

Doha Mandates

"We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter."

(Paragraph 30 of the Doha Ministerial Declaration)

"With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking."

(Paragraph 47 of the Doha Ministerial Declaration)

Review of the Dispute Settlement Understanding

Prospects for Cancun

Members have been unable to agree on improvements and clarifications of the WTO Dispute Settlement Understanding (DSU) by the mandated deadline given at Doha. Nevertheless, Members are set to continue negotiations on the basis of work done so far, including the latest DSU amendments proposed by the Chair of the negotiations on DSU reform, as well as other proposals that have not been reflected in the Chair's draft.

In terms of Members' priorities for Cancun, the negotiations on the DSU review are likely to only play a minor role at the Doha Round mid-term review. This is because, firstly, neither the draft Cancun Ministerial text nor the Doha Declaration contain timelines related to the Cancun Ministerial meeting. Secondly, many Members did not have much time to spend on the DSU negotiations in the lead-up to Cancun. Looking beyond Cancun, Members also seem inclined to allocate their resources to other negotiating issues, such as agriculture and services. All in all, some observers predict that the political will to seek compromise on DSU reform is still lacking, and that a fruitless DSU review exercise is likely to continue for another couple of years.

Background

Among the Uruguay Round's final documents, a 1994 Ministerial Decision agreed to a full review of WTO dispute settlement rules and procedures by end-1998 and that Members would *"take a decision... whether to continue, modify or terminate such dispute settlement rules and procedures"*. The 1 January 1999 deadline was later extended to 31 January 1999. The exercise yielded no concrete conclusions, however, and the review languished in an inconclusive limbo until ministers agreed in Doha to *"improve and clarify"* the DSU. These negotiations have been taking place in special sessions of the Dispute Settlement Body since March 2002 (DSB).

Mandated Deadlines

Members were originally mandated to *"aim to agree"* on an improved and clarified DSU by end-May 2003. Having failed to meet this deadline, Members agreed at a 24-25 July General Council meeting to finalise the review by the end of May 2004.

Notably, the DSU review is the only negotiating track under the Doha mandate not part of the 'single undertaking', and is therefore not subject to the overall 1 January 2005 deadline for concluding the Doha Round negotiations. However, during the past few months, a link between their completion and advancement in other areas has seemed at times inevitable.

Current State of Play

On 28 May, when it became clear that Members would miss their end-May 2003 deadline for agreeing on DSU reform, most delegates expressed the view that they would like to continue the negotiations. However, they did not agree on a new schedule for negotiations, nor on their scope or on whether a new negotiating mandate was required. Chair Ambassador Péter Balás, Hungary, had originally circulated a consolidated text on 16 May, which, after intense consultations, had been amended to a revised document presented to participants on 28 May.

The 28 May text contains a large number of issues, including, *inter alia*: third party rights¹; consultation proceedings; sequencing; introduction of a remand at the Appellate Body (AB); compensation for litigation costs; as well as various elements of special and differential treatment (S&D) for developing countries.

However, several contentious and substantive proposals were not included in the Balás text, including the EC's proposal for a body of permanent panellists (TN/DS/W/38), or the call from the group of least-developed countries (LDCs) to allow the AB to put on record dissenting opinions (TN/DS/W/17). Also, the proposal put forth by the EC and US to explicitly recognise

the right of panels and the AB to accept unsolicited friend-of-the-court (*amicus curiae*) briefs² (TN/DS/W/1; TN/DS/W/46) was not reflected in Balás's revised draft. The same fate was shared by the US proposal to open up dispute settlement hearings to the public and to make submissions and briefs publicly available (TN/DS/W/13), as well as its joint suggestion with Chile to increase Member-control on panel and AB reports (TN/DS/W/28). The case made by developing countries to adjust remedies under the DSU to their particular conditions, e.g. through retroactive remedies or collective retaliation, was also left out of the Chair's text. Since the DSB special session met formally for the first time in February 2002, numerous developed and developing country Members have submitted specific proposals (42) referring to almost all DSU provisions.

