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## MEMORANDUM

To: Standing Committee on Foreign Affairs & International Trade (SCFAIT),  
Sub-Committee on International Trade

Re: WTO Dispute Settlement Understanding (DSU)

Date: February 19, 2002

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### Public Expectations:

The resolution of trade disputes under the WTO Dispute Settlement Understanding (or “DSU”) works well. It should be considered one of the major achievements of international law and diplomacy in the 20<sup>th</sup> Century. While not perfect, considering where we were before the Uruguay Round, it is a singular advance in multilateral trade relations.

While minutely analysed by trade lawyers and academics, the DSU is not well understood by the public at large, however. The process also has been the target of criticism by interest groups and NGOs, often labelled as representatives of “civil society”, for being a closed and undemocratic process.

Much of the NGO criticism relates to matters of transparency and accessibility. Another concern revolves around delays in the seemingly un-ending round of appeals before

WTO panel decisions are actually finalized. The ongoing *Aircraft Subsidies* dispute between Canada and Brazil is a case in point.

Business Concerns:

As a general rule, business does not share the lack of confidence in the WTO process expressed by NGOs and so-called civil society. If one were to attempt a summary, it is in the need for efficiency, clarity and finality in the proceedings. What the business community is interested in is closure in individual disputes so that the world can move on with certainty.

Some Caution in Warranted:

Concerns over both public perception and systemic shortcomings in WTO dispute settlement have been recognized by WTO member governments. They have included on the Doha negotiating agenda an item on possible dispute settlement system reform.

Any movement to reform should proceed cautiously, however. We only have a few years experience with the Uruguay Round system and it may be premature to make judgments about its efficacy.

No legal system is perfect. Because of the delicate balance and juxtaposition of interests in this case, WTO governments therefore should move with care before tinkering with the DSU. As will be shown below, many of the shortcomings can be remedied through improved internal procedures without actually opening up the Agreement itself.

Where We Are Today:

The 1994 Uruguay Round mandated a review of the DSU by 1 January 1999. The Dispute Settlement Body (DSB) started that review in late 1997, held a series of informal discussions but could not reach a consensus on any possible changes to the system.

The Doha Declaration called for those negotiations to be recommenced this year. They are to conclude by May 2003. The Declaration makes it clear that the DSU talks will not be tied to the other negotiations. Having been de-linked, DSU reform is not going to be a deal-breaker, regardless of the outcome.

Resolving Disputes -- Taking the First Step:

Following the time-honoured GATT tradition, the DSU requires disputing governments to first hold consultations. If no resolution is achieved within 60 days, the complaining Party can then request the DSB to establish a dispute panel.

This requirement for prior consultations is a good thing. The WTO reports that about one-third of WTO disputes are resolved in this manner. Another one-third are simply not pursued and wither on the vine, while the remainder are in the DSU process at some stage or other.

This is an enviable settlement record. With consultations resolving at least one-third of the cases, these non-litigation routes should be strengthened, much like ADR in the sphere of domestic litigation. Because settlement is always preferred to litigation,

enhanced mechanisms for use the consultative process, aided by good offices and mediation procedures, should be vigorously pursued in the current round.

Requests for Panels:

When consultations do not achieve settlement within 60 days, the complaining Party can then request the DSB to create a dispute settlement panel. Under the old GATT system, panels required a consensus of the Contracting Parties to be created. A single negative vote could block their creation.

The Uruguay Round made panels virtually automatic once a request is filed. While an opposing WTO member can delay their creation at the initial meeting of the DSB, the establishment is virtually automatic at the next meeting.

Since the creation of the DSB, there have been over 150 requests for panels. While some were later withdrawn, the tally to date shows that about 50 or so disputes have run their full course between 1995 and 2000. This compares with a total of about 100 panels in all the years of the old GATT (1947-1994).

