

**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

Although the Doha Ministerial Declaration excluded the review of the Dispute Settlement Understanding from the single undertaking in which all negotiations were to end by 1 January 2005, the review suffered from the domino effect of sluggish and difficult talks in key areas such as agriculture after the WTO Cancun Ministerial Conference in September 2003.

Discussions after Cancun have focused on conceptual and organisational matters with a lack of enthusiasm by WTO Members to move on substantial issues. The efforts of a group of six countries led by Norway to salvage the review by presenting an informal 'package deal' consisting of proposed solutions to systemic issues were in vain. With no hope of arriving at a consensus by the new deadline of end-May 2004, Members supported a report by the Chair (TN/DS/M/19) to the WTO Trade Negotiations Committee (TNC) on 30 June 2004 in which he proposed an indefinite extension of the deadline. This report was reflected in the General Council's 1 August Decision on the Doha Work Programme – the July Package – which vaguely affirmed "Members' commitment to progress in this area of the negotiations".

In light of the lack of movement in the DSU review, the general sentiment among delegates is that Members are unlikely to expend any negotiating resources on the DSU talks or to garner the necessary political will to reach a consensus by the Hong Kong Ministerial Conference in December 2005. If this prediction proves true, the Doha Round could mirror the dynamics of the Uruguay Round negotiations where agreement on the rules-related issues, including the DSU, were only reached after the difficult areas such as agriculture and non-agricultural market access had been concluded.

**Background**

During the Uruguay Round, Ministers adopted decision to complete a full review of dispute settlement rules and procedures within four years after the entry into force of the

Agreement Establishing the WTO – by 1 January 1999. 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." Unable to conclude the negotiations by the 1 January deadline, Members approved an extension until July 1999, but were still unable to bridge their differences. The review lingered on inconclusively until ministers agreed in Doha in 2001 to 'improve and clarify' the Dispute Settlement Understanding (DSU). These negotiations have been held in Special Sessions of the DSB since March 2002.

**Mandated Deadlines**

Under the Doha Mandate Members were to 'aim to agree' on an improved and clarified DSU by end-May 2003. In July 2003, they adopted a new end-May 2004 deadline, which was also missed. The July Package endorses the continuation of the negotiations "on the basis set out by the Chairman in his report to the TNC". In this report (TN/DS/M/19), the Chair expressed a preference for an open-ended timeframe for the Special Session to complete its work "bearing in mind that these negotiations are outside the single undertaking". The Chair's report did not, however, rule out considering a target date later.

The repeated failure to reach agreement by agreed deadlines has raised questions about by Members' willingness and commitment to clarify and improve the DSU as mandated by paragraph 30 of the Doha Ministerial Declaration. Some delegates have attributed the slow pace of the negotiations to the fact that the DSU system is working well enough as it is and may not need to be reformed at all – a view that is not shared by many developing countries.

**Scope of Work**

Apart from the timeframe, another area of uncertainty has emerged in the DSU negotiations after Cancun regarding the scope of the review – that is, the proposals to be discussed. The Chair's report to the TNC

stated that consideration would be given to 'all existing proposals'. The definition of this category can be gleaned from his account of ongoing work, on which he noted that "additional progress has been made in the Special Session since [Cancun] building on the work done thus far, including the proposals put forward by Members as well as the text put forward by the Chair in May 2003."

The Chair's text of 28 May 2003, otherwise known as the Balas text after the then-Chair Ambassador Peter Balas of Hungary, contained a large number of issues, including, *inter alia*: third party rights, consultation proceedings, sequencing of retaliation and compliance procedures, remand authority for the Appellate Body, compensation for litigation costs, as well as various elements of special and differential treatment for developing countries.<sup>1</sup> Since the Balas text, Members have submitted five more contributions (two informal and three formal). In light of the broad scope of the review in terms of the proposals to be considered, the sense among some delegates is that opportunities still exist for further reforms. The challenge, however, lies in finding common ground even on existing proposals contained in the Balas text.

