August 29, 2002

Denyse Mackenzie
Director General and Counsel
Department of Justice
Trade Law Bureau (JLT)
Lester B Pearson Building, Tower C
125 Sussex Drive, 7th Floor
Ottawa, ON K1A 0G2

Dear Ms. Mackenzie:

Re: Understanding on Rules and Procedures Governing the Settlement of Disputes; Submission of Canadian Bar Association National Section of International Law

I write on behalf of the Canadian Bar Association's National Section of International Law (the Section) to comment on potential changes to the World Trade Organization's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).[1]

At the outset, we thank the Department of Foreign Affairs and International Trade for the opportunity to provide our input at this important stage. We hope our comments will assist the Canadian government in developing its position on the DSU and look forward to the opportunity to provide further input as this initiative progresses.

Our comments are divided into to the following areas: Transparency, Permanent Panel Members, *Amicus Curiae*, "Carousel" Retaliation, Remand Authority, Third-Party Rights, Business Confidential Information (BCI) and Implementation and Compliance Mechanisms.

Transparency

In May 2002, the Standing Committee on Foreign Affairs and International Trade ("SCFAIT") issued a Report entitled *Building an Effective New Round of WTO Negotiations: Key Issues for Canada*. The Report makes the following recommendation regarding transparency of proceedings under the DSU:

> Recommendation 13
> That, in order to enhance the transparency of the WTO's dispute settlement system, the federal government activate an aggressive campaign to achieve consensus among WTO Members to open WTO dispute settlement proceedings to

[1] Annex 2 to *Agreement Establishing the World Trade Organization*, April 15, 1994.

the public and to require that all Members make their submissions to WTO dispute settlement panels public.

The Section agrees in principle with this recommendation. WTO panels frequently adjudicate disputes that involve matters of broad public interest, and the implementation of panel decisions often requires the withdrawal of measures that have been enacted by democratically elected legislatures following open public debate. It is incongruous that such measures may have to be repealed or amended as a result of a process that is not equally open and public. We are therefore of the view that formal dispute settlement under the WTO should generally be public and that all arguments and submissions made to WTO panels should also be made public.[2]

Nevertheless, it is important to recognize that there may be legitimate reasons for delaying the publication of arguments and submissions made in WTO dispute settlement proceedings until after a the final decision of a panel is released. As recognized in Article 3.7 of the DSU, it is preferable that disputes between WTO Members be resolved consensually. Indeed, if the WTO system is to work successfully, recourse to formal panel adjudication should be the exception rather than the rule.

Since disputing Members are able to settle a dispute consensually at any time before a panel issues its decision, there may be merit to keeping the formal positions taken by Members confidential until the panel's decision precludes consensual settlement. Premature disclosure of submissions and arguments, including the panel hearing, may create an unfortunate impediment to late-hour efforts to resolve disputes through negotiation by raising the political stakes for Member governments and limiting their margin for compromise.

As noted above, the Section believes that public WTO dispute settlement is the preferable outcome. Nevertheless, should this solution prove unattainable, Canada should consider a compromise whereby the complete record of WTO panel proceedings, including all written submissions and a video recording of the hearing, would be made public following the release of the panel's final decision and subject to the redaction of business confidential information.

Permanent Panel Members

In a recent discussion paper,[3] the European Union proposes moving from the current *ad hoc* process for the selection of panelists to a system of permanent panelists. This paper, along with similar proposals, suggests the appointment of between 15 and 24 permanent panelists for non-renewable six-year terms. The proposal is intended to address difficulties and delays in the establishment of panels, the limited availability of *ad hoc*

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[2] That said, we do not believe that it is necessary for the actual hearings to be open to the public, provided that an electronic video recording of the hearings is made public.

[3] Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement (March 13, 2002) (WTO Document TN/DS/W/1)

panelists, the increased workload for panels and the increasing complexity of issues faced by panels. Implicit in these proposals is a perception that some panels have not had the resources, experience or perspective to deal fully with the daunting complexity of certain WTO disputes and the ramifications of potentially wide-ranging legal interpretations.