Under the GATT, developing countries tended to be infrequent users of the system. Following the Uruguay Round, developing countries have been active complainants, both in terms of inter-developing country complaints and in terms of complaints against industrialized countries. This is an important change and suggests that we have achieved a much greater degree of “multilateralisation” than previously.

Timing and Other Issues:

Slowness and delay have been listed as one of the main problems under the DSU. Panels have had a poor record of issuing decisions within the 6-month target set out in the DSU, from time of composition to the completion of the panel's report. The norm is more like ten months to one year or more.

These delays are partly a reflection of the growing complexity of WTO disputes. But there are also internal panel procedures that slow things down unnecessarily. One is the practice that every decision contain a full exposition of the arguments raised by every Party in the proceedings. This makes the preparation and translation of documents extremely burdensome.

An additional issue is the verbosity of the decisions themselves. With the full repetition of each of the arguments and the overly-wordy decisions, Panel reports now typically run to several hundred pages. All of this adds to the burden and to the time for completion. Attention needs to be paid to changing these internal procedures and devising a leaner and cleaner set of decision-making.

The Appellate Body:

An advance over the old GATT system was the establishment of an appeal mechanism. The DSU allows any disputing Party to appeal panel decisions to the five-member Appellate Body on points of law. That mechanism helps to ensure consistency of jurisprudence in panel decisions. But it leads to its own problems.

The first is that appeals to the Appellate Body have become virtually automatic. Governments seem reluctant to abandon any possible avenue of legal recourse. Hence, most panel reports are now routinely appealed. Canada has been equally guilty in this regard (but it is a welcome development to see that the Federal government has decided not to appeal the latest panel decision in the *Aircraft Subsidies* case).

The extensive use of the appeal process has put additional strains on the WTO system, far beyond what was ever envisioned when it was devised in the early 1990s. It is unclear whether there is any practical solution to this large number of appeals, but the potential gridlock of the Appellate Body system is of growing concern.

#### Implementation Problems:

Major disagreements have come to the fore concerning implementation of panel and Appellate Body decisions, principally in a series of high-profile disputes between the U.S. and the European Union. The DSU implementation procedures are complex and time-consuming. This has led to frustration and a seemingly endless round of new hearings after the substance of a dispute has been decided on.

The core issue is the extent to which a losing party is allowed to enact new implementation measures before the winning side is allowed to retaliate for non-compliance. The process works like this.

~~✍~~ Once a panel report or Appellate Body report is adopted by the DSU, the losing Party must notify its intentions on implementation. If it is impracticable to comply immediately, that Party is given “a reasonable period of time” to do so.

✍ If a Party cannot implement a decision within a reasonable period of time, it must pay compensation to the other side or, failing agreed compensation, be subject to retaliation through suspension of trade benefits by the winning Party.

✍ Where compensation cannot be agreed, the other side has to request the DSB to authorize retaliation. The DSB will grant such authorization within 30 days of the expiry of the agreed time-frame for implementation.

✍ One of the central provisions of the DSU reaffirms that Members shall not themselves make determinations of violations or suspend concessions unilaterally, but shall make use of the dispute settlement rules and procedures of the DSU. Therefore, any disagreement over the right and level of retaliation are to be referred to a WTO arbitration panel.

The central difficulty here where one side claims that it has fully complied with a WTO finding and the other side disagrees and demands the right of retaliation. This has led to serious disagreements that have taken the DSU process to the very edge of paralyzation.

The argument (principally advanced by the E.U. in the *Bananas* and *Beef Hormones* cases), that there can be no retaliation until another WTO panel has ruled on the consistency of any implementation measure. In other words, where one side claims to have implemented a WTO ruling and the other side says no, the winning side cannot seek authority to retaliate without another finding by a WTO panel that the implementation measure is also inconsistent with WTO obligations. The implication, however, is that there could be an endless round of new panel proceedings as successive implementation measures are put to the test.

