PAPER

The Review, Improvement and Clarification of the WTO Dispute Settlement Understanding

Felix Maonera

CUTS International

The Review, Improvement and Clarification of the WTO Dispute Settlement Understanding

Authored by:

Felix Maonera

Published by:

CUTS INTERNATIONAL, GENEVA
Rue de Vermont 37-39
1202 Geneva, Switzerland
www.cuts-geneva.org

This paper was undertaken by Felix Maonera, Acting Head, Permanent Delegation of the African, Caribbean and Pacific (ACP) Group in Geneva. It is published under CUTS Internataional Geneva's project "Keeping Pace with Trade Developments", undertaken with funding support from the Ministry of Foreign Affairs, Sweden.

Citation: MAONERA, F. (2018). *The Review, Improvement and Clarification of the WTO Dispute Settlement Understanding.* Geneva: CUTS International, Geneva.

Table of Contents

Abbreviations

AB	Appellate Body
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
US	United States of America
WTO	World Trade Organisation

Executive Summary

Members of the World Trade Organisation consider as a fundamental cornerstone the WTO Dispute Settlement Understanding (DSU), which governs the functions of the WTO Panels, the Appellate Body and the Dispute Settlement Body. These three components together comprise the WTO dispute settlement system.

Three times now Members have undertaken to review, improve, clarify and amend the DSU. The first time WTO Members agreed to review the DSU was in 1994 when they decided to undertake its full review. That review was not completed by the set deadline of 1998. The second time was in 2001 at the Doha Ministerial Conference where Members agreed to enter into negotiations on improvements and clarifications of the DSU. The third time was in 2018 after the US blocked the appointment of members of the WTO Appellate Body citing a number of reasons and concerns.

The negotiations for improving and clarifying the DSU that began in 2001 after the failure of the initial review, and are still ongoing, have been grouped into twelve thematic categories comprising: third party rights; panel composition; remand; mutually agreed solutions; strictly confidential information; sequencing; post-retaliation; transparency and amicus curiae briefs; timeframes; flexibility and member control; developing country interests, including special and differential treatment; and effective compliance. From initial conceptual discussions, the issues are now captured in draft legal text on the basis of which Members are continuing their work. In some areas the contours of possible agreement are set, needing little or no further work on the text, while the text is still evolving in other areas. Agreement is being shaped around issues that conform to the agreed principles such as that the improvements and clarification should benefit the entire Membership and the system, should be realistic, should be necessary and achievable, and should do no harm to the operation of the dispute settlement system.

In 2018 Members began considering proposals (under a track separate from the ongoing DSU negotiations) to amend the DSU to take into account concerns raised by the US. Regardless of the merits or otherwise of the US concerns and of the proposals, the resolution of that matter lies in the hands of the US, which can continue to block the appointments of Appellate Body members if the proposed solutions do not meet its expectations.

With three attempts now, what are the chances that the DSU will end up being reviewed, improved, clarified and amended? The legal text which is the basis of the ongoing negotiations defines the shape of possible agreement. As WTO negotiations go, the text should be considered as representing progress since many subjects of negotiation never go beyond the conceptual stage. However, only time will tell when the process could be completed.

The Context

The general belief among the Members of the World Trade Organisation (WTO) is that the WTO Dispute Settlement Understanding (DSU) is a fundamental cornerstone of the WTO and, by extension, of the multilateral trading system. The DSU governs the functions of the WTO Panels, the Appellate Body (AB) and the Dispute Settlement Body (DSB), which together comprise the WTO dispute settlement system.

The following is how the WTO Director-General, Mr. Roberto Azevedo, described the WTO dispute settlement system in 2014;[1]

> "There is no question that the WTO's dispute settlement system has been a success. The numbers tell their own story about how valued it has become. In just under 20 years since the system came into being, 482 requests for consultations have been received. In 47 years under the GATT, (only) 300 disputes were received. In 68 years, the International Court of Justice received (only) 162 cases."

And,

> "The WTO dispute settlement system has served the Membership extremely well. It is recognized the world over for providing fair, high-quality results that respond to both developing and developed country Members. It is faster than most, if not all international adjudicative systems operating today, to say nothing of domestic courts the world over."

While it is generally agreed that the WTO dispute settlement mechanism is so far the most successful amongst similarly constituted international dispute resolution mechanisms, it is also now generally accepted that the system is not perfect, and that it does not always work perfectly at all times, for all the Members. The blockage of the appointment of AB members by the United States of America (US) citing several concerns about the way the system operates points to the fact there is room to review the DSU, and to improve, modify and amend it. The WTO dispute settlement system has over the years revealed that certain of its aspects need attention; major surgery for some aspects and just tweaking for others. WTO Members have on three separate occasions undertaken to do that.

The first time WTO Members agreed to review the DSU was in 1994 when they adopted a decision in Marrakech to undertake its full review in the context of the (then) newly-created WTO, with a deadline of 1998 for the completion of that review.[2] That review mandate was narrowly crafted to enable the Members to take a decision whether to continue, modify or terminate the dispute settlement rules and procedures that had been used by the GATT Members before the formation of the WTO. The review could not be completed by the 1998 deadline although extensive discussions had been conducted in informal meetings at the WTO.[3] There was a consensus of the Members to extend the deadline

[1] Minutes of Meeting:Statement by the Director-General Regarding Dispute Settlement Activities; WT/DSB/M/350 dated 21 November 2014

[2] Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, paragraph 3, (page 408 of the Legal texts)

[3] Statement by the Chairman of the Dispute Settlement Body, Ambassador Karmel Morjane of Tunisia, on 8 December 19998; Document WT/DSB/M/52 dated 3 February 1999.

to the end of July 1999. That deadline too was not met.

