



Dispute Settlement Body Special Session

SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY

REPORT BY THE CHAIRMAN, AMBASSADOR RONALD SABORÍO SOTO

1.1. This report is presented under my own responsibility and reflects my understanding and assessment of the current state-of-play and possible way forward in the negotiations.

1.2. As reflected in my report of August 2015¹, the work in the DSU negotiations has advanced significantly over the past two years. Over this period, building on earlier work², participants engaged in an in-depth consideration of all areas under negotiation at the conceptual level, with the goal of building convergence around approaches that would have the broadest possible base of support.³

1.3. This "horizontal process" led to the presentation of potential elements of solutions in respect of all areas under negotiation. In areas where competing approaches previously existed, the main focus has been on seeking convergence around a single approach. In other areas, participants sought to explore flexibilities on the means to address each other's needs, and to develop on that basis elements of solutions that could command greater convergence. In this phase of the work, the focus on concepts and a horizontal perspective allowed flexibilities to be tested across, and not just within, each area under discussion, making it easier to identify potential linkages and start exploring overall balances.

1.4. As a result of this work, in combination with earlier text-based work, convergence of principle has been achieved in certain areas and is already reflected in mature draft legal text. In a number of other areas, significant progress has been made in clarifying the elements that could form the basis of further text-based work. In some areas, further work at the conceptual level would be needed to clarify the basis on which convergence might be found.⁴

1.5. In light of this state-of-play, recent discussions addressed the possibility of reaching agreement on a limited number of mature areas to capitalize on the progress made to date, without prejudice to continuing to seek further progress in areas where full convergence is not yet apparent. While participants were supportive of the goal of achieving agreement where possible - and implementing resulting improvements - as early as possible, concerns remained that any agreed outcomes should reflect a suitable balance of interests and should not prejudice the opportunity for an ambitious outcome in line with the effort that has been invested in this negotiation over the years. A number of participants therefore saw merit in continuing to seek agreement on a set of outcomes as meaningful and ambitious as possible.

1.6. Although it has therefore not been possible to reach agreement on specific outcomes in time for the Nairobi Ministerial Conference, participants remain strongly committed to continuing to work towards agreement on improvements and clarifications of the DSU, as mandated by Ministers.⁵ Participants recognize the systemic importance of this negotiation, the value of the

¹ See Report by the Chairman, TN/DS/27.

² See Report by the Chairman, TN/DS/25.

³ See Reports by the Chairman, TN/DS/25 and TN/DS/26.

⁴ For a detailed assessment of the state-of-play and possible avenues for further work in various areas, see Report of the Chairman, TN/DS/27, Section 3.

⁵ It is understood that, in accordance with paragraph 47 of the Doha Ministerial Declaration, this negotiation is not to be treated as part of the Single Undertaking of the DDA negotiations.

work accomplished to date, and its potential to lead to practical and meaningful outcomes for the benefit of all Members.

1.7. As dispute settlement activity increases⁶, the urgency and relevance of this work is ever more evident. The intensity of dispute settlement activity is a testament to Members' trust and reliance in the system. However, as reflected in recent discussions in the DSB and in the Director-General's recent statement to the DSB, it has also given rise to new challenges that require Members' attention.⁷ This negotiation and the work conducted to date in this framework provide an important avenue for Members to address such challenges and improve the overall efficiency and effectiveness of the dispute settlement system, in the shared interests of the entire Membership.

1.8. There should be flexibility and pragmatism going forward as to how this might be accomplished. It has been suggested for example that certain solutions could be pursued by adopting guidelines, testing the application of certain practices and improvements or developing certain approaches on a flexible basis. Incremental improvements in certain areas may also present a path to finding solutions that take into account the concerns expressed by all participants and an opportunity to build on existing experience.

1.9. Over the years, including the many years of this negotiation, use of the system has evolved in ways that have generated new approaches to meet new realities. Some of the proposals under consideration would in effect confirm or consolidate some of these approaches.⁸ Others would provide durable solutions to procedural issues that have not been resolved, or have been only partially resolved, through the use of the system to date.⁹ In some other areas, solutions developed through specific disputes may not reflect an agreed position of the entire Membership.¹⁰

1.10. Finding more permanent multilateral solutions to such issues – including where relevant by recording or confirming existing practice – could contribute to a more efficient use of resources for all actors involved in WTO dispute settlement. This would also have the benefit of greater inclusiveness for Members who are not frequent users of the system and who have different constraints in benefitting from practices developed on an *ad hoc* basis.

1.11. An incremental approach may also enable Members to find the right balance in addressing long-standing areas of uncertainty while adapting to the continuing evolution of the system. Reflecting on avenues for incremental progress should, however, not come at the expense of the opportunity to make meaningful and ambitious improvements as necessary, or of the need to address the needs of all participants.

1.12. It is the responsibility of Members to determine how to address current and future challenges of WTO dispute settlement, while capitalizing on its proven strengths. WTO dispute settlement is an important systemic element of the multilateral trading system, and all Members

⁶ See WT/TPR/OV/18, 17 November 2015, para. 3.159: "2015 has witnessed the highest level of dispute settlement activity since the inception of the WTO. (...) Several ongoing disputes involve an exceptionally large number of complex issues. While this shows that the Membership has great confidence in the system, it also means that, with current staffing levels, the dispute settlement system is having trouble coping with the workload. There have been delays at the panel stage as a result. Another trend that continued in 2015 was the participation of both developed and developing countries in the WTO dispute settlement system: almost all of the 5 Appellate Body reports and 7 panel reports circulated over this period involved at least one developing country Member as a party, either as the complainant or the respondent."

⁷ See Statement by the Director-General regarding dispute settlement activities, 28 October 2015, at WT/DSB/M/369, to be circulated. See also Statement by the Director-General regarding dispute settlement activities, 26 September 2014, WT/DSB/M/350, item 1.

⁸ For example, the granting of additional third party rights in panel proceedings or the opening to public observation of panel and appellate proceedings, which are under consideration in the negotiations, have, to date, been done on an *ad hoc* basis.

⁹ This is the case for instance in respect of sequencing or remand.

¹⁰ This is the case for instance in respect of unsolicited amicus briefs or post-retaliation.

are the stakeholders of this process. As such, they will be the beneficiaries of its results. It is therefore important, and all the more timely in light of present challenges, that Members continue to devote the effort necessary to bring about improvements and clarifications to the DSU, as mandated by Ministers.¹¹

¹¹ See in particular Ministerial Declaration adopted on 18 December 2005, WT/MIN(05)/DEC, para. 34: "We take note of the progress made in the Dispute Settlement Understanding negotiations as reflected in the report by the Chairman of the Special Session of the Dispute Settlement Body to the Trade Negotiations Committee (TNC) and direct the Special Session to continue to work towards a rapid conclusion of the negotiations."