The issue has been resolved to some extent through use of so-called compliance panels which combine the two cases in one. This was done in the *Aircraft Subsidies* case and followed in other cases, where parties agree that the issue of compliance of an implementation measure and the right to and amount of retaliation can be dealt with in a combined proceeding.

As is obvious, these complex issues can lead to an array of substantive complexity that further bedevil WTO proceedings and, ultimately, lead to further delays in putting closure on a given dispute. Finding a way to streamline this morass is one of the main targets of the Doha negotiations.

Transparency:

A recurrent issue raised by NGO's and public interest groups is the issue of transparency in DSU proceedings. This revolves around a desire both to have access to the documents filed in DSU proceedings and be allowed to appear and make representations the actual panel proceedings themselves.

Because of strict confidentiality rules, the unfortunate impression is that WTO panels and the Appellate Body makes decisions behind closed doors and that no outside parties really know what is going on until the decisions are eventually released. There is a need to deal with this so as to allow greater access to submissions and arguments before Panels and help change the view of the WTO as a large and anonymous monolith where justice is dispensed in camera.

With respect to documentation, there is no provision for publication of submissions by the Parties. WTO governments decide for themselves which of their own documents they will release to the public. Some governments do a better job of this than others. The Department of Foreign Affairs and International Trade regularly posts copies of its submissions on the DFAIT web-site. Other governments either refuse to post such documents or a much less forthcoming than others. Improvements would be welcome in this area and Canada can take the lead.

Accessibility:

Accessibility is separate from transparency. It revolves around demands by NGOs and other representatives of so-called civil society to be allowed to participate directly in Panel and Appellate Body proceedings to advocate their respective positions in any given dispute.

This development is partly the result of increased communication in the internet age, as policy positions can be conveyed instantaneously, allowing common cause to be developed among various interest groups around the globe.

The other factor is growing concern of citizens over the potency of WTO rulings, striking at a wider and wider array of domestic measures, well beyond the traditional border measures and into the realm of internal laws and policies that directly affect the average citizen. These groups want to have a say in cases where these issues are being adjudicated.

One means of permitting greater accessibility has been the demand to file *amicus curiae* briefs. There is no provision for this in the WTO Agreements, although the DSU does permit Panels the latitude to receive such briefs in individual cases.

However, the issues are more complex than meet the eye. The problem is both formal and practical. In a formal sense, the WTO Agreement is a public international law treaty among States, like the UN, the IMF, World Bank and a multitude of other organizations. It does not prescribe legal relationships among persons (individuals, corporations or other entities), who have no standing under the Agreements. Allowing them to participate would be contrary to the very foundation of that system and give them rights of access to proceedings where they have no obligations or duties.

On a practical level, however, allowing access to persons or NGOs would effectively paralyze the system. It is terribly overloaded now, to the breaking point, as disputes become more numerous and complicated, even without third-party intervention. Allowing intervention, even by way only of written *amicus curiae* briefs, would put huge additional strains on an already strained system.

One possible avenue is to allow the governments that are Parties to a dispute to file *amicus curiae* briefs that they have vetted and have determined to be relevant to the hearing.

Interest groups do not like this, since it gives the governments that ultimate authority over what is and what is not filed. On the other hand, it is the national governments that represent the interests of their citizens and it is not inappropriate that those governments exercise some responsibility and control in this area.

Human Dimension:

In all of these discussions it is necessary to recall that the DSU and all its accoutrements is ultimately a human system. There is a limit to what that system can bear in terms of detail and documentation. It is important to recognize the dangers in overloading that system and trying to make it respond to demands that can be dealt with in other ways and in other forums.

Going into the Doha round, there is good reason to question the wisdom of opening up the DSU itself. Many of the procedural shortcomings could probably be addressed through better internal procedures. To seek to amend the Agreement, after only a short half-decade of experience, would be truly opening the proverbial Pandora's box. Let governments not be too hasty in reacting to interest group pressures or trying to make perfect what is already pretty good.

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