The second time Members made another undertaking was at the 2001 Doha Ministerial Conference. This time the Members had a mind to do more than just 'review' the DSU, and agreed to enter into negotiations on improvements and clarifications of the DSU.[4] These negotiations were to be based on the work already done (in the incomplete 1994 mandated review), as well as on any additional proposals by Members. And perhaps as another measure of the importance of the DSU, the Members agreed that these negotiations would not be part of the Doha Development Agenda, meaning that they would not be linked to negotiations or results of negotiations in other areas in which negotiations were also launched in Doha. The Members gave themselves a deadline of not later than May 2003 to complete the negotiations. That deadline too, was to prove ambitious and could not be met. In July 2003 the WTO General Council extended the deadline to May 2004, which deadline was not met either. The Members then agreed at the General Council meeting on 1 August 2004 to further extend that deadline, with no specific end date. By then Members must have fully understood the enormity of the task at hand and that no kind of deadline could hasten agreement on the intractable issues that were under discussion.

At the 5th WTO Ministerial Conference in Hong Kong in 2005, Members took note of the progress that had been made in the ongoing negotiations and directed the Special Session to continue to work towards a rapid conclusion of the negotiations.[5] However, by 2018, Members were still engaged in negotiations to improve and clarify the provisions of the DSU.

The third attempt by Members was in 2018 after the US blocked, since 2016, the appointment of members of the WTO Appellate Body[6], citing a number of reasons and concerns.[7] This move by the US threatened to paralyse the functioning of the WTO dispute settlement system, even as Members were still engaged in the 2001 mandated negotiations to improve and clarify the DSU. In a bid to respond to the US concerns and resolve the issue to ensure the proper functioning of the WTO dispute settlement system a number of Members tabled proposals.[8] These 2018 proposals to reform and amend the DSU are not based on any specific mandate, but are simply based on the fact that the WTO is a forum for negotiations and any Member can propose amendments to any of the WTO agreements.

No specific deadline has been set either for this reform. However, one might say this issue has an

---

[4] Paragraph 30; Doha Ministerial Declaration; WT/MIN(01)/DEC/1 dated 20 November 2001

[5] Hong Kong WTO Ministerial Declaration, Document WT/MIN(05)/Dec dated 22 December 2005, paragraph 34

[6] This is a standing body established in terms of Article 17 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes to hear appeals from WTO panel cases. It is composed of seven persons, three of whom shall serve on any one case. The WTO Dispute Settlement Body appoints persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once.

[7] The reasons included, disregard by the AB of the 90-day deadline for appeals; the continued handling of cases by AB members even after their retirement; the issuing of advisory opinions on issues not necessary to resolve a dispute; the review of facts (as opposed to only law) by the AB and the review of a Member's domestic law *de novo*; claims by the AB that its reports set precedent (as opposed to being binding only between the parties to a dispute) and generally, the AB's tendency to add and diminish the rights and obligations of Members. This issue was dealt in detail by this author in a paper MAONERA, F. (2018) An Agenda for Reforming the World Trade Organisation: A New Wind Blowing. Geneva. CUTS International. Geneva. Available at…..

[8] Canada: Communication entitled *Strengthening and Modernising the WTO: Discussion Paper*; JOB/GC/201, dated 24 September 2018. Honduras: Communication entitled *Fostering a Discussion on the Functioning of the Appellate Body*, JOB/DSB/1, dated 20 July 2018. EU et al: Communications WT/GC/W/752 and 753 dated 26 November 2018. The European Commission also discussed this matter in detail in a background note on the modernisation of the WTO (WK 8329/2018) available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

in-built deadline in that if the US continues to block the appointments, then by the end of 2019 the number of AB members will have gone below the required three as the terms of two of the current three members will have expired on 10 December 2019. That would mean that the WTO dispute settlement mechanism would be semi-paralysed, with only the panels and the DSB continuing to operate on the existing rules but with no appeal mechanism. In a communication[9] in November 2018 proposing amendments to the DSU to accommodate the US concerns, the EU *et al* noted the "urgency of the matter" and proposed that the amendments be adopted by the General Council "as soon as possible" pursuant to the quick route provided for in Articles IV:2[10] and X:8[11] of the Marrakech Agreement Establishing the WTO. The question is, will this third attempt meet with success? One can only answer that with the cliché; only time will tell.

The WTO dispute settlement system of panels, the Appellate Body and the Dispute Settlement Body (DSB) were designed to serve the GATT Membership, which was smaller in number than the current 168 WTO Members. So, it is understandable that as the system evolved to serve an ever-growing number of members engaged in more disputes, its very design, suitability and efficacy would be tested.

The duty of a panel, (to be composed of well-qualified governmental and/or non-governmental individuals), is to address the relevant provisions in any covered agreement or agreements cited by WTO Members parties to a dispute and make such findings as will assist the DSB in making recommendations or in giving the rulings provided for in that/those agreement(s).[12] Its function is therefore to assist the DSB in discharging its responsibilities under the DSU.[13] The Appellate Body hears appeals from panel cases. It shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.[14] An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.[15] The DSB, composed of all the WTO Members, has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations.[16] As becomes clear, the DSB has pride of place in the dispute settlement system and is the institutional decision-making forum. For the dispute settlement system to operate effectively there has to be consistency in how these three components; the panels, the AB and the DSB, operate.

