

SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

The following communication is circulated at the request of the delegations of Argentina, Brazil, Canada, India, New Zealand and Norway.

**TEXTUAL CONTRIBUTION TO THE NEGOTIATIONS
ON IMPROVEMENTS AND CLARIFICATIONS OF THE
DISPUTE SETTLEMENT UNDERSTANDING**

Non-Paper presented by Argentina, Brazil, Canada,
India, New Zealand and Norway

In the attachment we are presenting revised drafting of three of the systemic issues that have been part of the DSU review for some time. These texts consolidate the work on these three issues by a number of countries undertaken in the last four months. They are presented in the interests of transparency. We believe they represent a useful step forward in our negotiations.

These three issues are not presented as a mini-package. They stand on their own, and are independent of one another. They could well form elements in a wider package at some point as most agree that these are three issues that should be dealt with.

Given the time constraints of the mandate for the DSU negotiations, we do not expect to have an extended discussion on these legal texts now. Furthermore, we recognise that there are other important issues, which we have been working on, and that need to be addressed in the context of DSU Review, including: improving compliance, participation of developing countries in the dispute settlement system, transparency, and increased third party rights.

Sequencing

Article 21.5

- (a) 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 disagreement must be decided through recourse to these dispute settlement procedures, as modified by this paragraph.
- (b) Any disputing party may request the establishment of a panel to resolve such disagreement.¹ Wherever possible, this panel shall be composed of the members of the original panel.²
- (c) Consultations under Article 4 are not required for these procedures.
- (d) 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 timeframe, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. Articles 16 and 17 apply to the adoption and appellate review of such reports.
- (e) The Member Concerned is not entitled to an additional reasonable period of time under these procedures.

Article 22.2

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 either immediately or, where required, within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, enter into negotiations within ten days of the request with any party having invoked the dispute settlement procedures, with a view to developing a mutually acceptable compensation.

Article 22.2 bis

A 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 only where:

- (a) the Member Concerned does not inform the DSB of its intention to comply in accordance with Article 21.3;
- (b) the Member Concerned informs the DSB that it does not intend to comply with the recommendations and rulings of the DSB;
- (c) within twenty days after the end of the reasonable period of time, the Member Concerned does not inform the DSB that it has complied; or
- (d) lack of compliance has been established in accordance with Article 21.5.

¹ The DSB shall establish a panel at the first meeting at which the request is made.

² If any member of the original panel is not available, the Director-General shall appoint a replacement within 7 days after the date of establishment of the compliance panel, after consulting with the parties.

Article 22.6

(a) When any of the situations described in paragraph 2 *bis* occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations, 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.

(b) Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director General and shall be completed within 60 days of the referral of the matter to arbitration. A complaining party may not suspend concessions or other obligations during the course of the arbitration.

Remand

Article 17.12

- (a) The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.
- (b) Where the Appellate Body finds that the panel report does not provide a sufficient factual basis to complete the analysis with respect to certain issues, it shall provide a detailed description of the nature of the findings that would be required to complete the analysis with respect to those issues.
- (c) In such cases, a disputing party may request that those issues be referred to the original panel, in accordance with the provisions of Article 17 *bis*.
- (d) Nothing in this paragraph or Article 17 *bis* affects the adoption and implementation of panel and Appellate Body reports.

Article 17 bis

Referral Procedure

1. A disputing party may request the establishment of a panel to consider any issues with respect to which the Appellate Body has found that there is not a sufficient factual basis to complete the analysis, pursuant to Article 17.12.
2. The disputing party shall make the request in writing no later than 30 days after the adoption of the Appellate Body report, and shall identify the specific issues it seeks to have addressed by the panel as well as relevant paragraphs in the Appellate Body report.
3. The DSB shall establish a panel, unless it decides by consensus not to do so, but only after the Appellate Body report has been adopted.³
4. The panel shall be composed of the members of the original panel.⁴
5. The panel may only examine those issues with respect to which the Appellate Body has expressly found that there is not a sufficient factual basis to complete the analysis, and that the disputing Party has identified in accordance with paragraph 2 of this Article.
6. The panel shall make such findings, in accordance with the guidance provided by the Appellate Body pursuant to paragraph 12 of Article 17, as will assist the DSB in making its rulings and recommendations.
7. The provisions of Articles 10 to 16 apply to matters referred to a panel pursuant to Article 17 *bis*. As a general rule, the panel shall circulate its report within 90 days after the date of referral of the matter to it. However, in recognition of the need for flexibility in resolving matters that

³ If the disputing Party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days advance notice of the meeting is given. The request for the establishment of a panel may be considered at the same meeting at which the Appellate Body report is adopted.

⁴ If any member of the original panel is not available, a replacement shall be appointed by the Director General within 7 days after the date of the establishment of the panel, after consulting the parties to the dispute.

are referred pursuant to Article 17 *bis*, the panel may modify and simplify its working procedures, after consulting the parties to the dispute.⁵

8. If the report of the panel is appealed, the Appellate Body proceedings, as well as the adoption of the Appellate Body report, must be conducted in accordance with Article 17, and Article 17 *bis*.

⁵ The DSB may adopt additional guidelines on the working procedures to be followed by panels to which issues are referred pursuant to Article 17 *bis*.

**Procedures for removal of
authorization for suspension of concessions or other obligations**

Article 22.8

- (a) 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.
- (b) Where the DSB has authorized the suspension of concessions or other obligations against a Member and there is a subsequent disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB, the Member concerned may have recourse to the procedures of Article 21.5. In such cases:
- (i) in its request for the establishment of a panel, the Member concerned shall set out the specific measures taken to comply and the legal basis for consistency of such measures with the rulings and recommendations of the DSB;
 - (ii) where a Member that has been authorized to suspend concessions or other obligations considers that the measures taken to comply are inconsistent with any other provisions of the covered agreements, it shall submit, within 10 days of the establishment of a panel, a notice providing a brief summary of the legal basis for its disagreement with the Member against which suspension of concessions or other obligations has been authorized; and
 - (iii) the terms of reference of the panel consist of the request and the notice(s) submitted under this provision.
- (c) Where, in the context of such Article 21.5 procedures, the DSB:
- (i) finds that the measures taken to comply are not inconsistent with the provisions in question, on the request of the Member against which suspension of concessions or obligations has been authorized, the DSB shall withdraw that authorization;
 - (ii) finds that the Member against which suspension of concessions or obligations has been authorized has taken a measure to comply but that the measure is not consistent with a covered agreement, notwithstanding Article 22.7, any party to the dispute may have recourse to arbitration pursuant to Article 22.6 to determine a new level of suspension. The arbitrator shall inform the DSB promptly of its decision. Upon request, the DSB shall grant authorization to suspend concessions or other obligations consistently with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.
- (d) In the circumstances described in paragraph c(ii), the existing authorization to suspend concessions or other obligations remains in effect until the DSB grants a new authorization pursuant paragraph c(ii).
- (e) In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations and 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.
