

The World Trade Organization's  
Doha Development Agenda  
The Doha Negotiations after Six Years  
Progress Report at the End of 2007

## DISPUTE SETTLEMENT



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## DISPUTE SETTLEMENT

### BACKGROUND

The Dispute Settlement Understanding has often been described as the “jewel in the crown” in the framework of WTO agreements. Constructed with painstaking, innovative hard work during the Uruguay Round, it has generally been seen as constituting a significant step forward in international dispute settlement and the rules-based multilateral trading system.

Perhaps because Members were unsure how the new system would operate in practice, they undertook (in 1994) to “complete a full review of dispute settlement rules and procedures” within four years after the entry into force of the Marrakesh Agreement Establishing the WTO. Despite this broad mandate, the review focused on the relatively few provisions where some ambivalence had been noted or where it was felt that it might be possible to expedite processes without compromising rights and obligations.

For a variety of reasons, this review was not able to be completed within the four years stipulated. The Doha Ministerial Declaration of November 2001 (paragraph 30) then launched negotiations on improvements and clarifications of the DSU, based on the work done thus far as well as any additional proposals by Members, with the aim of reaching agreement by the end of May 2003.

The Doha Declaration (paragraph 47) explicitly excluded negotiations on the DSU from the “single undertaking” which applied to all other aspects of negotiations launched at Doha. The underlying reason for this was to isolate dispute settlement from other negotiating subjects, thereby discouraging trade-offs and preserving the sanctity of the “jewel in the crown”. This separation was further underlined by the fact that the DSU negotiations were to be completed well in advance (i.e. by 31 May 2003) of the other Doha negotiations (1 January 2005).

The Chairman of the negotiating group – the “Special Session of the Dispute Settlement Body” – issued a Chairman’s text in May 2003, containing the proposals which, in his view, had a high level of support among Members. Again, however, agreement proved elusive and the General Council agreed that the deadline should be extended to May 2004. But, in June 2004, the Chairman reported to the Trade Negotiations Committee that, despite some progress being made, the Special Session needed more time to complete its work. It was

accordingly agreed that the review should be extended, this time without a deadline being stipulated.

As a statistical snapshot, in the first ten years of operation of the DSU :

- 313 disputes were initiated (i.e. formal Article 4 consultations were requested).
- 128 panels were established, covering 158 of the 313 disputes formally initiated (i.e. roughly half).
- 104 panels were composed, covering 133 disputes.
- 80 panel reports were adopted, covering 103 disputes.
- 53 Appellate Body Reports were adopted.

One of the encouraging conclusions which can be drawn from the above is that many disputes appear to be settled at the consultation stage.

Overall, Members generally feel that the current system is operating reasonably well. They have however made numerous proposals to clarify and improve DSU provisions. They are interested in pursuing at least some of these but appear to have felt no great sense of urgency in doing so.

Having said this, it is also worth noting that some Members, while recognizing the value of the system, have with varying frequency been concerned about "overreaching" by panels or the Appellate Body - in other words not respecting the limits of their authority, enshrined in the DSU, in terms of not adding to or diminishing the rights and obligations negotiated by Members. On various occasions, the United States, Canada, Australia, Korea, Argentina and the European Communities, along with many developing countries on issues like amicus briefs, have all expressed concerns in this regard. But it is the United States which has done so most consistently, especially in trade remedy cases (often with respect to the "zeroing" methodological issue in anti-dumping cases).

## **MAJOR POSITIONS IN THE NEGOTIATIONS**

The negotiations have, more recently, been pursued in a variety of formats. Apart from formal and informal meetings of the Special Session of the DSB, a considerable amount of work has been done in an ad hoc process involving experts from about 20 delegations which has been convened by the Mexican delegation in Geneva. This has allowed proposals to be fully explored and discussed in detail and in a very informal setting away from the WTO

premises. In addition, the Chairman of the Special Session, Ambassador Saborio Soto of Costa Rica, who is a long serving Geneva Ambassador with substantial experience in dispute settlement matters, has consulted with many delegations individually.

It would be fair to say that the negotiations on the DSU have certain special attributes compared with other negotiations under the Doha Round. They generally do not take place according to long-established or ideological group positions. Some groups of Members have made proposals (and proposals from the African Group are currently awaited), but at least some of the groupings are unusual. For example, Argentina, Brazil, India, Mexico, New Zealand and Norway have jointly made a number of proposals. Having said this, a grouping comprising Cuba, India, Malaysia, Egypt and Pakistan (which bears some resemblance to what was known as the "Like Minded Group" in pre-Doha days) has also been active. In many cases, however, Members' proposals reflect very much their individual experiences of WTO dispute settlement matters.