The negotiations for improving and clarifying the DSU take place in a Special Session of the DSB dedicated to dealing only with this issue, on the basis of proposals made by Members. By 2002, less than a year after the Doha mandate, 16 papers had been received containing proposals on the improvements and clarifications spanning across the whole dispute settlement system.[17] To enable the negotiations to proceed systematically and in a coherent manner, in 2002 the WTO

---

[9] . EU et al: Communications WT/GC/W/752 and 753 dated 26 November 2018

[10] This Article provides that in the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council.

[11] This Article provides that Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

[12] DSU, Article 7

[13] DSU, Articles 7, 8 and 11

[14] DSU, Article 17.3

[15] DSU, Articles 1,3 and 6

[16] DSU, Article 3.1

[17] Special Session of the DSB: Note by the Secretariat; Compilation of Negotiating Proposals; JOB)(02)/42/Rev. 6 dated 13 November 2002

Secretariat made a compilation of all the negotiating proposals[18] arranging the issues in a thematic fashion. In December of the same year, the Secretariat also did a Checklist of Issues[19] which identified the issues raised in the proposals and linked them to the relevant DSU provisions. In 2008, based on the status of negotiations then, a consolidated draft legal text was produced as a working document[20]. This draft legal text has been revised and amended over the years based on the ongoing discussions. At the time of writing, the latest text was a 2013 compilation[21] which can be considered as the most significant achievement in the negotiations to date.

The enthusiastic response by Members as seen in the large number of proposals submitted in 2002 again testifies to how important Members think the dispute settlement system is. The fact that the process has gone on for about 18 years means there is simply no way the improvements and clarifications can be rushed through on a matter that Members attach such importance to. Anyone familiar with WTO negotiations will also be aware that it is often difficult to change already agreed text, such as the DSU. Already adopted WTO agreements always contain compromise language to accommodate the interests of all the Members and lead to their adoption by consensus. Any suggestions for improvements and clarifications that threaten that balance are unlikely to meet with success. Hence the careful and protracted negotiations. The aim is to find convergence across all areas in a single undertaking, which means 'nothing is agreed until everything is agreed'.

Members are conducting the negotiations on the basis of certain principles, such as that any improvements and clarifications should benefit the entire Membership; focus should be on systemic improvements and clarifications that would increase the effectiveness of the dispute settlement system leading to its predictability and security, and that negotiations should achieve overall balance and do no harm where the system currently functions well. [22] Further, it is understood that the intention is to develop specific solutions, while limiting drafting changes to what is necessary to achieve the intended purpose. Members also seek to avoid the introduction of new concepts not necessary for the improvement and clarification, and to achieve internal consistency between unchanged existing DSU text and proposed new amended text, while avoiding introducing new procedural complexities.[23]

It is against this background of already advanced negotiations that in 2018 some Members tabled proposals[24] to amend the DSU as a response to the concerns raised by the US, and in the context of WTO reform. The EU *et al* communication recalls the shared responsibility of all Members for the proper functioning of the dispute settlement system, expresses concern about the lack of consensus to fill the AB vacancies, acknowledges the concerns raised (by the US) and proposes to amend the DSU "in order to achieve balance." Interestingly, none of the 2018 proposals makes any reference, link or connection to the ongoing negotiations to improve and clarify the provisions of the DSU.

---

[18] Special Session of the DSB: Note by the Secretariat; Compilation of Negotiating Proposals; JOB)(02)/42/Rev. 6 dated 13 November 2002
[19] Special Session of the DSB: Checklist of Issues; JOB(02)/86/Rev.6 dated 12 December 2002
[20] In TN/DS/25, Annex 1, dated 18 July 2008
[21] Job/DS/14 dated 28 May 2013
[22] Reflected in, *Special Session of the Dispute Settlement Body:* Report by the Chairman, Ambassador Ronald Saborio Soto; TN/DS/27, dated 6 August 2015
[23] Reflected in, *Special Session of the Dispute Settlement Body:* Report by the Chairman; TN/DS/25, dated 18 July 2008.
[24] Communication from Honduras: *Fostering a Discussion on the Functioning of the Appellate Body*, JOB/DSB/2, dated 20 July 2018; Communication from the European Union *et al*, WT/GC/W/753, dated 23 November 2018

SECTION 1

Aspects of the Negotiations

The negotiations for improving and clarifying the DSU have been grouped into twelve thematic categories comprising: third party rights; panel composition; remand; mutually agreed solutions; strictly confidential information; sequencing; post-retaliation; transparency and amicus curiae briefs; timeframes; flexibility and member control; developing country interests, including special and differential treatment; and effective compliance. Under each of these themes are a plethora of issues that form the subject of the negotiations.

As can be appreciated, it is not possible in a paper of this length to deal with all the issues being discussed under the thematic categories, some of which are quite technical and legally complex. So this is an attempt 'from thirty-thousand feet' to present the themes (and the issues under each theme) in a manner that enables one to have a sense of what is being proposed and why it is being proposed, without bogging them down in the technical and legal details.

Unlike in most of the WTO negotiations in other areas, there is not the usual clear developed/developing country divide in the negotiations on these issues, except for those issues that clearly apply only to developing and least-developed countries. But even then, one can see an attempt by Members on those issues to look for solutions with a view to making the dispute settlement system effective for all, while maintaining procedural consistency throughout the system. One can therefore say, generally, that the negotiations have called for cooperation and complementarity among the whole Membership, developed and developing countries alike. The draft legal text on the basis of which Members are working looks set in some areas, needing little or no further work. But in some areas, the text is still evolving as the discussions and the Members' thinking on the issues evolves.

