

**WORLD TRADE ORGANIZATION**

*Third party submission to the Panel*

**CANADA – CONTINUED SUSPENSION OF OBLIGATIONS IN THE  
EC-HORMONES DISPUTE  
(WT/DS321)**

THIRD PARTY SUBMISSION OF AUSTRALIA

19 AUGUST 2005

1. Widely regarded as one of the principal achievements of the Uruguay Round and a cornerstone of the multilateral rules-based trading system, the Dispute Settlement Understanding (DSU) is underpinned by a number of basic principles, perhaps the most central being the prohibition on unilateral action to resolve disputes in favour of a system of multilaterally agreed procedures to be followed by all Members.

2. The issue of compliance with Dispute Settlement Body (DSB) recommendations and rulings and how that compliance is determined is a fundamental aspect of the dispute settlement mechanism and of utmost importance to all WTO Members. Similarly, all WTO Members have an interest in ensuring that unilateral determinations of compliance – which are alleged in this dispute – are not condoned by WTO adjudicative bodies.

3. Article 1 of the DSU makes it clear that the rules and procedures set out in the DSU for resolution of disputes between Members apply to disputes brought pursuant to the “covered agreements”, of which the DSU itself is one.<sup>1</sup> Australia welcomes the opportunity afforded by this dispute for this Panel to make findings that will provide clarification of the relevant DSU provisions.<sup>2</sup>

4. This dispute is about one fundamental question: does the DSU provide that a Member’s announcement of its compliance with DSB recommendations and rulings triggers an obligation on a retaliating<sup>3</sup> Member to either (i) cease retaliation or (ii) initiate a new process for a multilateral determination of compliance?

5. Australia submits that it does. If this was not the case, a number of fundamental DSU principles would be compromised. By continuing retaliation in the face of a respondent’s “notification” of its compliance, a complainant is effectively challenging the measure(s) taken to comply. It is thus logical and consistent with the provisions of the DSU that in such a case it is for that Member – the complainant - to invoke a panel pursuant to Article 21.5 of the DSU (a “compliance panel”).

6. Australia acknowledges that DSU Article 21.5 does not explicitly place the obligation to invoke a compliance panel on a complaining party; the text simply provides that in cases of disagreement over compliance “*such dispute shall be decided through recourse to these dispute settlement procedures...*”. However requiring a respondent to invoke a compliance panel against its own measure(s) constitutes an implicit unilateral determination of inconsistency by the complainant and undermines the presumption that Members act in good faith in taking action to comply with DSB recommendations and rulings.

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<sup>1</sup> DSU Article 1 and Appendix 1.

<sup>2</sup> Australia notes that the DSU provisions at issue in this dispute are under discussion by Members in the context of the negotiations on the review of the DSU. Australia wishes to emphasise that the interpretation that it argues in this submission is the correct interpretation is based on the *current* provisions of the DSU and not how Australia or other Members may wish to see the DSU amended. The fact that Australia may support amendments that *clarify* existing rules on specific issues should not be taken to imply that such amendments would introduce *new* rules on those issues.

<sup>3</sup> Australia uses the terms “retaliate” and “retaliation” to refer to the suspension of concessions or other obligations under the covered agreements.

7. This position is consistent with Appellate Body findings on the presumption of good faith. In *US – Hot Rolled Steel*, for example, the Appellate Body noted that the principle of good faith “...is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements”.<sup>4</sup> In *Chile – Alcoholic Beverages*, the Appellate Body stated that: “Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith. Accordingly, we hold that the Panel committed a legal error in taking this factor into account in examining the issues of ‘so as to afford protection’”.<sup>5</sup> In its analysis in *US – Line Pipe* the Appellate Body noted: “As always, we must assume that WTO Members seek to carry out their WTO obligations in good faith”.<sup>6</sup>

8. Australia submits that the fact that a complainant may have been granted temporary authorisation to retaliate against a Member found to be in non-compliance does not change the fundamental application of this presumption of good faith. Disregarding the presumption in the specific circumstances of a Member announcing that it has taken action which it considers brings it into compliance would go against the design and underlying logic of the DSU.

9. The DSU is explicit on the following points, which provide context for the interpretation of Article 21.5:

- Members must not take unilateral action to seek redress for alleged violations of obligations or other nullification or impairment of benefits (Article 23)
- Instead, Members must have recourse to the DSU and abide with its rules and procedures (Article 23)
- DSU procedures, including those provided for in Article 21 - must be used to resolve disagreements over compliance (Article 23.1)
- The suspension of concessions or other obligations is a “last resort” by Members and is temporary- i.e. only authorised until compliance is achieved (Articles 3.7, 22)

10. In light of the above, a Member who continues to retaliate after a respondent’s announcement of its compliance with DSB recommendations and rulings is acting inconsistently with a number of DSU obligations. When a respondent announces its compliance, a retaliating Member must either cease retaliation or invoke a compliance

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<sup>4</sup> *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (WT/DS184/AB/R) paragraph 101. The Appellate Body cited this statement in a subsequent dispute, noting the relevance of the principle of good faith in a number of cases coming before it: *US – Continued Dumping and Subsidy Offset Act 2000* (WT/DS217/AB/R and WT/DS234/AB/R), paragraph 297.

<sup>5</sup> *Chile – Taxes on Alcoholic Beverages*, (WT/DS187/AB/R and WT/DS110/AB/R), paragraph 74, (emphasis in original, footnote omitted). Similarly, in *US – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/AB/R) the Appellate Body referred to “[t]he presumption that WTO Members act in good faith in the implementation of their WTO commitments...”, paragraph 173.

<sup>6</sup> *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (WT/DS202/AB/R), paragraph 110.

panel in order to obtain a multilateral determination of compliance. Article 21.5 requires that “...where there is disagreement as to the existence or consistency with a covered agreement of measure taken to comply with the recommendations and rulings” such dispute shall be decided through recourse to the dispute settlement procedures in the DSU. By refusing to invoke a “compliance panel”, a complainant who disagrees with the respondent’s announcement of its compliance allows the dispute to continue unresolved.