



TRADE AND DEVELOPMENT SYMPOSIUM

Perspectives on the Multilateral Trading System

A Collection of Short Essays

Establishment of a Dispute Tribunal in the WTO

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1. Introduction

The dispute settlement system has been the WTO's "crown jewel" during its first 16 years. Members have brought over 400 disputes, half of which have proceeded through to completion or settlement¹, making the WTO the most prolific international dispute resolution system in the world today. In this time of economic turbulence and uncertainty, it is important to the overall legitimacy and credibility of the WTO to ensure that the dispute settlement system remains strong and effective, able to meet the challenges of the future.

As a result of the Uruguay Round negotiations, the dispute settlement system was significantly modified with the creation of the Appellate Body; reverse consensus decisions for establishment of panels, adoption of panel and Appellate Body reports, and authorization of suspension of concessions; as well as specific timeframes for stages of the dispute settlement proceedings. However, many of the operational aspects of the ad hoc panel system were not significantly modified in the Uruguay Round. The panel system has developed by gradual evolution since the first working party was formed in the 1950s. The panel system has served the WTO well in the past, but is it time, after over 60 years' experience with ad hoc panels, to consider a dispute tribunal for the WTO?

2. Problem/Opportunity

WTO Members have an opportunity to consider bold changes to strengthen the WTO dispute settlement system in the context of the Dispute Settlement Understanding (DSU) Review. As Members have decided that this Review will proceed independently from the Doha Development Round (DDR), there is a unique opportunity for major improvement of the system if Members wish to seize the moment.

With the impasse in the DDR and the problems in the world economy, cases could be brought in the WTO in the future which could seriously test the limits of the dispute settlement system. There is already evidence that WTO disputes are reaching into some of these new issues, such as energy and the environment.

While many of the WTO cases continue to raise claims under the GATT and the trade remedies agreements, an increasing number of disputes are being brought under newer agreements such as the General Agreement on Trade in Services (GATS), the Subsidies and Countervailing Measures Agreement (SCM Agreement), the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and China's Protocol of Accession. These cases often involve complicated issues of fact and legal interpretation. Hearing and deciding these cases at the panel level requires a great deal of expertise and skill.

Under the DSU, there is a clear division of labour between the panels and the Appellate Body. The function of panels is to be a sort of 'court of first instance'. Under Article 11, a panel is to make an objective assessment of the facts and of the matter before it. Therefore, the role of a panel is to be the fact-finder: to determine the facts based on the evidence presented by the parties and to determine whether the respondent Member has acted in accordance with its obligations. The function of the Appellate Body is set out clearly in Article 17.6. An appeal is limited to "issues of law covered in the panel report and legal interpretations developed by the panel". The role of the

Appellate Body does not extend to hearing evidence, making factual findings or reviewing factual determinations of the panel. In recent years, the disputes have become far more complex in terms of the number of claims, the number of agreements, the number of parties involved, the novelty of the legal provisions being interpreted, and the complexity of the facts. Fact-finding and appreciation of evidence as well as interpretation and application of the law are all skills requiring specific expertise and training. It is important that panellists have the requisite skills and experience required to perform these important tasks.

Timeliness is a fundamental feature of the WTO dispute settlement system. Uruguay Round negotiators built explicit timeframes into several provisions of the DSU to ensure that the proceedings are completed in a timely and efficient manner. This is crucial to businesses for which time is money. As it is, under current DSU rules, businesses often complain that the WTO process takes too long to resolve disputes and therefore, is ineffective from their perspective, especially considering that a case can take 4 - 5 years from consultations through to implementation and remedies are prospective. In the DSU Review, Members have recognized the importance of the timeliness of WTO dispute settlement procedures by discussing various proposals to shorten specific timeframes in the DSU.

While Members are seeking ways to shorten timeframes in the DSU to make dispute settlement procedures more expeditious, in practice, the dispute settlement system has not functioned strictly within DSU timeframes. The DSU states: "In no case should the period from the establishment of the panel to the circulation of the panel report to the Members exceed nine months." Since 1995, the average panel proceeding has taken approximately 14 months.² Since 1995, 28 out of a total of 135 panels have been completed in less than 10 months.³ Recently, the Appellate Body, after years of observing its maximum 90 day deadline for appeals⁴, has requested the DSB to extend timeframes by delaying adoption or the start of an appeal of a panel report under Article 16.4 of the DSU.