Third party rights (Article 10 of the DSU)

A third party is any other WTO Member not directly involved in the dispute but that considers that it has a "substantial interest" in a matter before a panel. [25] Substantial interest might include the fact that the Member also has major trade interests in the product that is the subject of a dispute between parties such that whatever finding the panel makes in that particular dispute might systemically affect the future trade of that product by the third party.

The proposals under this theme seek to address third-party rights in panel proceedings, and at the appellate stage. The DSU provides an opportunity for a third party to be heard by the panel and to make written submissions to the panel. Third parties also receive the submissions of the parties to the dispute to the first meeting of the panel.[26] The intention of the proposals is to give third parties more rights of participation at the panel and AB stages.

Members seem agreeable to enhance third party rights at the panel stage on a case-by-case basis so that for example, the third party can be present at the substantive meetings of the panel with the

[25] DSU, Article 10.2

[26] DSU, Article 10.2 and 10.3

parties to the dispute preceding the issuance of the interim report; make written submissions prior to the first substantive meeting, and make an oral statement to the panel. In addition, some favour that Members be allowed to become third parties for the first time at the appellate stage of a dispute, while others feel this may create excessive additional burdens for appellate proceedings.

This issue is a systemic one, and one on which Members are likely to find common ground around the issues of the right to join in consultations as third parties, enhanced third-party rights in panel proceedings and the timing of notification of interest to participate in panel proceedings as a third party, since there is always the likelihood that every Member might at one point or another find itself in a position to want to be a third party to a dispute.

Panel composition (Article 8 of the DSU)

The proposal is to create a panel roster and to define the expertise expected of panelists. Some Members believe that the establishment of a panel roster could entail significant procedural burdens, and that flexibility is needed to select panelists with appropriate experience and expertise for each dispute. However, there is convergence around the need to clarify the overall combination of expertise required in the composition of panels, and the process of selecting.

This issue is not likely to bring any significant changes to the current functioning of the system considering that it is already a requirement in the DSU that a panelist be a well-qualified governmental and/or non-governmental individual.[27] Also, it is already a requirement in the DSU that, to assist in the selection of panellists, the WTO Secretariat should maintain an indicative list of governmental and non-governmental individuals possessing the required qualifications. Members can also periodically suggest names of governmental and non-governmental individuals for inclusion on this indicative list.[28]

Remand

Remand refers to the practice of the referral of a case by a higher court to a lower court for further consideration. Currently, no such procedure exists in the DSU. In the context of the negotiations, the proposal is that a procedure be introduced to allow the AB to send a case back to the panel for the panel to make additional findings in respect of issues for which the AB believes it needs more factual determination by the panel to enable the AB to complete its legal analysis. If the AB cannot complete the legal analysis, then the appeal dies there and the complaining party would have to initiate the dispute proceedings afresh.

While at the beginning of the discussion it looked like Members could find agreement on this issue, the current debate has led to some pronounced disagreements. Some Members favour a remand procedure in principle, subject to the working out of the details of such a procedure to deal with aspects such as the impact that remand proceedings would have on the overall timeframes for dispute settlement, guarding against unintended consequences, and preventing one party to the dispute from exploiting the availability of remand to delay dispute settlement. Doubt has been expressed by others on the utility of a remand procedure, with concerns raised such as that it would have negative consequences for a dispute settlement system that has been working

[27] DSU, Article 8.1

[28] DSU, Article 8.4

well for many years with remand never being critical for the resolution of a dispute. It is also feared that the availability of remand could lead to panels preparing incomplete reports; the AB choosing not to complete the legal analysis in some cases and simply resort to remand; parties trying to re-argue their cases on remand, and the adverse implications remand could have for the resources of parties to the dispute.

Remand appears however to be a procedure that would improve the functioning of the dispute settlement system by enabling the AB to ask a panel to clarify certain factual issues so that the AB can complete the legal analysis that might be key to resolving the dispute.

Mutually agreed solutions (Article 3 Of the DSU)

Mutually agreed solutions are those solutions negotiated and agreed to between the parties to a dispute on an issue that they have already initiated under the dispute settlement system. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements are supposed to be notified to the DSB and to the relevant Councils and Committees, where any Member may raise any point relating thereto.[29]

The negotiations are around the suspension of panel and AB proceedings upon the parties' agreement and whether the parties would be expected to submit their notifications jointly, unless a party prefers that notifications be submitted separately. These types of solutions, especially if they are consistent with the covered agreements, are clearly to be preferred.

Strictly confidential information

The proposal is to enhance the protection of information such as business confidential information which may require special protection in order to be presented in WTO dispute settlement proceedings, called strictly confidential information. The DSU does not currently protect strictly confidential information although it already provides modalities for the protection of confidential information submitted in the course of dispute settlement proceedings, such as that the information shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information. [30] However, some Members feel there is a need for a standard new rule on how strictly confidential information should be handled in continuity beyond the panel stage to cover also AB and any subsequent proceedings.

There seems to be broad support for the introduction in the DSU of language to require panels to adopt measures for the protection of strictly confidential information if requested by a party to the dispute. There still remains to be determined what type of information is to be considered as strictly confidential, and what happens in the case of objections by a party to the designation, or non-designation, of information as strictly confidential.