Establishing a system of permanent panelists would shorten the panel selection process, ensure a ready supply of panelists and contribute to the enhancement of the institutional experience of panelists. In addition, under the current system, most panel reports are appealed and often reversed (at least partially) by the Appellate Body. A permanent panelist system would ideally produce more experienced panelists, which could decrease the frequency at which panel conclusions are overturned.

There are, of course, obstacles to the establishment of a standing panel roster. It may be difficult to find 15 to 24 highly qualified persons willing to forgo other employment opportunities to accept a six-year appointment. Compensation and perceived prestige of appointment may assist in reducing these difficulties.

Of critical concern for the acceptance and credibility of a standing panel roster are the means chosen for panelist selection. This applies both in appointment to the roster and in selection of members of a particular division to hear specific cases.

Under the current system, the WTO can make an effort to match the issues raised in a given dispute to a prospective panelist's area of expertise. Given the objective of achieving greater general expertise on the part of all panelists, however, a standing body should obviate the need for expertise-based appointment. Indeed, under the E.U.'s proposal, panelists would be chosen by lot – a method which may promote the value of disinterested impartiality. In addition, developing countries have voiced concerns relating to the representation of developing country nationals in a permanent panel system.

In our view, the establishment of a permanent system of panelists merits further consideration. Issues relating to the composition of the roster of permanent panelists and the procedures governing the appointment of panelists to hear a given dispute are key to the utility of this proposal, and warrant further discussion.

Amicus Curiae

Now that the Appellate Body has decided to accept *amicus curiae* briefs on a case-by-case basis, there is a need to adopt formalized procedures for the submission and acceptance of such briefs from non-Member entities.

The admissibility of *amicus* briefs should not be left to the determination of individual Panels or the Appellate Body on an *ad hoc* basis. This introduces an undue and unnecessary element of uncertainty. Timelines under the DSU are extremely tight and the filing of *amicus* submissions invariably places additional burdens on the parties. An *ad hoc* approach to the acceptance and filing of *amicus* briefs does not adequately permit

parties to anticipate and respond to these additional burdens. These effects are likely to be felt disproportionately by developing country Members, whose resources are often already strained by the demands of the dispute resolution process. An *ad hoc* system also creates the potential for either real or perceived inconsistency in the conduct of each dispute.

The guiding principle of any formal procedures should be that Panels and the Appellate Body have access to all relevant information and viewpoints to properly consider the dispute on its merits. At the same time, the procedures should not prejudice the rights of Members to an efficient and effective dispute resolution process.

These procedures should ensure that:

- the submission of *amicus* briefs does not delay the dispute resolution process;
- the submission of *amicus* briefs does not impose undue additional burdens on developing Members; and
- the views of non-Member entities should be predictably and consistently considered.

"Carousel" Retaliation

"Carousel" retaliation refers to the ability of WTO Members to unilaterally revise the list of products subject to suspension of concessions. It is intended to affect imports from other WTO Members found not to have implemented recommendations arising from a WTO dispute settlement proceeding. There is a need to clarify that a WTO Member does not have the right to modify unilaterally the list of concessions or other obligations for which a Dispute Settlement Body (DSB) authorization has been granted under Article 22.7 of the DSU.

Section 407 of the *Trade and Development Act* of 2000,[4] signed into law by President Clinton on May 18, 2000, added teeth to the United States *Trade Act of 1974*[5] by allowing the United States to rotate the list of products targeted for retaliation every six months. The E.U. protested these carousel sanctions, arguing that they are illegal under WTO rules, and immediately filed a complaint with the WTO. The E.U. and U.S. participated in the initial consultation stage of WTO dispute settlement in July 2000. To date, the U.S. has not implemented a "carousel" type of suspension of concessions in any dispute.

As a legal matter, carousel retaliation is not expressly prohibited by the DSU. A recent proposal by the Philippines and Thailand to amend Article 22.7 to make it harder to impose carousel sanctions[6] implies that the DSU currently does not prohibit them. The E.U. also suggests that the DSU be amended in order to prevent the application of a carousel suspension of concessions in its own negotiating proposal.[7]

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4 Public Law 106-200.

5 *United States Code*, Title 19, Chapter 12.