The number of disputes, however, has decreased since the early days of the WTO. Consultation requests peaked at 155 in the first four years from 1995-1998, dropped to 63 from 2007-2010, and to 8 from January - September 2011. The number of panel reports circulated from 2007-2010: 34, was nearly half what it was in the peak period from 1999 - 2002: 63.⁵ Similarly, the number of Appellate Body reports adopted in the recent period from 2007 - 2010: 18, was half what it was from 1999-2002: 36.⁶ These figures demonstrate that the workload of panels and the Appellate Body has been declining in the past five years, as compared with the early years of the WTO, and yet, there has not been an improvement in the speed with which panels complete their reports.

Also, the number of disputes in which the Director-General has been requested to compose panels is increasing. In 2010, he was asked to compose the panels in 7 out of 9 cases, and so far in 2011, he has been called upon to compose the panels in 3 out of 4 disputes.⁷ Since 1997, the Director-General has composed approximately half or more of the panels each year, and since 2002, he has composed two-thirds or more of the panels each year. Since 1995, panel composition has taken on average 74 days, but the longest took 234 days.⁸ In the case of composition by the Director-General, the DSU calls for panels to be composed within 30 days after they are established.⁹

1 Speech delivered by Chairman of WTO Dispute Settlement Body, H.E. Mr. Yonov Frederick Agah, in March 2011 on developments in WTO dispute settlement during his Chairmanship from 19 March 2010 - 24 February 2011, available at: http://www.wto.org/english/tratop_e/dispu_e/speech_agah_4mar10_e.htm

2 DSU, Article 12.10.

3 WTO dispute settlement statistics, 1 January 1995-23 September 2011, provided to author by WTO Secretariat.

4 DSU, Article 17.5.

5 Supra note 3. This figure includes Article 21.5 Compliance panel reports.

6 Ibid. This figure includes Article 21.5 Appellate Body reports.

7 WTO Dispute Settlement Statistics (as of 10 November 2011), provided to the author by WTO Secretariat.

8 Supra note 3.

9 DSU, Article 8.7.

These facts demonstrate that although the number of disputes has declined in recent years, the panel system has not improved in the efficiency with which it produces reports. Moreover, perhaps due to the increasing complexity of disputes, the problem of lack of timeliness has now crept over into the Appellate Body as well.

3. Responses

Establishing a dispute tribunal to replace the current ad hoc panel system is a necessary reform at this stage in the evolution of the WTO dispute settlement system to ensure that it will be able to meet the challenges of the future, but also so that it does not risk becoming weaker and less effective. The idea of creating a permanent panel body has been proposed before¹⁰, however, the reasons for establishing a dispute tribunal are even more compelling today.

The model proposed is a dispute tribunal composed of 25-30 part-time members appointed by the DSB. Qualifications would be similar to those required for appointment to the Appellate Body - members would be required to be persons with knowledge and experience in law, international trade and the subject matter of the covered agreements generally. When appointed, they would be required to be unaffiliated with any government in order to be free from any perceived conflict of interest. Their terms of appointment would be similar to those of Appellate Body members, each member would be paid a retainer to ensure his/her availability to serve on cases at all times and on short notice as well as compensation for each case. In order to provide greater incentives for independence, impartiality and consistency in decision making, each member should be appointed by the DSB for one non-renewable term of 6-8 years.

Reasons:

Timeliness and Efficiency

A dispute tribunal would save time and be more efficient than the current ad hoc panel system. It would save time through eliminating the panel composition process as well as through other organizational and procedural efficiencies that would result from having members available at all times and on short notice to work on cases. In 2006, William Davey estimated the time saving from panel composition in the median case at 50 days¹¹; today, in the average case it would be 74 days.