This issue does have linkages to a number of DSU provisions and other proposals addressing the confidentiality or publicity of information, and submissions or hearings. And usually, the more linkages there are, the more difficult it becomes to achieve coherence and consistency throughout the dispute settlement system, which might make some Members hesitant to embark on such changes.

[29] DSU, Article 3.6

[30] DSU, Articles 13, 18, and Appendix 3 "Working Procedures", as well as Appendix 4 "Expert Review Group"

Sequencing (Article 21 of the DSU)

The DSU provides that where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, such disagreement shall be decided through recourse to the dispute settlement procedures including, wherever possible, resort to the original panel.[31] A determination of compliance or non-compliance is necessary before an authorization to suspend concessions may be granted. The issue is what sequence should be followed, or what should happen first, in these circumstances in relation to events that would trigger the initiation of retaliation proceedings where the member who lost the dispute has not complied with the ruling against it; the relationship between the events triggering the negotiation of compensation and those triggering the initiation of proceedings for the suspension of concessions or other obligations, and the relationship between negotiation of compensation and the initiation of retaliation proceedings.

Discussions seek to clarify the possibility for consultations prior to initiating compliance panel proceedings and the question of which party should have the possibility of initiating compliance proceedings. Members seem to congregate around proposals that consultations would be possible, but not required, prior to the establishment of a compliance panel; that compliance panel proceedings would be initiated by the complaining party, and that the initiation of retaliation proceedings would be possible only after one of certain listed events has occurred, including a prior determination of non-compliance through compliance proceedings.

Though of a rather technical nature, this is an issue that Members should be able to resolve in further discussions since they are all committed to effective compliance. Any proposals to better clarify what should happen when the losing party feels it has complied while the winning party feels that compliance has not happened, can only benefit the system.

Post-retaliation

Post retaliation relates to what happens after an authorization to retaliate has been granted to a successful complainant but the Member against whom the retaliation is to take place considers that it has complied. In such a case, authorization to retaliate may have to be withdrawn. The DSU does not currently cover post-retaliation. This issue has obvious linkages to sequencing and it is understood that the approach taken to that issue could be a useful guide to the approach to be followed on post-retaliation.

The intention is to introduce a procedure to determine whether compliance has indeed been achieved by the Member that considers that it has complied. Issues raised in discussions include which of the parties could initiate such proceedings, the nature of recommendations and rulings arising from such proceedings, and the question of what implications partial compliance might have in this context. The clarification of this issue offers benefits to the system.

Transparency and *amicus curiae* briefs (Article 13 of the DSU and Appendix 3)

The transparency proposals seek to open panel and AB hearings to public observation and to make parties' submissions accessible to the public. Members who support this 'enhanced

[31] Article 21.5

transparency' believe that such openness could contribute to greater public confidence in the dispute settlement process, while those who oppose this point to the intergovernmental character of the dispute settlement proceedings and the need to protect confidential information. Some have encouraged, instead, resort to the existing *ad hoc* practice under the current rules where parties can agree to open hearings to the public in a variety of formats in specific cases. A significant number of Members have expressed support for making submissions to the panels and the Appellate Body public, while others have expressed reservations as to whether this would be of any benefit to the system. Others feel there is a risk of misrepresentation by the press of the debate at public panel meetings/AB hearings.

There seems to be a strong desire by some Members to want to guard the intergovernmental nature of WTO dispute settlement proceedings, making it unlikely that Members will reach consensus on further opening the proceedings to the public.

Amicus curiae briefs are submissions made to a panel or AB usually by civic organisations not parties to the dispute, but who consider they have a systemic interest in the issue. In a case on the banning of tobacco, for example, one organisation might support this for health reasons while another might oppose this because of the adverse trading effects a ban on tobacco could have. Both would have an interest in submitting *amicus curiae* briefs stating their positions on the issue as 'friends of the court.' The DSU provides[32] that each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A panel or AB, therefore, has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations that are not Members of the WTO. The participation by private individuals and organizations is dependent upon the Panel and Appellate Body permitting such participation, if it deems it useful to do so.

In the negotiations, some Members believe that there should be a general prohibition on unsolicited briefs to protect the intergovernmental nature of WTO dispute settlement. Others believe *amicus curiae* briefs should be allowed and can be managed through regulating the timing of their submission, their length and their contents.

Agreement is unlikely on this issue, again because of the intergovernmental nature of the proceeding, which some Members seek to protect. There is also nothing to stop a party to a dispute including in its written submissions briefs from any organisation that it feels would further its case.

Time-frames (Articles 2, 3, 5, 12, 20 and 21 of the DSU)

The proposal is to shorten timeframes at specific stages of the dispute settlement proceedings in order, according to the proponents, to speed up the process and reduce the amount of resources expended on settling disputes. For example, a suggestion has been made to shorten the minimum consultation period before a panel can be requested from 60 to 30 days.

However, some developing countries have proposed that they be provided additional time when they are defendants in a dispute. Reservations have been expressed on this idea. The request by developing countries for more time when the idea is to shorten time-frames is

[32] Article 13.1

counter-intuitive. Questions have also been raised in relation to the definition of the benchmarks against which such additional time would be counted.

The difficulty one sees in reaching agreement on this issue is the arbitrariness of the time periods being suggested (even if the current timeframes appear to also have been arbitrarily set). Each case has its own peculiarities, and what would be too much time in one case might be too little time in other cases. It is also not demonstrable how much resources would be saved by the shortening of times frames. In addition, the AB has been having difficulty with keeping to the 90-day time limit for deciding appeals, (which is one of the recent concerns raised by the US in 2018) with strong indications that the AB might in fact need more time due to the shortage of AB members, and the increasing complexity of the disputes.