Key issues addressed in Balás text

Sequencing: A large number of WTO Members have proposed clarifying the so-called 'sequencing problem' between DSU non-compliance (DSU Article 21.5) and retaliation rules (DSU Article 22). The revised DSU Article 22 of the Balás text now stipulates that a so-called 'compliance panel' would have to review implementing measures in the case of disagreement on their WTO consistency, before the complainant could seek authorisation from the DSB to retaliate. This 'withdrawal of concessions' usually amounts to the imposition of sanctions in the form of prohibitive tariffs. The reports of this compliance panel would be subject to appeal.

Third party rights Reflecting a number of amendments proposed by Costa Rica (TN/DS/W/5), the EC (TN/DS/W/6) and Jamaica (TN/DS/W/7), the Balás draft contains new provisions enhancing third parties' access to information and knowledge in the dispute settlement system. Whereas the current DSU regime only allows third parties to be present at the first substantive review stage, under the 28 May draft, third parties would be entitled to join the proceedings up to the interim review stage. However, they would be excluded from the portions of the meetings where confidential information is presented.

Remand: The Balás draft contains an important modification at the appellate stage: the possibility for the Appellate Body (AB) to remand a case back to the original panel. This option would be important in cases where the AB finds itself unable to fully examine a case due to an insufficient factual record. Under current DSU rules, if there are gaps in the factual base of a case, the AB has to leave the dispute unresolved - with the unsatisfactory result that the complainant would have to file a new case to arrive at an enforceable determination. The second option for the AB itself to complete the factual analysis, but in that case it would operate in a grey area, considering its mandate to exclusively deal with issues of law.

Special and differential treatment:

The draft modalities incorporate several proposals made by a group of developing countries, including Cuba, Egypt, India, and Kenya (TN/CTD/W/2), as well as India (TN/CTD/W/6), on S&D under the DSU. The proposals seek mandatory terms for granting special attention to developing country Members' particular problems and interests during consultations (DSU Article 4.10), as well as an amendment to provide developing country Members sufficient time to prepare and present their argumentation before panels. Additional S&D provisions are spread over the draft modalities text, such as extended procedural and implementation periods. Special and more favourable treatment is also envisioned for least-developed countries (LDCs).

Litigation costs and monetary compensation as remedy

The Balás draft contains another interesting new point, which is the provision that — as an exception to the general rule that every party bears its litigation costs — a panel or the AB can award an amount for such costs. In such cases, the particular situation of the parties, as well as S&D is to be taken into account. A group of nine like-minded Members had been proposing a similar mechanism under which developing countries would be compensated for their legal costs accrued if they won a case against a developed country, or if the developed country complainant was

unable to prove its claims against a developing country (TN/DS/W/19).

Notably, and related to this issue, the LDC Group (TN/DS/W/17), the African Group (TN/DS/W/15) and Kenya (TN/DS/W/42) have proposed introducing the notion of monetary compensation in the event that an offending measure is left in place against a developing or least-developed country. These Members are arguing that the current — and very rare — practice of voluntarily granting compensation through deepened market access is not working for poor countries — often because they do not have the supply-side capacity to use access to export markets outside their traditional ones; or because their competitive edge might have been seriously hurt by the condemned action in the market of destination.

Consequently, the approach of financial compensation for litigation costs would add a completely new element to current WTO compensatory practice under which Members are usually granted additional concessions. However, the full draft provision on litigation costs (new DSU Article 28) appears in brackets, and the exact modalities of such a compensatory mechanism remain completely open. In this respect, some Members seem to be wary of setting a precedent with unforeseeable systemic implications for the WTO.

Endnotes

- 1 Third party rights in dispute settlement refer to the ability of Members not party to a particular dispute to make submissions to the panel. They must first establish why the particular dispute is of interest to them.
- 2 Most developing countries vigorously oppose the practice of WTO panels and the Appellate Body to accept amicus briefs, submitted by civil society groups. This is partly due to fears that well-endowed institutions in developed countries would be most likely to be called upon for information and technical advice.

All written submissions from Members can be found at <http://docsonline.wto.org> under TN/DS/W/*

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