There would be significant additional efficiencies and improvements to be gained when members are available to work together in Geneva on a case for the duration of the proceeding. These could lead to a significant modification of the current panel process which could result in even greater time savings. A standing tribunal could also be given the ongoing jurisdiction to deal with such issues in future as preliminary matters, remands from the Appellate Body, and remedies.

Expertise and Experience

Currently, the required qualifications for WTO panellists are that they be “well-qualified governmental and/or non-

governmental individuals”.¹² The overwhelming majority of them have been current or former government officials, as well as international trade academics, lawyers, economists and former Secretariat officials.¹³

WTO disputes are becoming more complex: in relation to the number of claims being raised, the complexity of the measures and the facts, and the novelty of the legal issues in the cases. The cases will only become more difficult as a consequence of the DDR impasse, the economic instability in the world economy and as pressures for unilateral action increase. The WTO dispute settlement system needs a dedicated, highly-qualified first instance tribunal to hear disputes, consider and weigh evidence, make factual findings, and make determinations based on WTO rules. The skills and experience required to perform these functions are essentially judicial-like or legal skills. The knowledge required relates to international trade law and the WTO agreements.

Training in judicial skills could be “easily accomplished in the framework of a Permanent Panel Body. The result should be a more credible - more legitimate - panel process that produces better decisions”.¹⁴ More experienced panellists would lead to higher quality panel reports, and less work for the Appellate Body,¹⁵ especially in reviewing factual determinations and questions of mixed fact and law. While the Appellate Body’s mandate is limited to reviewing issues of law and legal interpretation in panel reports, increasingly it appears to also review complex factual and evidentiary matters.¹⁶

Independence and Impartiality

Independence and impartiality on the part of a decision maker are hallmarks of any dispute settlement system. Independence comes from one of the two key principles of natural justice which requires decision makers to be free from bias and to keep an open mind. Independence and impartiality can be influenced by the type of mechanism selected, the process of appointment, the qualifications of the persons appointed, the terms of their appointments, and the renewability of their terms.

A dispute tribunal would eliminate any potential for perceived conflicts of interest because members would be required to be unaffiliated with any government. Ideally, the tribunal would be served by a small staff, separate from the rest of the WTO Secretariat, similar to the Appellate Body Secretariat. This would alleviate concerns about potential conflicts of interest between government and Secretariat officials involved in negotiations or those giving legal opinions to governments, and those advising panels.

Collegiality and Consistency

A standing tribunal would provide for collegiality and a shared sense of institutional purpose and memory among its members. Because members would serve for a specific term, and work on several cases together, it would also provide for greater coherence and consistency in their decisions over time than would an ad hoc panel system. This should lead to higher quality decisions and less work for the Appellate Body.

10 See Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1 (13 March 2002) and TN/DS/W/38. See also W.J. Davey, “Expediting the Panel Process in WTO Dispute Settlement”, in M.E. Janow, V. Donaldson, A. Janovich (eds), THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES (Juris 2008), 409-470 [Davey I]; W.J. Davey, “The Case for a WTO Permanent Panel Body” (2003) 6 *Journal of International Economic Law* 175 [Davey II]; “Mini-Symposium on the Desirability of a WTO Permanent Panel Body” (2003) 6 *Journal of International Economic Law* 175.

11 Davey I, *ibid.*, at 426.

12 WTO DSU, Article 8.1.

13 Davey I, *supra* note 10, at 433.

14 *Ibid.*, at 435.

15 M.L. Busch and K.J. Pelc have shown that panellists’ experience does make a difference in whether or not the Appellate Body reverses the panel report. See M.L. Busch and K.J. Pelc, “Does the WTO Need a Permanent Body of Panelists?” (2009) 12 *Journal of International Economic Law* 579.

16 See, e.g., Appellate Body Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R adopted 1 June 2011.

Greater Geographic Diversity

As a result of his extensive study in 2006, Davey concluded that a typical WTO panellist has been “a current or former government official from a small developed country”.¹⁷ More recently, there have been a greater number of panellists from developing countries.¹⁸ However, because of the rule against panellists being selected who are nationals of parties or third parties to a dispute,¹⁹ panellists tend not to be chosen from all of the major users of the dispute settlement system.