6 WTO Document WT/MIN(01)/W/3.

7 WTO Document TN/DS/W/1.

In our view, allowing WTO Members to resort to carousel retaliation, where concessions and other obligations subject to suspension would change periodically, is inconsistent with the object and purpose of the DSU. It endorses unilateral action without any prior multilateral control. Moreover, to the extent that it is permitted, carousel retaliation could cause serious unacceptable effects on the marketplace, as it would generate uncertainty concerning the industries and products that may face retaliation. It therefore threatens the security and predictability of the multilateral trading system.

For these reasons, Canada should support the efforts of the E.U., the Philippines and Thailand to amend the DSU in order to impose controls and disciplines on carousel retaliation.

Remand Authority

Remand authority would empower the Appellate Body to refer a matter back to a panel with instructions to make findings in accordance with findings of law or other directions of the Appellate Body.

Remand authority would be useful in circumstances in which a panel chooses to exercise "judicial economy". The exercise of judicial economy, which is well established in *General Agreement on Tariffs and Trade* and WTO jurisprudence, is based on the principle that a panel is only obliged to decide what is required to resolve a dispute, and not more. If a panel finds that a measure is inconsistent with one provision of a WTO agreement, the panel may exercise judicial economy and choose not to determine whether that measure is also inconsistent with other WTO provisions raised by the complainant.

Problems can arise when such a case is appealed. The Appellate Body may find that a panel has erred in the finding that it did make, while the panel may not have made other findings because it has exercised judicial economy. The Appellate Body's authority is limited to issues of law covered in the panel report and legal interpretations developed by the panel. At the same time, only panels may make findings of fact. In some instances, a panel may have made sufficient findings of fact to enable the Appellate Body to make findings respecting allegations of inconsistency that the panel did not consider. However, if consideration of those allegations requires additional findings of fact, the Appellate Body cannot make any findings respecting those allegations. The only course of action open to the complainant is to initiate an entirely new complaint. If the Appellate Body had remand authority, the Appellate Body could instruct the panel to make findings (including factual findings) in respect of allegations that the panel did not consider because of the exercise of judicial economy.

A panel may also fail to make factual findings if it reaches an initial legal conclusion that a particular measure cannot be inconsistent with the WTO provision alleged. Having so concluded, it may not make any findings respecting the facts alleged by the complainant. The Appellate Body may conclude that the panel's initial legal conclusion was incorrect. However, as the panel would have made no findings of fact, the Appellate Body could

not make any finding respecting the complainant's claim. The only course of action open to the complainant would be to initiate a new complaint. If the Appellate Body had remand authority, the panel could be instructed to address the complainant's allegation of inconsistency on the basis of the Appellate Body's finding as to the interpretation of the applicable law.

One question is whether a remand authority would unduly delay the dispute settlement process. Undue delay would result where the Appellate Body could complete the panel's analysis itself (as occurred in *Periodicals*[8]) but instead chooses to exercise its remand authority. This problem could be addressed by requiring the Appellate Body not to exercise its remand authority when the panel has made sufficient findings of fact for the Appellate Body to complete the analysis. Once this concern has been addressed, a remand authority should increase the efficiency of the process, as it would generally eliminate the requirement for a Member to initiate an entirely new complaint in the circumstances described above. The panel to which a matter is remanded already has all the submissions from the original case. The panel need only consider those submissions in light of the Appellate Body's remand order, possibly pose additional questions to the parties and hold a hearing to hear their respective positions. This is more efficient than requiring an entirely new complaint.

One suggested alternative to a remand authority is to empower the Appellate Body to make factual findings where the panel has failed to do so. In municipal court systems, facts are generally proven through *viva voce* evidence. Appellate courts are precluded from making factual findings because they have not had the benefit of hearing the witnesses and assessing their credibility. Proving facts is somewhat different under the DSU procedures. The parties make written submissions and the panel poses questions regarding matters which it feels needs factual evidence. Parties make initial oral responses to questions but invariably follow up with formal written responses that become part of the record. Witness credibility is not a factor. The Appellate Body has all the submissions of the parties. There is no reason why the Appellate Body could not also pose questions to the parties to fill in factual gaps in an appropriate case. While this would slow up the Appellate Body process, it would be more efficient than remanding the matter back to the panel and much more efficient than placing the complainant in the position of having to initiate an entirely new complaint.

