

Developments Since the Fourth WTO Ministerial Conference

The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD)

Vol. 1 No. 8 of 13

February 2003

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)

Mandated Deadline

May 2003, conclusion of the review. The deadline and the review process are formally independent of the Doha Round's single undertaking negotiations.

Review of the Dispute Settlement Understanding

Background

Among the Uruguay Round's final documents, a 1994 *Ministerial Decision* agreed to a "full review of dispute settlement rules and procedures under the World Trade Organisation within four years after the entry into force of the Agreement Establishing the World Trade Organisation." Ministers further agreed to "take a decision on the occasion of [their] first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures." Members agreed to complete the review by 1 January 1999, which 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 Dispute Settlement Understanding (DSU). These negotiations have been taking place in special sessions of the Dispute Settlement Body since March 2002 (DSB).

Current State of Play

The review has proceeded on a two-track arrangement, in which Members' proposals are considered formally, followed by informal discussions on the various negotiating points contained in a *Checklist of Issues* circulated by the Chair of the review process. By the end of 2002, Members had submitted 20 proposals.

These discussions have not yet, however, led to the clear identification of possible consensus areas. According to the special session Chair, the informal consultations ended with the informal meeting on 18 December, 2002. Subsequently, the DSB's focus has been on further exploring the scope for consensus on an agreed text by the mandated deadline of May 2003.

Issue-by-Issue Deliberations

Sequencing: A large number of WTO Members have jointly proposed that Article 21.2 of the DSU be amended to address the so-called 'sequencing pro-

blem' between DSU provisions regarding retaliation in case of non-compliance with dispute settlement rulings (WT/MIN (99) 8). They propose clarifying that compliance panel and appellate proceedings must be complete before the DSB can authorise the 'withdrawal of concessions', which in practice usually amounts to the imposition of trade sanctions in the form of prohibitive import tariffs. At present, this is the one issue that seems to have garnered the support of all Members, drawing its legitimacy from the desire for prompt compliance with panel and Appellate Body recommendations by all Members.

Amicus briefs: Touching on an issue of intense interest to civil society, the European Union and the United States have proposed explicit recognition of the right of panels and the Appellate Body to accept unsolicited friend-of-the-court (*amicus curiae*) briefs, as they already do on an *ad hoc* basis. Most developing countries vigorously oppose this practice — and the two proposals — partly due to fears that well-endowed institutions in developed countries, including powerful business associations, would be most likely to be called upon for information and technical advice. In addition, some developing countries have pointed to the bad experience of the shrimp-turtle case and others in which *amicus* briefs in support — or complementing — a party's position were submitted by civil society groups. At issue here is the distinction between 'assisting' the court in the public interest, as opposed to assisting a party to 'politically tilt' a case in its favour.

Article 13 of the DSU empowers panels to 'seek information' during dispute settlement proceedings. Developing countries argue that this gives panels sufficient flexibility and the discretionary authority "to seek information and technical advice from any individual or body [they deem] appropriate." According to Taiwan, to allow unsolicited *amicus curiae* submissions, and to systematise this in a new Article, as proposed by the EU, would create a situation where Members with

the fewest social resources could be put at a disadvantage (TN/DS/W/25). Other developing countries have also called for clear guidelines on *amicus curiae* briefs.

Transparency: Acceptance of *amicus* briefs is closely tied with the larger concern about transparency in the dispute settlement process. The US has proposed opening dispute settlement hearings to the public and making submissions and briefs publicly available (TN/DS/W/13). The US notes that this is common practice in most courts and “there is no reason why the WTO should be different in this respect. The public has a legitimate interest in the proceedings.” Many developing countries disagree, mainly arguing that this would lead to complications and inefficiency in settling disputes. They also insist that the ‘intergovernmental nature’ of the dispute settlement process must not be compromised.

Remedies: Many developing countries have raised problems with regard to the remedies available in case of non-compliance with dispute settlement rulings. Least-developed countries (LDCs) have suggested that compensation by Members who fail to rectify measures found to be inconsistent with WTO regulations should be made mandatory by the elimination of the phrase “if so requested” from Article 22.2 (TN/DS/W/17).

A strong case has also been made for monetary compensation. This remedy is deemed important for developing and least-developed countries, and for any economy that stands to suffer for the time that an offending measure remains in place (the concept of retroactive remedies). Members have also proposed the adoption of a ‘principle of collective responsibility’ akin to its equivalent under the United Nations Charter. Under this principle, all WTO Members would have the collective right and responsibility to enforce the recommendations of the DSB. They further propose that where a developing or least-developed country has been a successful complainant, “collective retaliation should be available automatically, as a matter of special and differential treatment. In determining whether to authorise collective retaliation,

the DSB should not be constrained by quantification on the basis of the rule on nullification and impairment.”

Many follow the remedies discussion with great attention, as it is one of the principal aspects of the review process that might address the DSU’s current shortcomings and imbalances, which make the system of little use or effectiveness for addressing development concerns.

