WORLD TRADE ORGANIZATION

TN/RL/GEN/37
23 March 2005

(05-1241)

Negotiating Group on Rules Original: English

DISPUTE SETTLEMENT

Communication from Canada

The following communication, dated 22 March 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)/45), also be circulated as a formal document.

Members will recall that Canada raised specific dispute settlement related issues in both TN/RL/W/112 of 6 June 2003[1] and TN/RL/W/47 of 28 January 2003.[2] As Canada has noted in earlier submissions, the issues it has raised to date do not purport to represent the totality of the matters it wishes to pursue in the trade rules area. There are other important dispute settlement related issues particular to antidumping and countervail that, in Canada's view, merit discussion in the Rules Group with a view to clarifying and improving the ADA and ASCM. In this regard, Canada proposes the following clarifications and improvements to address particular concerns relating to the scope of compliance with the recommendations and rulings of the Dispute Settlement Body (DSB).

Basic Principle

As has been noted by the United States, the WTO Agreement is the product of a carefully negotiated balance of concessions.[3] As has been further pointed out by Mexico, every time an illegal measure is maintained in force, the delicate balance of concessions that has been achieved, is upset.[4] Canada agrees and believes that, as a matter of basic principle, immediately upon antidumping or countervail measures having been ruled by the DSB to be WTO-inconsistent, the Member concerned should be prohibited from continuing to impose such inconsistent measures. Of course, as a necessary corollary to this basic principle, any resulting loophole that would afford exporters a window of opportunity within which to ship dumped/subsidized goods with impunity, would have to be closed.

In addition, the Member concerned, after bringing the measure found to be inconsistent with a covered agreement into compliance therewith, should be obliged to apply the compliant measure to all past entries and, where application of the compliant measure yields lower duty liability, to refund all

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[1] These related specifically to the need to reconcile the accelerated timeframes prescribed in the *Agreement on Subsidies and Countervailing Measures* for prohibited subsidies with the generally applicable timeframes in the Dispute Settlement Understanding, and the need to reconsider the role of the Permanent Group of Experts in dispute settlement.

[2] This related specifically to swift dispute settlement procedures for the adjudication of claims of violation relating to the initiation of investigations and duty refunds obligations.

[3] Refer to WT/DS248/249/251-254/258/259/R at paragraph 7.51.

[4] Refer to TN/DS/W/23 of 4 November 2002.

excess anti-dumping and/or countervailing duties collected pursuant to the original (WTO-inconsistent) measure.

Proposal

Both the *Anti-dumping Agreement* (ADA) and the *Agreement on Subsidies and Countervailing Measures* (ASCM) include 'special and additional' dispute settlement rules, which, by virtue of Article 1.2 and Appendix 2 of the *Dispute Settlement Understanding* (DSU), supersede the generally applicable provisions of the DSU to the extent of any conflict between the two.

In this regard, Canada believes that consideration should be given to the inclusion of a new provision in both the ADA and ASCM pursuant to which any antidumping or countervailing duty enforcement action (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 a measure that has been ruled by the DSB to be WTO-inconsistent, would be prohibited until such time as the measure was brought into compliance with the DSB's ruling. In short, Members would no longer be allowed to apply WTO-inconsistent antidumping/countervail measures under cover of the reasonable period of time for compliance (RPT) established under Article 21.3 of the DSU.[5] At the same time, complaining Members would still be precluded from seeking authorization to retaliate during this period. 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 not be considered WTO-compliant until:

a) a prescribed period of time had elapsed after:

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

   (ii) expiration of the RPT,

   without further challenge (i.e., deemed compliance);[6] or

b) a DSU Article 21.5 panel determined the measure to be compliant.[7]

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[5] 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 retrospective duty enforcement under a WTO-compliant measure can occur – leaving no one around to pay duties found to be properly owing. Such scenarios would 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.

