

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

Communication from Australia

The following communication, dated 14 February 2003, has been received from the Permanent Mission of Australia.

Australia has identified the following improvements and/or clarifications of the Dispute Settlement Understanding (DSU):

- (a) The need to address anomalies in procedural time-frames for dispute settlement on safeguards compared to subsidies (**involving amendments to Articles 1(2) and the inclusion of a new 8bis**);
- (b) the need to ensure that the rights of non-parties to a dispute are respected, particularly in relation to compensation arrangements (**involving amendments to Article 22.2**);
- (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) (**involving amendments to Article 22.7**);
- (d) the potential for possible time savings in the dispute settlement procedure (**involving amendments to Article 6 and item 12 of Appendix 3**);
- (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 (**involving the inclusion of a new 5bis and amendments to Article 22.6**).

Further to Australia's proposal TN/DS/W/34, we offer the following draft legal texts for the above clarifications and improvements of the Dispute Settlement Understanding.

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and

procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. Article 8bis shall apply to disputes involving safeguard actions. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, or under one or more covered agreements and Article 8bis, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 6

Establishment of Panels

1. If the complaining party so requests, ~~the DSB shall establish a panel at the meeting shall be established at the latest at the DSB meeting following that~~ the DSB shall establish a panel at the meeting at which the request first appears as an item on the DSB's agenda, unless ~~at that meeting~~ the DSB decides by consensus not to establish a panel.¹

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 8bis

Accelerated time-frames for disputes on safeguard actions

1. The following accelerated time-frames shall apply to disputes on safeguard actions unless otherwise extended by mutual agreement of the parties to the dispute.

2. If the consultations fail to settle a dispute under Article 4 within 30 days of the request for consultations, any party to such consultations may refer the matter to the Dispute Settlement Body for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

3. The time-frames in the Working Procedures of item 12 of Appendix 3 shall be halved.

¹ In the event that the DSB decides not to establish a panel, if the complaining party so requests, a meeting of the DSB shall be convened for ~~this~~ the purpose of making a subsequent request for panel establishment within 15 days of the initial request, provided that at least 10 days' advance notice of the meeting is given.

4. The accelerated time-frames in this Article shall not apply to a dispute if a developing country party to that dispute requests the application of the standard DSU time-frames.

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days² after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

- (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval;
- (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement;
- (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.³ In such arbitration, a guideline for the arbitrator⁴ should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform

² If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

³ If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

⁴ The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

5bis. The procedures in Article 21.5 shall be completed before the procedures in Article 22 are initiated.

6. 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. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, ~~and no later than the expiry of the reasonable period of time~~, enter into negotiations within 10 days of such a request with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If any party having invoked these dispute settlement procedures and the Member whose measure has been found to be inconsistent agree on acceptable compensation but such compensation is not available to third parties to a dispute, the Member whose measure has been found to be inconsistent shall, on request, agree to expedited arbitration under Article 25 to determine the right of a third party to compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

- (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
- (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
- (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;
- (d) in applying the above principles, that party shall take into account:
 - (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
 - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;
- (e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;
- (f) for purposes of this paragraph, "sector" means:
 - (i) with respect to goods, all goods;
 - (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;⁵
 - (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;
- (g) for purposes of this paragraph, "agreement" means:
 - (i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;
 - (ii) with respect to services, the GATS;
 - (iii) with respect to intellectual property rights, the Agreement on TRIPS.

⁵ The list in document MTN.GNS/W/120 identifies eleven sectors.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. ~~When the situation described in paragraph 2 occurs,~~ The DSB, upon request by a party, where such request is permitted by paragraph 2, shall grant authorization to suspend concessions or other obligations ~~within 30 days of the expiry of the reasonable period of time~~ 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 a 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. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator⁶ appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator⁷ 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 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. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration unless the concessions or other obligations suspended have been varied. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request. A member shall not vary the concessions or other obligations once the arbitrator has determined under paragraph 6 that they are equivalent to the level of nullification or impairment, unless the variation is to correct a technical error or the concessions or other obligations are made inutile by subsequent developments. Where a member varies the concessions or other obligations, the other member retains the right to seek arbitration under Article 22.6.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to

⁶ The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

⁷ The 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.

ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.⁸

⁸ Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

Appendix 3

Working Procedures – item 12

12. Proposed timetable for panel work:

(a)	Receipt of first written submissions of the parties:		
(1)	complaining Party: <u>the composition of the panel</u> 3-6 weeks	_____	<u>within five days of</u>
(2)	Party complained against:	_____	2-3 weeks
(b)	Date, time and place of first substantive meeting with the parties: third party session:	_____	1-2 weeks
(c)	Receipt of written rebuttals of the parties:	_____	2-3 weeks
(d)	Date, time and place of second substantive meeting with the parties:	_____	1-2 weeks
(e)	Issuance of descriptive part of the report to the parties:	_____	2-4 weeks
(f)	Receipt of comments by the parties on the descriptive part of the report:	_____	2 weeks
(g)	Issuance of the interim report, including the findings and conclusions, to the parties:	_____	2-4 weeks
(h)	Deadline for party to request review of part(s) of report:	_____	1 week
(i)	Period of review by panel, including possible additional meeting with parties:	_____	2 weeks
(j)	Issuance of final report to parties to dispute:	_____	2 weeks
(k)	Circulation of the final report to the Members:	_____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.
