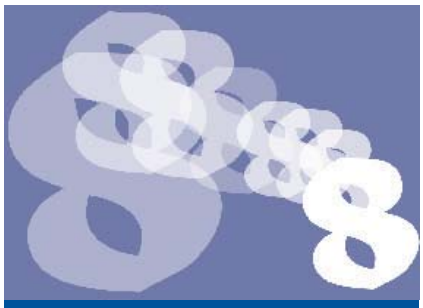

Review of the Dispute Settlement Understanding

Doha Mandate:

"We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation- Related Issues and Concerns in document WT/IN(01)/W/10 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action."

(Paragraph 12 of the Doha Ministerial Declaration)

Despite picking up intensity in 2005, the review of the WTO's Dispute Settlement Understanding (DSU) has continued to move slowly. This is largely because of Members' unwillingness to move forward in the absence of concrete advances in their key areas of interest in the Doha Round, notwithstanding the formal decoupling of the review from the negotiation's 'single undertaking'. In addition, while recognising that the DSU has much room for improvement, most Members consider it to operate well enough for the moment. Thus the clarification and/or amendment of dispute settlement rules is not the most pressing among current issues for most Members.

Many delegates have praised the quality of proposals tabled at the 2005 DSU negotiating sessions, as well as the informal meetings arranged by the Chair, Ambassador David Spencer of Australia. The discussions brought clarity to a number of issues, while allowing Members to voice their differences of opinion. Delegates have also emphasised how the 'bottom-up approach' – under which the review's scope is left at the discretion of individual Members – had facilitated issue-by-issue discussions on the submissions presented, particularly in light of the failure of past attempts to define the scope of the DSU review.

Early in 2005, Chair Spencer urged delegations to change gears and speed up the negotiations. To facilitate discussion and consensus-building, he initiated a series of informal meetings in which delegates could seek clarification on proposals. Although the Chair suggested potential issues for discussion before each meeting, delegates were free to raise their own issues of interest. At the end of the summer recess, he called for progress in moving beyond issues of clarification to the active consideration of legal texts in formal negotiating sessions.

While the DSU negotiations stepped up between February and October 2005, there is no sign of consensus. Many delegates believe it unlikely that any agreement or substantive text will be submitted to ministers in Hong Kong. The most likely outcome of the conference is a paragraph in the Ministerial Declaration, urging delegations to accelerate the negotiations without mention of specific DSU issues. Negotiators are therefore bracing themselves for increased DSU activity post-Hong Kong. While there seems to be enough will to reach an agreement, the task is made difficult by the political sensitivities around some issues.

With a good number of proposals now on the negotiating table, many delegations are aiming at a 'package' agreement since this would improve the chances of forming a consensus. They recognise, however, that such a package might not address the most politically sensitive issue in this area, namely the implementation of WTO rulings. Indeed, it is possible that an agreement on implementation in the DSU might be postponed to a future review, or dealt with under a separate negotiation.

Mandated Deadlines

Under the Doha Mandate, Members were to negotiate improvements and clarifications of the DSU by end-May 2003. In July 2003, they adopted a new end-May 2004 deadline, which was also missed. The 2004 July Package simply endorsed the continuation of the DSU negotiations.

Even though the DSU review currently has no set deadline, some trade delegates see mid-2007 as a *de facto* limit for the review's completion. This is based on speculation that the Trade Promotion Authority – under which the US executive branch is authorised to negotiate trade agreements without Congressional participation – is unlikely to be renewed when it lapses in late June 2007, and that getting a DSU amendment package through US Congress after that date might prove difficult. Consequently, delegates are aiming to agree a deal by late 2006 or early 2007.

Background

During the Uruguay Round, ministers adopted a decision to complete a full review of the DSU within four years of the establishment of the WTO, i.e. by 1 January 1999. When this deadline was missed, it was extended to July 1999. At the Doha Ministerial in 2001, it was agreed to "improve and clarify" the DSU agreement, which has been under negotiation in Special Sessions of the Dispute Settlement Body (DSB) since March 2002.