These are not classic trade negotiations. There are no major trade-offs in play, either with respect to the DSU itself or the wider Doha Round. Generally speaking, proposals are assessed on their merits and there is no reason for any participant to accept any that it does not feel comfortable with.

A WTO document entitled "*Compilation of Revised Drafting Proposals Addressed in Substantive Consultations (January-July 2007)*", issued to Members on 30 August 2007, encapsulates the main proposals which are now under active consideration. Unfortunately in terms of transparency, this is (what is known in WTO parlance as) an internal "job document", with the reference JOB(07)/135, which means that it is not intended to be officially available, although delegations may not always respect that convention. It includes contributions from the following Members (either individually and/or collectively as indicated below:

Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway  
Australia  
Canada  
Chile and the United States  
Cuba, India, Malaysia, Egypt and Pakistan  
European Communities  
European Communities and Japan  
Hong Kong, China (i.e. the one Member with this name)

Japan  
Korea  
Mexico  
Switzerland  
United States

Of the above, only the contributions of Mexico,<sup>1</sup> the United States,<sup>2</sup> and the Chile and the United States jointly,<sup>3</sup> have been made available by the countries concerned as official documents.

## **MAJOR ISSUES IN THE NEGOTIATIONS**

The following are the main elements currently under negotiation. It should be noted however that, in the interests of conciseness, this is not a detailed or exhaustive list.

### **a) Third Party Rights**

Concerns have been raised by some that there should be greater opportunity for those Members claiming to have a substantial trade interest in consultations held under Article 4 of the DSU to participate in such consultations. Proposals have been made to the effect that those claiming such an interest may join in the consultations unless there are objections from one or more of the original consulting parties. At present the Member to which the request for consultations is addressed must agree that a claim of substantial interest is well founded.

There are also proposals to give greater clarity, under Article 10 of the DSU, to the rights of third parties in panel meetings – for example, the right of third parties to be present at panel meetings prior to issuance of the interim report, to receive the parties' submissions, to make written submissions to the first substantive panel meeting, to make an oral statement to the panel and to respond in writing to questions. Some of these are already made available to third parties by panels on an *ad hoc* basis. However, in addition, there is a proposal which would enable third party participation in proceedings before the Appellate Body, even where the Member concerned had not been a third party at the panel stage.

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<sup>1</sup> TN/DS/W/91

<sup>2</sup> TN/DS/W/82 plus Add.1, Add.1/Corr.1 and Add.2 thereof, and TN/DS/W/86.

<sup>3</sup> TN/DS/W/89

b) Transparency

Proposals have been made which would make substantive meetings of parties with panels, the Appellate Body and arbitrators open to the public to observe, except for any portions dealing with confidential information. At present this does happen, but only on a case by case basis where the parties and the panel so agree. Indeed the current panel working procedures laid down in Appendix 3 of the DSU state that panels shall meet in closed session.

Based on current trends it seems that some WTO Members, though by no means all, may be softening or reassessing their opposition to greater openness. In the very small number of cases which have been opened up at the panel stage, the low-key and sometimes mystified reactions from the public have not so far borne out the worst fears which some delegations harbored.

c) "Sequencing"

This refers to the sequence between suspension of concessions under Article 22 and rulings by "compliance panels" under Article 21 of the DSU.

It has been proposed that there should be greater clarity as regards the procedures leading up to the establishment of a compliance panel, under which respondents would notify measures aimed at compliance. Where a compliance panel is established, this should be at the first DSB meeting which considers the request. The complaining party would be able to seek authorization from the DSB to suspend concessions only where the respondent has not informed the DSB of its intention to comply with panel findings, or does not notify the DSB by the expiry of the reasonable period of time that it has fully complied, or the DSB has ruled, following a compliance panel proceeding, that the respondent has not complied with the recommendations and rulings of the DSB. It has also been proposed that a complaining party should not suspend concessions during an arbitration proceeding.

d) Post-retaliation procedures

There are a number of proposals in this area. The essential issues are how to determine, following authorization of suspension of concessions by the DSB, that inconsistencies with the covered agreements have been removed, and how to modify or withdraw previously authorized levels of suspension of concessions. The proposals which have been made seek to add detail and clarity in these areas.

e) Remand

The DSU at present contains no provision which would allow the Appellate Body to refer back to a panel any issues with respect to which it feels there is an insufficient factual basis to complete its analysis. A proposal has been made to provide such a referral procedure through a new Article 17*bis*.

f) Developing country participation

A recurrent theme in the short history of the DSU has been its accessibility to developing countries, and more particularly the poorest amongst them. Concerns have been expressed that they lack the resources and expertise to participate and that, even where they win cases, there is no viable route available to them to secure implementation. For example, in *Bananas*, Ecuador was authorized by the DSB to suspend concessions to the European Union, but it was unable to identify practical means of doing so.