Another factor against possible agreement on this issue is that the reduction of any timeframes in one area will affect other time-bound aspects of the dispute settlement system. One cannot imagine Members being keen to engage in what would be a necessary but time-consuming assessment of the merits of time-savings or extensions in light of their overall cost or contribution to the prompt and effective resolution of disputes.

Developing country interests, including S&DT (Articles 4, 8, 12, 21, and 27 of the DSU)

Obviously pushed by developing and least-developed countries, the proposal is to take into account these countries' interests and to grant to them special and differential treatment in light of the fact that they face unique constraints because of their under- developed status. A number of developing countries have stated that they face resource constraints in accessing the dispute settlement system and have proposed the creation of a dispute settlement fund for developing countries. They have also called for the awarding of litigation costs for developing country Members that would have won their cases. The issue of protecting developing country interests cuts across almost all the themes, touching on effective compliance, mutually agreed solutions, third party rights, timeframes, and *amicus curiae* briefs.

There has been positive engagement as regards creating a funding mechanism targeted at trade-law related technical assistance and dispute settlement capacity building for developing and least-developed countries. The setting up of a dispute settlement fund does have budgetary implications as well, even though some Members feel that contributions need not only be financial, but they could also be in-kind. It has also been suggested that voluntary funding mechanisms could be put in place. However, some developed countries feel there are existing solutions to the problems raised such as the provision of technical and dispute settlement assistance by the WTO Secretariat, and by the Advisory Centre on WTO Law.

Some believe that the DSU does already make provision for particular attention to be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.[33]

The hurdle to finding a solution on this issue probably remains that some Members (developed countries) do not believe that all developing countries should be given blanket favourable treatment since, in the view of these developed

[33] DSU, Article 21.2, as well as in Articles 3,4,8,12,22 and others

countries, the situations of individual developing countries in respect of human and financial resources available for dispute settlement vary considerably. However, funding mechanisms for enhanced trade related technical assistance to developing and least-developed countries based on identified needs, on a case by case basis, through the WTO Secretariat and the ACWL could be feasible as Members continue to develop their thinking around this issue.

Flexibility and members' control (Article 2 of the DSU)

Some Members seek to have more control of certain aspects of the dispute settlement system beyond the control they exercise through the DSB. For instance, Members want to have the ability to jointly seek the deletion of parts of panel or AB reports that they deem unnecessary for the resolution of the dispute, or to allow Members to partially adopt such reports. Others are opposed to this idea, arguing that this may adversely affect the adjudicators' determinations and the outcome of a case, as well as the integrity of the reports.

Others have proposed, and there seems to be broad support for, allowing the suspension of panel or AB proceedings upon a joint request by the parties. Also proposed is the possibility of Members providing additional guidance to adjudicators on the use of public international law and the interpretive approach to be followed.

Allowing parties to a dispute to agree to the suspension of panel or AB proceedings, (presumably after working out a solution in private) seems something Members can agree to if they can work out modalities of how this could be done, as well as the import of such a suspension and what would happen if one of the parties changes their mind about the suspension. Providing for Members to give additional guidance to adjudicators on the use of public international law and the interpretive approach to be followed might mean Members are stepping into adjudicators' territory and could, for that reason, be difficult to find an agreement on as it speaks to the integrity of the panel and AB reports, and the independence of the adjudicators.

Effective compliance (Articles 21 and 22 of the DSU)

The DSU states that prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.[34] The proposals seek to promote and ensure prompt and effective compliance with panel and AB rulings by the party at fault.

In this context, some developing countries proposed automatic collective or group retaliation by all WTO Members against a developed country (as a matter of special and differential treatment) in the case where a developing or least developed country Member has been a successful complainant in a dispute. This proposal takes into account the fact that the economies of small developing and least-developed countries could be decimated if they retaliated against a powerful trading partner by suspending trading with that partner. A proposal has also been made that there be monetary compensation awarded to a developing or least-developed country that would have prevailed in a case but whose economy would have suffered harm in the time it takes to settle the dispute. Compensation is provided for in the DSU[35] in the event that recommendations and rulings are not implemented within a

[34] DSU, Article 21.1

[35] DSU, Article 21.1 and 21.2. It is provided that however, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.

reasonable period of time, but it is voluntary and there is no requirement that it be monetary. In an attempt to make compensation actually work in practice, some Members have proposed that if a dispute is one initiated by a developing-country Member against a developed country member, the DSB may recommend monetary compensation. A point to note is that the provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.[36]

It has been proposed also that retaliation across sectors, called cross-retaliation, (instead of retaliation in only the same sector as that to which harm was caused) be available to developing country and least-developed country complainants, as a matter of right, where the defendant is a developed country. Under the DSU [37] the general principle is that the complaining party (developed or developing country) should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which a violation or other nullification or impairment has been found. If that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement. Further, if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another WTO agreement.