Key Issues Raised in the Special Sessions

During the first nine months of 2005 Members' submissions covered a wide range of topics. Framed by the bottom-up approach, topics were raised in accordance with the interests of delegations and discussion took place on an issue-by-issue basis. Although no consensus was reached on any of the proposals submitted, delegates indicated that some of them could form the building blocks of a future agreement.

Third Party Rights

A Group of Seven (G-7) – Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway – submission addressed the issue of balancing the enhancement of third-party rights at all levels of the dispute settlement process with the preservation of the interests of the main parties involved in a dispute (Job (05)/19).

The revised text contains four main elements. The first refers to the granting of the right to third parties to join consultations. Under DSU Article 4.11, Members have to prove a 'substantial trade interest' in a case, which gives the defending Member considerable latitude to reject third party requests. Disagreeing with long-standing GATT and WTO practice, the G-7 questioned the effective sense of the definition of 'substantial trade interest', and proposed that a defendant should only be able to reject a Member's request for third party rights if all other such requests were also declined. The second element is related to the right of third parties to attend panel hearings and receive documentation. The third element proposes that, under certain conditions, third party rights should be granted to Members at the appellate stage without requiring their participation at the panel stage. Lastly, to secure parties the right to attend all meetings, the G-7 put forward an amendment to Appendix 3 (Working Procedures) since its paragraph 7 refers only to 'parties' and not 'third parties'. This would oblige the panel to invite third parties to attend the second and any subsequent meeting(s) held in the proceedings before its interim report is issued to the main parties in the dispute. The proposal was well-received by the many delegates who consider third party rights to be a key issue.

Granting all Members a *de facto* right to be accepted as third parties in any dispute, including access to all meetings and submissions, would enable developing countries to participate in the WTO dispute settlement process in spite of a lack of legal and financial capacity to initiate cases or prepare documentation showing a 'substantial trade interest'. From a broader perspective, this would also provide an important opportunity to WTO Members that have not previously participated in dispute settlement proceedings to gain first-hand experience about the system without having to fulfil the ever more complex requirements demanded from a complaining or defending party. Such experience would build developing country capacity to defend their trade interest in future disputes, as well as the negotiations on the DSU.

Sequencing

The Group of Six (G-6) – Argentina, Brazil, Canada, India, New Zealand and Norway – has proposed a clarification of the so-called 'sequencing problem' between Article 21.5 on non-compliance and Article 22 on retaliation rules (Job(05)/52). The inconsistency between the timelines for the completion of a compliance ruling and the request for trade sanctions came to light during the long-running banana dispute. Since then the defending and complaining Members have frequently resorted to bilateral arrangements similar to the one proposed by the G-6.

The issue of sequencing has recently become more controversial, however, with a joint submission by the EU and Japan (Job(05)/47) outlining a procedure to be followed when a Member under trade sanctions notifies the WTO that it has brought the condemned measures into compliance with the dispute settlement ruling. The two proponents suggest that if the Member applying the sanctions does not request a compliance panel within 60 days of the notification, the DSB shall, upon request, withdraw the authorisation to retaliate.

The proposal reflects the beef hormones dispute, where the EU notified its compliance measures to the WTO in 2003, but the US and Canada maintain that the measures do not constitute compliance and therefore refuse to lift the trade sanctions they have applied since 1999. As the latter two have refused to request a panel to determine whether compliance has indeed been achieved, the EU has initiated a new case against what it regards as their 'unilateral determination of [the EU's] non-compliance'. The root cause for both sides' reluctance to request a panel on the substance of the EU measures appears to be that the party initiating compliance proceedings bears the burden of proving its case.

Remand

The G-6 has also proposed that the Appellate Body should be required to send an issue back to original panel for review if it is unable to make a ruling on the basis

of the panel's findings (Job(04)/52). The establishment of such a 'remand' procedure under the DSU would respond to many Members' wish to see the dispute settlement system rule on all issues raised in a complaint, including those that currently remain unaddressed on the grounds that the panel report lacked a sufficient factual basis for the Appellate Body to complete its analysis.