[6] The prescribed period would be of sufficient duration to afford the complaining Member(s) a reasonable opportunity to assess the adequacy of the compliance action taken. During this period a complaining Member could request consultations to clarify any aspects of the compliance action. 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 could have recourse to Article 21.5 of the DSU.

[7] 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.:

(i) 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; and

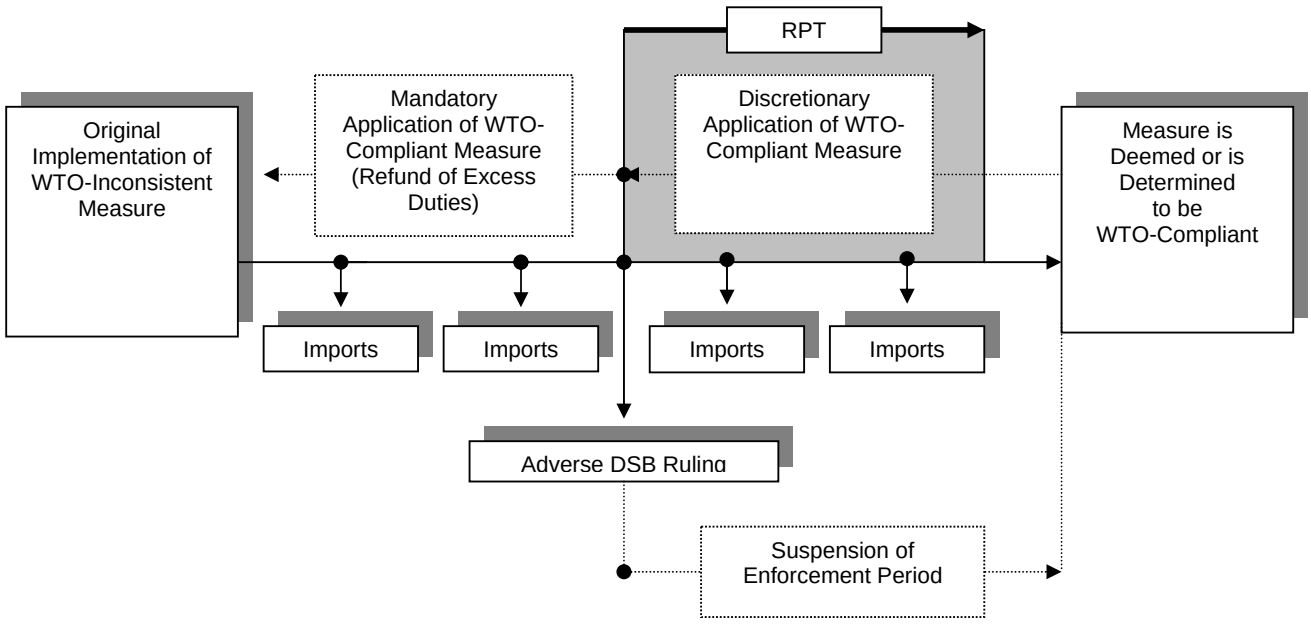
(ii) *Quantum* of retaliation rights, in the case of non-compliance, should accrue as of the date of first imposition of the WTO-inconsistent measure, as opposed to the end of the RPT.

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

(i) would be allowed, to enforce the newly-compliant measure retrospectively on subject products imported during the period between the beginning of the RPT and the date on which the measure was deemed or determined to be compliant;[8] and

(ii) would be required to apply the newly-compliant measure retrospectively, as appropriate, and to refund any excess antidumping or countervailing duties collected on all imports of the subject product made during the period beginning with the first importation in respect of which such duties were imposed, and ending at start of the RPT. 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.[9]

Schematic Depiction of Proposal



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.

[8] This would be consistent with Article 9.1 of the ADA and Article 19.2 of the ASCM, whereby the decision whether or not to impose duties, where all the requirements for their imposition have been fulfilled, and the decision whether the amount shall be the full amount or less, are decisions of the authorities of the importing Member.

[9] This would be consistent with 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.