## Current State of Play

Since the Cancun Ministerial Conference, the Special Session has met nine times in both formal and informal meetings. Ambassador David Spencer of Australia was appointed as Chair at the fourth meeting.

The disappointment of Cancun was evident in the first meeting in October 2003 convened to discuss a study by Mexico that diagnosed some of the problems of the DSU relating to non-compliance with rulings, access to the system and the often prolonged timeframes for settling disputes. Due to reluctance on the part of both Mexico and other Members present, the meeting was converted into an informal session and discussion on the proposal was postponed. This apathy characterised subsequent sessions, with meetings scheduled for two days lasting for less than an hour.

A case in point was a proposal submitted (but not yet circulated) by Malaysia (JOB(04)/2). Malaysia said that Members

whose domestic industries were experiencing injury due to measures imposed by another WTO Member should be able to apply provisional measures in order to protect and restore their rights, thereby maintaining the status quo pending an appropriate determination by the panel or Appellate Body. The provisional measures prescribed would be implemented until the decision of the Panel on the original action had been given. Members discussed this proposal only briefly.

With the hope of rekindling Member's interest in the advancement of the DSU reform process, Ambassador Spencer's strategy upon election was to postpone discussions on substantive issues until he had met with delegates on an individual or group basis to discuss the best way to move the process forward. Ambassador Spencer also urged Members to strive to bridge their positions in informal meetings outside the Special Sessions. Frustrated by the slow pace of the negotiations, some Members suggested that the scope of the review should be limited to allow for a more realistic outcome and an early harvest. This idea was rejected by some developing country groups, which felt that such a limited scope would compromise the opportunity to reform the DSU to better respond to the challenges they faced in accessing it.

It was against this background and the looming deadline of May 2004 that Argentina, Brazil, Canada, India, New Zealand and Norway introduced a much-anticipated informal proposal during the Special Session of May 2004 (JOB (04)/52). The 'package deal' covered three issues; equipping the Appellate Body with a 'remand' authority to send a complaint back to the original panel for clarification on factual issues; 'sequencing' trade sanctions and compliance rulings so that a party wishing to request sanctions against an offender would have to await a WTO compliance panel decision affirming that the offender in question has not implemented the ruling; and 'post-retaliation' procedures for the removal of previously authorised trade sanctions. Although these proposals were relatively non-contentious, and had also appeared in the Balas text, consensus proved impossible. Coinciding as it did with the Chair's proposal to extend the deadline for the review, the 'package deal' was unable to (even partially) fulfil the Doha mandate.

Nevertheless, when negotiations resumed after the WTO summer recess, this proposal was the focus of the last three sessions for the year. Although Members showed considerable interest and discussions were more detailed this time round, no consensus emerged on any of the three issues. Notably, there was very little engagement on the package deal by the United States, which was of the view that the issue of 'sequencing' did not present any problems that needed to be fixed. The EU disagreed with the suggestion (under 'sequencing') that either party to a dispute could seek a panel to determine whether the offender had complied with a ruling – a right that is currently available only to the complaining party. The proponents of the package deal agreed to address the technical questions and concerns Members had raised and continue discussion in 2005. The Chair thus concluded the DSU review for 2004 with no harvest in sight.

Some developing country delegates have expressed their disappointment with the package deal and the general trend of the discussions. In their view, their concerns outlined in various proposals – relating to a pro-development WTO dispute settlement system – are not being adequately considered.

The two formal proposals submitted to the DSU review Special Session since Cancun were a contribution from Thailand (TN/DS/W/60), which proposed an increase in the number of Appellate Body Members in light of rise in appeals, and a joint proposal from Thailand and Indonesia (TN/DS/W/61), which called for certain changes in the panel stage such as streamlining the time it takes for panelists to be selected. These proposals are yet to be discussed in any detail.

## Endnotes

- <sup>1</sup> For further details of the Balas text see Doha Briefing Series, Vol.2 No. 8 of 13, August 2003. Available at [www.ictsd.org](http://www.ictsd.org)

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

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