There has been discussion over a number of years of “legal aid” to poor countries to enable them to participate more effectively. There is an independent “Advisory Centre on WTO Law” in Geneva which can in certain cases subsidise such participation. In addition the WTO Secretariat, through a trust fund for technical cooperation, makes available a limited amount of legal advice. Valued as these channels are, however, some developing countries have continued to press for enhanced assistance. To date, some developed Members have remained sceptical on the grounds that they should not be expected to subsidise legal actions which may potentially be taken against them.

A group of developing countries has proposed that, in a dispute between a developing Member and a developed Member, if the panel upholds a claim of the developing Member, or rejects the claim of a developed Member, the panel should award reasonable costs of litigation.

The same group has also proposed that developing Members should have the right to suspend concessions in sectors under any of the covered agreements.

g) Panel selection

The European Union has proposed the establishment of a roster of 20 persons to serve on panels, appointed for five years with the possibility of reappointment for a further term. One of the aims of this proposal is to speed up



the panel selection process which currently often proves to be problematical and time consuming.

Other Members see some attractions in this proposal, but they also no doubt wish to take into account the flexibility and degree of control which they enjoy with the current system of panel selection, drawn out as it may be.

#### h) Timeframes

In earlier phases of the DSU negotiations, considerable attention was given to possible options for shortening timeframes. According to the August 2007 *Compilation*, this now seems to be seen as somewhat less of a preoccupation. Nevertheless, there is a proposal by Australia under current consideration which would shorten somewhat the timetable for panel work, notably by allowing the complaining party only 5 days after the organizational meeting with the parties in which to make its first written submission. At present 3-6 weeks is allowed, though the starting point is not explicitly stated. As against this, the Australian proposal would also allow the respondent 3-4 weeks in which to make its first written submission (compared with 2-3 weeks at present).

Australia also proposes accelerated timeframes for disputes on safeguard measures – a panel would be established by the DSB immediately upon request and the timeframes in Appendix 3 for the panel's work would be halved.

#### i) Parameters governing dispute settlement procedures

The United States has proposed a series of parameters concerning the use of public international law and the interpretive approach to be used in dispute settlement. It is suggested, *inter alia*, that "constructive ambiguity" in the covered agreements should be regarded as a placeholder indicating that further negotiation is needed between Members before disciplines can be codified; and that the Members should emphasize that they have not agreed to delegate to WTO adjudicative bodies the task of filling in gaps in the covered agreements.

This proposal at least in part reflects the concerns often expressed by the United States (referred to in the "Background" section above) regarding "overreaching" by panels and the Appellate Body.

It is emphasized once more that the above list is not exhaustive but gives an indication of the main themes occupying negotiators.

## **SITUATION AT THE END OF 2007**

The negotiations aimed at improving and clarifying the provisions of the DSU may have lacked a sense of urgency but they are still being doggedly pursued. Probable reasons for the lack of urgency are, first, that no insurmountable flaws have been encountered in implementing the DSU as it stands. Where problems have been encountered – notably on “sequencing”-practical solutions have been found. Secondly, participants wish to proceed at a deliberate pace, thoroughly examining proposals from all angles given the sensitive nature of the subject matter and the long term consequences of changing the DSU.

The “landing zone” for these negotiations has gradually become clearer: it seems to be accepted that the August 2007 *Compilation*, to be supplemented by the forthcoming contribution from the African Group, more or less defines the universe of proposals from within which participants will seek consensus.

## **OUTLOOK AND THE WAY AHEAD**

The most probable outcome for the negotiations on dispute settlement is that there will be no major deviations from the DSU in its present form. There will however be some worthwhile procedural clarifications and possibly some cautious evolutions with respect to current practice. The most likely areas in which this will happen are :

- limited enhancement of third party rights
- codification of current practices with regard to “sequencing”
- clarification of post-retaliation procedures
- limited improvements with respect to transparency
- possible limited enhancement regarding developing country participation

Nevertheless, more ambitious proposals such as those relating to panel selection, clarification of certain “parameters” and “remand” are still in play.

Whether or not the negotiations on the DSU are finalized in 2008 may depend to some extent on prospects for the Doha Round as a whole. Despite the

separation of the DSU negotiations from the wider Round, if a feeling emerges that the Round is moving towards a conclusion, that could provide the spur to wrap up the negotiations on improvement and clarification of dispute settlement procedures at the same time. DSU negotiators are conscious that the Doha Round will not wait for them to finish.

If, on the other hand, it becomes clear that the Doha Round as a whole is not moving towards a conclusion in 2008, it is still not impossible that the negotiations on the DSU could be concluded next year, perhaps along with one or two other subjects (such as Trade Facilitation), providing a mini package of results for the WTO.