The EC has made useful proposals[9] for a remand authority that form a useful starting point for addressing this issue.

Third-Party Rights

The following proposals have been submitted regarding third-party rights:

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8 *Canada - Certain Measures Concerning Periodicals*, Panel Report WT/DS31/R 14 March 1997, Appellate Body WT/DS31/AB/R 30 June 1997.

9 WTO Document TN/DS/W/1.

- the E.U. proposes that Article 10.2 include a 10-day time frame for a third party to notify the DSB of its interest in a particular dispute;
- in response to a question from India, the E.U. indicated that there is a clear qualitative difference between the broader rights of a Member third party to a dispute (which the E.U. would like to see enhanced) and the minimal right of a Member or natural person to file an *amicus* brief.
- Australia proposes that any compensatory measures should be generally available to other Members to the extent feasible. Where it is not feasible to apply compensatory measures that are generally available, Australia proposes that a non-implementing Member should be required, on request, to agree to expedited arbitration under Article 25 of the DSU. This would determine whether a third party has the right to negotiate compensation and, if so, what the level of compensation should be.

The Co-sponsors' paper proposes the following in connection with third parties:

- Each third party should receive a copy of all documents or information submitted to the panel, at the time of submission. There would be two exceptions: one for certain confidential information designated by the disputing party that submitted it and another for any submission following the interim panel report. A third party could observe any of the substantive meetings of the panel with the parties, except for portions of sessions when such confidential information is discussed.
- In establishing the working procedures, the panel could consider any special circumstance of a third party that is closely related to the matter in dispute.
- Each party and third party to a proceeding should be required, if requested by a Member, to provide a non-confidential summary of the information in its submissions. This could be disclosed to the public no later than 15 days after the date of either the request or the submission, whichever is later, or such other deadline as is agreed by the party and requesting Member.

These proposals raise a number of issues which should be addressed during the negotiations. They are:

- With reference to most-favoured nation application of remedies, are effects on the length and complexity of proceedings ascertainable? Are they excessive?
- Should third parties have to establish a prescribed minimum threshold of nullification and impairment before entitlement to third party remedies? If so, does this proposal require establishment of nullification and impairment arbitration prior to compensation or suspension?
- Should third parties have independent rights to obtain compensation or suspension irrespective of whether complaining parties consider that there has been compliance with an adopted report?
- Co-sponsors' third party proposals are restricted to expansion of certain procedural rights. Is this adequate? Conversely, if we include substantive rights, does this transform the DSU goal from one of arriving at a mutually acceptable non-litigious resolution of disputes to one of being a multi-party hearing?

Protection Of Business Confidential Information

The protection of business confidential information (BCI) is critical to the effective functioning of the dispute settlement process. Often, the specific factual evidence necessary to defend or challenge a particular government measure or program will encompass commercially sensitive information of private third parties. For example, the recent *Aircraft* challenges[10] involved extensive and detailed financing information on transactions between private parties.

Protecting BCI requires the balancing of two often competing interests: access by the parties, the panel and the Appellate Body to all relevant information and the protection of private business interests in proprietary and commercially sensitive information. In many cases, WTO Members may not be able to provide requested information without the consent of the private interests potentially affected. In those instances, access to all relevant information will depend on the existence of sufficient protections for BCI that affected businesses will have confidence to disclose that information.

Currently, the DSU provides very limited protection for BCI. Article 18.2 of the DSU provides:

> Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

The panel-working procedures set out in Appendix 3 of the DSU extend similar treatment to the deliberations of the panel and documents submitted to it, but do not add to this protection.

At present, the absence of specificity in the DSU's BCI protections requires specific procedures to be developed on an *ad hoc* basis. This uncertainty and unpredictability seriously undermines business confidence in the DSU's protection of commercially sensitive information and in turn undermines the efficacy of the dispute settlement process itself. Indeed, Canada has been forced to refuse requested information owing to the inadequacy of BCI protections promulgated by WTO panels.