According to the proponents, in such cases the Appellate Body should offer a detailed description of the nature of the findings that would be required to complete the analysis. After the adoption of an Appellate Body report, the issues highlighted therein could, upon request, be brought before the original panel, which would make its findings in accordance with the guidelines provided by the Appellate Body. All issues brought before a WTO panel and the Appellate Body would thus be addressed, unless the principle of judicial economy was found to apply.

Panel Composition

The EU reiterated its call for the establishment of a permanent roster of panel members and submitted a discussion paper to further the debate (Job (05)/48). A permanent roster, as well as saving time and resources on the cumbersome process of selecting panellists, would ensure that the panel is more experienced in fact-finding and adjudication. The latter consideration is particularly important as panels continue to face increasing factual and legal complexity in their proceedings. As in the past, delegates remain divided over the merits of a fixed roster of panellists, with those against expressing concern over how it would be structured and its potential to narrow participation. Some developing country delegates have pointed out that compared to issues such as third party rights, sequencing and transparency, the panel roster debate represents merely a fine-tuning of the DSU. They advocate finding a better balance between the two levels of discussion.

Transparency

Discussion continued on increased transparency, an issue long-championed by the US. In a July 2005 submission (TN/DS/W/79), the US elaborated on two previous proposals (TN/DS/W/13 and TN/DS/W/46) on opening up panel and Appellate Body hearings, and providing timely access to submissions and final reports. Two months after its submission, representatives of all Member countries, as well as the general public, were allowed to attend a dispute settlement hearing for the first time in the WTO's 10-year history. The hearing dealt with the beef hormone case (see under 'sequencing' above), and the parties to the dispute – the EU, Canada and the US – agreed to open the proceedings to the public through a closed circuit television link. Reflecting continued dissention among Members regarding the appropriateness of making dispute settlement proceedings public, the session involving third party arguments was not broadcast. Nevertheless, a precedent has been set for cases where all parties agree to make hearings accessible to the public.

In contrast, status quo will probably prevail on the other major transparency issue raised in the DSU review, i.e. the treatment of unrequested 'amicus' briefs submitted by public interest and other organisations or individuals. This deeply divisive topic has not been addressed in recent DSU review sessions, and most delegates predict that panels and the Appellate Body are likely retain their current right to consider such submissions, or to reject them without explanation.

Additional Guidelines to WTO Adjudicative Bodies

The US put forward a set of questions (TN/DS/W/74) on developing modalities for panels and the Appellate Body, based on its long-standing disagreement with some of the interpretive methods used. The paper focused on the function, scope and limitations of the decision-making process. It also touched on the understanding of 'judicial economy', the use of public international law in the WTO, and the interpretive scope of panels and the Appellate Body in particular. Although parts of the paper were well received, US calls to provide additional guidance to adjudicative bodies on the interpretation of WTO agreements and public international law found little support. The proposal reflects the US view that undue 'judicial activism' exercised by panels and the Appellate Body has been responsible for a number of adverse rulings over the years, especially in anti-dumping cases. In its proposal, the US suggested that Members discuss, inter alia, "what significance should attach to the fact that some provisions of the covered agreements are imprecise and susceptible to more than one interpretation", as well as whether it is appropriate for a panel or the Appellate Body to "fill in the gap" in the agreement text if the latter is "silent on an issue."

Acceleration of Timeframes in Dispute Settlement Procedures

Throughout the DSU review, several Members have called for a tightening of timeframes in the dispute settlement process. Australia's 2002 submission (TN/DS/W/8) proposed time-saving mechanisms in areas such as safeguard disputes, compensation arrangements and the rights of non-parties to a dispute, sequencing, and surveillance of retaliation. A 2005 revised text from Australia prompted re-discussion of these issues. Although time-saving procedures have much support among delegations in principle, the full text of the Australian proposal was not well received. In particular, the idea of a fast-track procedure for safeguard disputes did not sit well with many delegates, and some felt the issue more suited to discussion under the Negotiating Group on Rules. On the other hand, Australia's proposal to shorten the timeframe for the complainant's first written submission was widely supported. Currently, this timeframe is almost twice as long as that afforded to the defending party. The revised text proposed an amendment requiring the complainant's first written submission to be lodged at the time of the first panel request.