance to the Members (Article 4.9)	Within 30 days following its issuance to Members (Article 14)
Granting of authorization to the complainant to take certain action, where DSB recommendation is not followed within the specified time-period	Granting of authorization to take appropriate countermeasures is immediate after expiry of time specified by panel for withdrawal of prohibited subsidy (Article 4.7 and 4.10)	Granting of authorization to suspend concessions or other obligations is subject to: <ul style="list-style-type: none"> • the respondent having a "reasonable time" to comply with DSB recommendation (should not exceed 15 months from the date of adoption of a panel or Appellate Body report) (Article 21.3); • failing such compliance and any negotiations on mutually acceptable compensation (which must be agreed within 20 days after the date of expiry of the "reasonable period of time"), authorization may be requested (Article 22.2); and • the DSB can grant authorization within 30 days of the expiry of the "reasonable period of time" (Article 22.6).
All other tasks	Time-periods to be halved (Article 4.12)	As provided in the DSU

Actionable Subsidies

Task	SCM (Article 7)	DSU
<u>Request</u> DSB to establish panel	Within 60 days of request for consultations (Article 7.4)	Within 60 days of request for consultations (Article 4.7)
<u>Actual</u> establishment of panel	Established at first DSB meeting (Article 7.4)	Established no later than the second DSB meeting following the meeting at which the request first appears on the DSU Agenda (Article 6.1)
Composition and panel terms of reference to be established	Within 15 days of establishment of panel (Article 7.4)	Up to 30 days from establishment of panel (Articles 7.1 and 8.7)
Final panel report to be circulated to Members after establishment of panel's composition and terms of reference	Within 120 days (Article 7.5)	Within 6-9 months, or in the case of emergency 3 months (Articles 12.8 and 12.9)
Adoption of panel report by DSB	Within 30 days of issuance of the panel report to Members (Article 7.6)	Within 60 days of circulation of a panel report to Members (Article 16.4)
Appellate body decisions to be issued	Within 60-90 days from the date a party to the dispute gives notice of its decision to appeal (article 7.7)	Within 60-90 days from the date a party to the dispute gives notice of its decision to appeal (17.5)
Adoption of appellate body reports by DSB	Within 20 days of issuance to Members (Article 7.7)	Within 30 days following its issuance to Members (Article 14)
Granting of authorization to the complainant to take appropriate countermeasures, where DSB recommendation is not followed within the specified time-period	Granting of authorization to take appropriate countermeasures is immediate after failure of Member to take appropriate steps to remove adverse effects of the subsidy within 6 months from the date when the DSB adopts the panel or AB report (Article 7.9)	Granting of authorization to suspend concessions or other obligations is subject to: <ul style="list-style-type: none"> • the respondent having a "reasonable time" to comply with DSB recommendation (should not exceed 15 months from the date of adoption of a panel or Appellate Body report) (Article 21.3); • failing such compliance and any negotiations on mutually acceptable compensation (which must be agreed within 20 days after the date of expiry of the "reasonable period of time"), authorization may be requested (Article 22.2); and • the DSB can grant authorization within 30 days of the expiry of the "reasonable period of time" (Article 22.6).

ANNEX B

Summary of Additional Procedures for Agreement on Textiles and Clothing (ATC)

Where there is no agreement following 60 days consultations between the two Members concerned over the proposed safeguard action, the Textiles Monitoring Body must examine the matter and make appropriate recommendations to the Members concerned within 30 days of referral of the matter (Article 6.10 ATC).

A Member that considers itself unable to conform with the recommendations of the TMB has one month to notify this to the TMB with reasons (Article 8.10 ATC).

The TMB must then undertake a thorough consideration of the reasons given and issue any further recommendations it considers appropriate – no time-limit for this is given (Article 8.10 ATC).

If after such further recommendations, the matter remains unresolved, either Member concerned may bring the matter before the DSB and invoke Article XXIII GATT 1994 and the DSU. This would seem to imply that a fresh request for consultations must be made under Article 4 of the DSU to commence the dispute settlement procedure.