Composition of panels: Members are also divided over an EU proposal to establish between 15 and 24 permanent full-time panelists instead of the current system of choosing them from a large roster of experts who have other responsibilities. Some have also proposed to expand the currently seven-member Appellate Body (AB), and LDCs have called for allowing the AB to put on record dissenting opinions because the “Appellate Body has displayed an excessively sanitised concern with legalisms, often to the detriment of the evolution of a development-friendly jurisprudence” (TN/DS/W/17).

Functioning of the Appellate Body: The US and Chile have submitted a joint proposal setting out the following six options aimed at providing parties to a WTO dispute more control over the content of Appellate Body reports, as well as the course of the dispute settlement proceedings: introducing confidential interim reports to be circulated by the AB to parties prior to issuing the final report; allowing parties to “delete by mutual agreement findings in the report that are not helpful or necessary to resolving the dispute”; allowing the DSB to only partially adopt a report; providing parties the right to suspend panel or AB proceedings for further negotiations; and providing “some form of additional guidance to WTO judicative bodies” concerning the application and interpretation of WTO law (TN/DS/W/28). While Malaysia and India expressed support for the US position, Brazil, Canada, the EU, Korea and Switzerland cautioned that the proposed changes would undermine the independence of the AB, transform the WTO dispute settlement system from litigation towards bilateral settlements, and subvert the predictability and security of the multilateral trading system.

Third party rights:¹ Most Members agree that the issue of enhancing third party rights deserves serious exploration. Fears have often been expressed that any extension of such rights might make the procedures more complex and result in a third party having undue influence on panel or Appellate Body decisions. The current DSU regime only allows third parties to join in at the first substantive review stage. Given that resource and monetary constraints often preclude small and developing Member countries from making full use of the system, a number of amendments have been proposed by Costa Rica (TN/DS/W/5), the EU (TN/DS/W/6) and Jamaica (TN/DS/W/7) to enhance third parties’ access to information and knowledge of the dispute settlement system.

Special and differential treatment: Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe have submitted a joint proposal on special and differential treatment under the DSU to the Special Session of the Committee on Trade and Development (TN/CTD/W/2). India has also made an individual submission (TN/CTD/W/6). Among their suggestions is making it mandatory to give special attention to developing country Members’ particular problems and interests during consultations (DSU Article 4.10), and requiring panels to rule on whether this obligation was duly carried out. They have also proposed changes to Article 12.10 to provide developing country Members sufficient time to prepare and present their argumentation before panels.

Endnote

- 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 — it may deal with a good that is crucial to their economy, for example.

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

This series of **Doha Round Briefings** is published by the International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD).

Mark Halle (IISD) and Ricardo Meléndez-Ortiz (ICTSD) conceived the Briefings. Contributing writers at ICTSD included: Heike Baumüller, Hugo Cameron, Anja Halle, Ricardo Meléndez-Ortiz, Victor Mosoti, David Primack, Mahesh Sugathan, David Vivas and Alexander Werth. Trineesh Biswas (IISD) served as copy editor, Donald Berg as graphic designer and Stuart Slayen (IISD) as publication manager. Funding for this project has been provided by the Swiss Agency for Development and Cooperation through IISD and by ICTSD’s supporting donors. Series Editor: Anja Halle, ahalle@ictsd.ch. Series Directors: Ricardo Meléndez-Ortiz, rmelendez@ictsd.ch and Mark Halle, mhalle@iisd.ca.

The full series as well as upcoming updates can be found at www.ictsd.org and at www.iisd.org. Copyright: ICTSD and IISD, February 2003.

The International Centre for Trade and Sustainable Development (ICTSD) – <http://www.ictsd.org> is an independent non-profit and non-governmental organization based in Geneva. Established in 1996, ICTSD’s mission is to advance the goal of sustainable development by empowering stakeholders in trade policy through information, networking, dialogue, well-targeted research and capacity building to influence the international trade system. ICTSD is the publisher of *BRIDGES* Between Trade and Sustainable Development®; and *BRIDGES* Weekly Trade News Digest®. Co-publisher of *PASSERELLES* entre le commerce et le développement durable® (with ENDA Tiers-Monde); *PUENTES* entre el Comercio y el Desarrollo Sostenible® (with Fundación Futuro Latinoamericano - FFLA and Centro Internacional de Política Económica para el Desarrollo Sostenible - CINPE); and *BRÜCKEN* Zwischen Handel und Zukunftsfähiger Entwicklung® (with GERMANWATCH).

The International Institute for Sustainable Development (IISD) – <http://www.iisd.org> contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change, measurement and indicators, and natural resource management. By using Internet communications, we report on international negotiations and broker knowledge gained through collaborative projects with global partners, resulting in more rigorous research, capacity building in developing countries and better dialogue between North and South.

IISD’s vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD receives operating grant support from the Government of Canada, provided through the Canadian International Development Agency (CIDA) and Environment Canada, and from the Province of Manitoba. The institute receives project funding from the Government of Canada, the Province of Manitoba, other national governments, United Nations agencies, foundations and the private sector. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States.