A standing disputes tribunal would allow for greater geographic diversity in the appointment of members of panels while ensuring against conflict of interest.

A Strong Two-Tier System

The WTO needs a strong, two-tier dispute settlement system. Establishing a dispute tribunal at the first instance level is the logical next step after the creation of the Appellate Body. There now appears to be a risk that Appellate Body could incrementally become a one-level tribunal. The Appellate Body is increasingly reviewing facts and evidence, and taking more time to hear cases. There is a risk that the panel system will become weaker, and unless the first instance level is strengthened, the Appellate Body may become the tribunal of choice. In order to maintain a strong, two-tiered system, a dispute tribunal should be established.

Panel Roster or Panel Chair Body

Proposals have been made in the DSU Review to establish a permanent panel roster²⁰ or a panel chair body.²¹ The panel roster proposal would replace the current indicative list with a roster of qualified governmental or non-governmental candidates nominated by Members (each Member could nominate only one candidate, using qualifications similar to those of the Appellate Body). WTO panellists would be selected from this roster, composition would otherwise remain the same as under current DSU rules. The panel chair body proposal would create a group of persons from which all panel chairs would be selected. All other panellists would be selected pursuant to existing DSU rules.

The panel roster proposal would not provide major gains in terms of time savings and efficiencies because current DSU procedures and practices on composition of the panels would continue to apply. Also, a panel roster would not ensure the same level of expertise and experience or collegiality, consistency and coherence that a standing tribunal would provide. While a panel chair body would have the advantage of greater experience for one person on each panel as compared with the current system, it would not result in significant time savings and efficiencies because the rest of the members of the panels would still have to be composed under existing DSU rules. Moreover, the panel chair system could undermine collegiality among the panel members. The panel chair would have more experience, possibly more expertise, and a closer working relationship with the Secretariat,

giving him/her more influence than his/her colleagues in the final decision in the case. For all of the reasons enumerated above, a dispute tribunal would be a far superior alternative than a panel roster or a panel chair body.

4. Conclusion

After the innovation of the Appellate Body, the next logical step in strengthening the WTO dispute settlement mechanism is to establish a dispute tribunal to replace the ad hoc panel system. Members have a unique opportunity in the context of the DSU Review to plan boldly for the future of the WTO, in the same way that Uruguay Round negotiators did twenty years ago.

There are compelling reasons to create a dispute tribunal at this point in the history of the WTO. As the WTO adjusts to the rapidly changing global economy, disputes are becoming more complex and challenging, both on their facts and in the novelty of the legal issues presented. Moreover, higher quality decisions would be produced by a tribunal whose members are available at all times and on short notice to serve on cases. This would allow the two-tier system in the WTO to function as it was designed, and enable the Appellate Body to focus on its mandate which is to review issues of law and legal interpretation in panel reports.

Finally, a dispute tribunal would result in significant time savings and efficiencies as compared with the present ad hoc panel system. Time would be saved in panel composition, and other procedural and organizational efficiencies would ensue from having members available at all times and on short notice to serve on cases and from the experience, knowledge and collegiality that would develop over time in the dispute tribunal as an institution.

There is currently a gap between the goals of the DSU and actual experience with respect to the timeliness of the dispute resolution system. While the number of disputes has been declining in recent years, panels have not generally completed their cases within the DSU timeframes and the Appellate Body has also recently begun to request the DSB to extend its timeframes. These delays could ultimately be problematic for the reputation of the WTO both with Members and stakeholders. If these delays continue and become accepted practice, they could undermine respect for the DSU as well as the credibility and legitimacy of the WTO.

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17 Davey I, supra note 10, at 431.

18 Ambassador Agah's Speech, supra note 1, fn 28, the number of panellists was 209, of which 110 were from developed countries and 99 were from developing countries (taken from www.worldtradelaw.net).

19 DSU, Article 8.3.

20 Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W41 (24 January 2003), at 3-5.

21 Contribution to Clarify and Improve the Dispute Settlement Understanding: Panel System, Communication from Thailand, TN/DS/W31 (22 January 2003), at 2.