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[10] *Canada - Measures Affecting the Export of Civilian Aircraft* - AB-1999-2 - Report of the Appellate Body (WT/DS70/AB/R).

Canada should press for the adoption of specific procedures for the effective, predictable and consistent protection of BCI in the dispute settlement process. The elements of such protections would include:

- restrictions on the physical location and control of confidential information;
- limitations on persons permitted access to such information;
- signed non-disclosure declarations by parties, third-party Members and any individuals permitted access to such documents; and
- provisions for the return of all BCI upon completion of the process and destruction of tapes, transcripts etc. referring to BCI.

Implementation and Compliance Mechanisms

Two areas where the DSB should be improved or clarified are:

- surveillance of the implementation of adopted DSB recommendations and rulings; and
- compliance with such decisions.

Implementation

There is a need to clarify the process that WTO Members should follow before a request for authorization to retaliate is made when they disagree over the implementation of a ruling.

The DSU includes mechanisms designed to ensure implementation of DSB recommendations and rulings. However, in our view, the procedural steps to engage these mechanisms are not adequately set out. We believe that implementation could be improved by elaborating the steps and clarifying the procedure Members should follow when invoking those mechanisms.

A related issue is the relationship between Article 21.5 and Article 22 dealing with compensation and suspension of concessions. It is clear that the DSU does not sanction unilateral suspension of concessions and that such action must be preceded by authorization from the DSB. However, it is unclear whether any action taken under Article 22 must be preceded by a finding of non-compliance under Article 21.5. In our view, the spirit of the DSU and principles of procedural fairness suggest that recourse to the mechanism in Article 21.5 should precede a request to the DSB under Article 22.2 to suspend concessions to the Member that has failed to bring its inconsistent measure into conformity with its obligations. The relationship between Article 21.5 and 22 should be clarified.

We also note that the *Proposed Amendment of the Dispute Settlement Understanding*,[11] which was co-sponsored by Canada, addressed the above issues and should, therefore, form the basis of the Canadian position.

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[11] WTO Document WT/Min(99)/8.

Compliance

There is a need to strengthen the mechanisms to ensure compliance with DSB recommendations and rulings.

Beyond procedural issues, WTO practice has demonstrated that suspension of concessions is not always an efficient means to induce compliance and creates disruption in international trade. Specifically, retaliation through suspension of concessions can be ineffective in that it rarely results in the withdrawal of measures found to be inconsistent with any of the covered agreements. As securing the withdrawal of such measures is the first objective of the dispute settlement mechanism,[12] we believe that this situation threatens the effective functioning of the DSU.

Moreover, for smaller and medium-sized economies like Canada's, the suspension of concessions is not easy to undertake and raises broader economic and political questions. In most cases, the only way Canada can suspend concessions is by hurting industries that are unrelated to the dispute at the risk of escalating a trade war. Thus, retaliation makes it difficult to achieve a satisfactory settlement of the matter at issue.

In the light of the problems associated with the suspension of concessions, we believe that WTO Members should consider developing alternatives to retaliation as a means to ensure compliance with DSB recommendations and rulings. Matters that Canada could consider include:

- enhanced compensation rules, including mandatory compensation or the requirement for the defending Member to present a compensation offer in circumstances where compliance is not feasible;
- the possibility of punitive action, political or commercial, against Members that deliberately and unequivocally decide not to implement DSB recommendations and rulings. Whether trade sanctions could be applied by Members other than the complainant should also be discussed; and
- the payment of monetary damages to the governments or industries in the complaining members' territory that are adversely affected by the refusal to withdraw measures found to be inconsistent with covered agreements.

We recognize that the above raises ambitious and, indeed, controversial issues. However, improving the mechanisms to prompt compliance is crucial if WTO Members want to ensure that recourse to the dispute settlement mechanism achieves satisfactory solutions and fosters the maintenance of a proper balance between the rights and obligations of Members.

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[12] DSU, Article 3.7.

We thank you for the opportunity to provide input. Should you have any questions, please do not hesitate to contact me directly or through Richard Ellis, Legal Policy Analyst at the CBA's National Office.

Yours truly,

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