The suspension of concessions across sectors was authorized by an arbitration panel with respect to prohibited cotton subsidies found to be inconsistent by the original Panel and the Appellate Body in a case involving Brazil and the United States. [38] Brazil argued before the arbitrator that it was neither practicable nor effective for it to suspend concessions only on imports of US goods and that the circumstances were serious enough to justify the suspension of concessions or obligations under other covered agreements, and proposed to suspend the concessions also under the GATS and the TRIPS Agreement.[39] The United States argued that not only had Brazil failed to follow the required principles and procedures but that, in addition, given the size and diversity of the Brazilian economy, Brazil could not justify and demonstrate its claim that applying countermeasures with respect to only goods was not practicable or effective.[40] The panel found that Brazil would be entitled to suspend certain obligations under the TRIPS Agreement and/or the GATS, with respect to any amount of permissible countermeasures applied in excess of a certain threshold.[41]

The proposal by some Members is that in a dispute in which the complaining party is a developing-country and the other party which has failed to bring its measures into consistence with the relevant agreement is a developed country, the developing country shall have the right to seek authorization for the suspension of concessions or other obligations with respect to any or all sectors, under any of the WTO agreements.

Despite the desirability of prompt and effective compliance, the underlying concepts in the

[36] DSU, Article 3.7
[37] DSU, Article 22.3
[38] *United States – Subsidies on Upland Cotton: recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*; WR/DS267/ARB/2, dated 31 August 2009
[39] *United States – Subsidies on Upland Cotton: recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*; WR/DS267/ARB/2, dated 31 August 2009, Section V, para 5.1, page 52
[40] *Ibid,* para 5.2
[41] *Ibid*, Section VI, para 6.3, page 100

proposals and the putting in place of modalities to give effect to these proposals are unlikely to lead to agreement, the main reason being that developing countries (including large developing countries) would be given the same blanket favourable treatment. Developed countries are against such blanket treatment. On collective or group retaliation, the reality is that many countries' economies are struggling and would suffer great harm if they were to suspend trade with powerful trading partners in solidarity with a developing country compatriot whose economy would have been harmed by the measures adopted by a large trading partner. And, of course, the offending large trading partner might turn out to be a developing country too, further complicating matters.

DSU amendment in the context of the proposed WTO reform

In 2018 some Members tabled proposals,[42] in a track separate from the ongoing DSU negotiations in a bid to resolve concerns raised by the US with certain aspects of the dispute settlement system. The US indicated since 2016 that it would not support appointment by the DSB of AB members until certain of its concerns had been resolved, effectively vetoing the appointments and thereby threatening to paralyse the work of the AB. The US concerns relate to: disregard by the AB of the 90-day deadline for appeals; the continued handling of cases by AB members even after their retirement; the issuing of advisory opinions on issues not necessary to resolve a dispute; the review of facts (as opposed to only law) by the AB and the review of a Member's domestic law *de novo*; claims by the AB that its reports set precedent (as opposed to being binding only between the parties to a dispute) and the AB's (perceived) tendency to add and diminish the rights and obligations of Members.

The proposals suggested amending the DSU to provide, among other things, that parties to a dispute can agree to the exceeding of the 90-day rule; an outgoing AB member shall only serve beyond retirement for the disposition of a pending appeal in which a hearing has already taken place during the member's term; the AB shall address each of the issues raised on appeal by the parties to the dispute to the extent necessary for the resolution of the dispute; and that annual meetings be held between Members and the AB to enable Members to express their concerns with regard to some of the AB approaches, systemic issues or trends in the jurisprudence. Interestingly, the issue of the 90-day rule has also arisen in the context of the ongoing negotiations to improve and clarify the DSU, with suggestions having been made on the need to find an outcome that balances agreement by the parties to extend this time frame where necessary, and the workload of the AB as well as its independence.[43]

Some of the proposals seek to guarantee the independence of the AB members by proposing that they be appointed for one single longer term so that they don't have to worry about re-appointment even if they deliver rulings that some of the Members may not like. A proposal was made for reverse consensus in the appointment of AB members (meaning, all Members would have to agree for the appointments not to take place) to avoid one Member vetoing the appointments as the US has done.

Making these proposals under a track separate from the ongoing DSU negotiations, even though

[42] Canada: Communication entitled *Strengthening and Modernising the WTO: Discussion Paper*; JOB/GC/201, dated 24 September 2018. Honduras: Communication entitled *Fostering a Discussion on the Functioning of the Appellate Body*, JOB/DSB/1, dated 20 July 2018. EU et al: Communications WT/GC/W/752 and 753 dated 26 November 2018.

[43] *Special Session of the Dispute Settlement Body:* Report by the Chairman, Ambassador Ronald Saborio Soto; TN/DS/27, dated 6 August 2015, para 3.36

the issues could easily be fitted into the current themes, is necessitated by the fact that by the end of 2019 the AB would not be functional if the US continues to block the appointments. However, the resolution of this matter lies firmly in the hands of the US, which at the time of writing had not tabled any proposal on how it wished to see its concerns resolved, or indicated whether it agreed with the proposals.

SECTION 2

Possible Shape of a Reviewed, Improved and Clarified DSU

The contours of what the DSU could look like after the exercise to review, clarify, improve and amend its provisions can be seen from the draft legal text on the table, and the direction the discussions and negotiations among Members have taken over the years. The negotiations, based on the 12 thematic categories, have been organised around a draft legal text which follows the structure of the DSU, while the 2018 proposals in the context of WTO reform suggest specific amendments, giving one a good idea of the parameters of what could be agreed upon. However, members are unlikely to reach agreement on issues that do not conform to the principles on the basis of which they have been proceeding in the negotiations, which are essentially that the review and clarification should benefit the entire Membership and the system, and be realistic, necessary and achievable.

