

**AUSTRALIA – MEASURES AFFECTING THE IMPORTATION OF APPLES
FROM NEW ZEALAND**

Understanding between New Zealand and Australia
Regarding Procedures under Articles 21 and 22 of the DSU

The following communication, dated 13 September 2011, from the delegation of New Zealand and the delegation of Australia to the Chairperson of the Dispute Settlement Body, is circulated at the request of these delegations.

New Zealand and Australia wish to inform the Dispute Settlement Body that they have reached agreement on procedures under Articles 21 and 22 of the *Dispute Settlement Understanding* in the aforementioned dispute.

We kindly request that you circulate this communication and the attached agreed procedures to the Members of the DSB.

Australia – Measures Affecting the Importation of Apples from New Zealand
(WT/DS367)

Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding

On 17 December 2010, the Dispute Settlement Body (DSB) adopted its recommendations and rulings in the *Australia – Measures Affecting the Importation of Apples from New Zealand* (WT/DS367) dispute. Pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), New Zealand and Australia agreed that the period of time to implement the DSB recommendations and rulings would be eight months, expiring on 17 August 2011 (WT/DS367/19). During the implementation period, Australia undertook a review of its import risk analysis for New Zealand apples, which resulted in new measures to replace those measures previously found to be inconsistent with Australia's obligations under the SPS Agreement.

New Zealand and Australia (collectively "the Parties") have agreed on the following procedures for the exclusive purposes of this dispute. They are designed to facilitate the resolution of the dispute and reduce the scope for procedural disputes and are without prejudice to either party's views on the correct interpretation of the DSU:

1. Should New Zealand consider that the situation described in Article 21.5 of the DSU exists, New Zealand shall request that Australia enter into consultations with New Zealand. The Parties agree to hold such consultations within 15 days from the date of receipt of the request. After this 15-day period has elapsed, New Zealand may request the establishment of a panel pursuant to Article 21.5 of the DSU at any time.
2. At the first DSB meeting at which New Zealand's request for the establishment of an Article 21.5 panel appears on the agenda, Australia shall accept the establishment of that panel.
3. The Parties shall cooperate to enable the Article 21.5 panel to circulate its report within 90 days of the panel's establishment, excluding such time during which the panel's work may be suspended pursuant to Article 12.12 of the DSU.
4. Either Party to the dispute may request the DSB to adopt the report of the Article 21.5 panel at a DSB meeting held at least 20 days but within 60 days after the circulation of the report to the Members, unless either Party appeals the report.
5. In the event of an appeal of the Article 21.5 panel report, the Parties shall cooperate to enable the Appellate Body to circulate its report to the Members within 90 days from the date of notification of the appeal to the DSB. Further, either Party may request the DSB to adopt its recommendations and rulings at a DSB meeting held within 30 days of the circulation of the Appellate Body report to the Members.
6. New Zealand may request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU in the event that:
 - (a) the DSB rules as a result of a proceeding under Article 21.5 of the DSU that a measure taken to comply does not exist or is inconsistent with a covered agreement; or
 - (b) the Parties mutually agree that New Zealand may submit such a request.

Australia shall not assert that New Zealand is precluded from obtaining such DSB authorization because its request was made outside the time period specified in the first sentence of Article 22.6 of the DSU. This is without prejudice to Australia's right to have the matter referred to arbitration in accordance with Article 22.6 of the DSU.

7. If New Zealand requests authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU, Australia shall have the right to object under Article 22.6 of the DSU to the level of suspension of concessions or other obligations and/or claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed. In the event of such objection, the matter will be referred to arbitration pursuant to Article 22.6 of the DSU.
8. The Parties shall cooperate to enable the arbitrator under Article 22.6 of the DSU to circulate its decision within 60 days of the referral to arbitration.
9. If any of the original panelists is not available for either the Article 21.5 compliance panel or the Article 22.6 arbitration (or both), or any person serving in such proceeding becomes unavailable to serve, the Parties shall promptly consult on a replacement, and either Party may request the Director-General of the WTO to appoint, within ten days of being so requested, a replacement for the proceeding or proceedings in which a replacement is required. If an original panelist is unavailable to serve in either of the proceedings, or a person serving in such proceeding becomes unavailable to serve, the Parties shall further request that, in making this appointment, the Director-General seek a person who will be available to act in both proceedings.
10. The Parties shall continue to cooperate in all matters related to these agreed procedures and agree not to raise any procedural objection to any of the steps set out herein. If, during the application of these procedures, the Parties consider that a procedural aspect has not been properly addressed in these procedures, they shall endeavor to find a solution within the shortest time possible that will not affect the other aspects and steps agreed herein.
11. These agreed procedures in no way prejudice other rights of either Party to take any action or procedural step to protect its rights and interests, including the activation of any of the provisions of the DSU.

Signed in Geneva, 13 September 2011

For New Zealand

For Australia

H.E. John Adank

Ambassador

Permanent Representative to the WTO

H.E. Tim Yeend

Ambassador

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