It can be expected that the DSU will be amended to provide for enhanced third party rights, a systemic issue which stands to benefit the whole Membership considering that at one point or the other each of the WTO Members might find itself as a third party to a dispute. The issue of enabling the AB, through a remand procedure, to ask a panel to clarify certain factual issues so that the AB can complete the legal analysis of an issue would improve the effectiveness of the dispute settlement system as that additional clarification by the panel could be key in resolving the dispute. Mutually agreed solutions are certainly to be preferred as they would lighten the burden of dispute resolution on the system.

The sequencing and post-retaliation issues, linked to each other, would help clarify the procedural aspects of the dispute settlement system, especially the issues of compliance and retaliation.

Although it can be expected that under the flexibility and Members control issue, Members would want to arrogate to themselves more power than they currently exercise through the DSB, agreement can only be reached if the whole Membership believes that the suggested changes do not infringe upon the territories of the other components of the dispute settlement system, the panels and the AB.

Regarding proposals for amending the DSU in the context of WTO reform, Members seem to have little choice here but to find agreement and avoid the system paralysis that the US blockage of AB appointments could cause. However, the merits or otherwise of the US concerns should not be lost sight of in deciding the shape of the amendments. It is the preservation of the integrity of the dispute settlement system that is at stake.

The rest of the issues are unlikely to reach consensus either because the system already accounts for these in some way, or because they may not of great benefit to the system, or are too complicated to be resolved by consensus among all WTO Members. The issue of panel composition and the proposed establishment of a roster of panelists is already provided for in some way in the DSU. Since the protection of confidential information is already a feature of the DSU, a strong case would have to be made for the enhanced protection of ‘strictly’ confidential information. Some Members seem to want to be

gracious to the public through the transparency and *amicus curiae* briefs proposals, but it can be expected that others will continue to insist on guarding the intergovernmental nature of WTO dispute settlement proceedings. Proposals for reducing time-frames are unlikely to see any traction either for the simple reason that adjusting these on any one aspect of the dispute settlement system requires a compensatory adjustment on other aspects, a complicated exercise Members might not be too keen to engage in.

The issues of special and differential treatment and the taking into account of developing country interests is likely to fail on the hills of the argument by developed countries that not all developing countries should be given blanket favourable treatment since the situations of individual developing countries vary considerably. Even though effective compliance is recognised in the DSU as essential, the underlying concepts in the proposals on the setting up of a dispute settlement fund and on group retaliation do not seem acceptable to all. At the same time, and for the sake of the equitable application and use of the WTO dispute settlement system – which will be the best guarantee for the long-term credibility of the multilateral trading system – these proposals should be given serious and sympathetic consideration.

Ideas that have been proposed in the context of WTO reform should lead to agreement, or some kind of compromise, whatever their merits. It can therefore be expected that Members will agree to rein in the AB and take more control of the dispute settlement system than the DSB currently grants to them. However, some of the Members will, undoubtedly, seek to guarantee the independence of the panels and the AB, without which the system would be compromised. Agreement will also have to be reached on the conditions for giving legal effect to the proposed amendments within the shortest time possible to avoid the system being paralysed by the absence of a working AB.

Conclusion

The WTO dispute settlement system has not evolved much since the days of GATT in the 1940s, the reason why a review of the system was mandated in 1994. It is reasonable to expect that a DSU designed that far back to cater for a system that served Members far fewer than the current 168 would need some amending to address observed faults or fissures, or to introduce new components. It has been observed that approximately two thirds of the Membership has participated in the settlement of disputes, in one way or another, and that the disputes have generally become more complex than they were in the first decade of the operation of the WTO.[44] New situations such as the blockage of the appointment of AB members also require some creative tweaking of the DSU to ensure that Members can still have a usable dispute settlement system.

Three times now Members have undertaken to review, improve, clarify, and amend the DSU, beginning in 1994 and continuing in 2018. The draft legal text should be taken to be an encouraging sign. Members have progressed from the early days of the initial conceptual discussions in 2001 to the current stage at which agreement could be reached in the form captured in the draft legal text. As WTO negotiations go, this should be considered as good progress since many subjects of negotiation never go beyond the conceptual stage.

The principles on the basis of which members are proceeding also efficiently define the parameters of the negotiations, and help move the debate along. Members must continue, as they have been doing, to focus on solutions that are realistic and achievable and which would benefit the whole Membership and the system, while responding to the mandate. However, even with that in mind, it is still not easy to predict when these negotiations could be concluded. One thing that is clear though is that if agreement cannot be found on the DSU amendments proposed in the context of WTO reform, then Members might soon not have a working dispute settlement system whose cornerstone, the DSU, they have for years been seeking studiously to review, improve, clarify and amend.

[44] As stated by Mr. Roberto Azevedo, WTO Director-General, in *Minutes of Meeting*: Statement by the Director-General Regarding Dispute Settlement Activities; WT/DSB/M/350 dated 21 November 2014

References

https://www.wto.org/english/tratop_e/dispu_e/dispu_negs_e.htm

Minutes of Meeting: Statement by the Director-General Regarding Dispute Settlement Activities; WT/DSB/M/350 dated 21 November 2014

Special Session of the Dispute Settlement Body: Report by the Chairman, Ambassador Ronald Saborio Soto; TN/DS/27, dated 6 August 2015

Special Session of the Dispute Settlement Body: Report by the Chairman; TN/DS/25, dated 18 July 2008

Special Session of the DSB: Checklist of Issues; JOB(02)/86/Rev.6 dated 12 December 2002

Special Session of the DSB: Note by the Secretariat; Compilation of Negotiating Proposals; JOB)(02)/42/Rev. 6 dated 13 November 2002