The Importance of Transparency in WTO Dispute Settlement


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1. **Introduction**

The usage and, as a consequence, the significance of the dispute settlement system of the World Trade Organisation (WTO) is likely to increase in the coming period. This is particularly the case if the Doha Round of multilateral trade negotiations fail to reach a breakthrough.

As this increase in dispute settlement activity occurs, it is important that the WTO dispute system be seen as *legitimate* and *credible*, both by WTO member governments and by the politically important groups to whom those governments are accountable.

Transparency of the process is crucial to promoting the legitimacy and credibility of the WTO dispute settlement system.

2. **Background**

2.1 **The state of the negotiations**

As a recent comment in the *Financial Times* observed, the WTO's "Doha round of trade talks has been declared in crisis for so long that casual observers can be for forgiven for losing interest".\(^1\)

It is questionable whether the negotiations will be able to overcome the current set of impasses:

- Pascal Lamy said earlier this week that what remains to be done in the round remains small compared to the proposals that are already on the table.\(^2\)

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\(^1\) “The Real Costs of a Failure in Doha Multilateralism Must Trump Short Term Interests to Survive”, *Financial Times*, 15 May 2006.

• Minister Truss famously expressed the view in May that a conclusion to the round was "inevitable".\(^3\)

• On the other hand, Trade Promotion Authority in the United States expired at midnight on June 30, and it is axiomatic in trade circles that it is undesirable to submit the details of a trade agreement to the US Congress: people still remember Congress' blocking of the Havana Charter in the late 1940s and the Kennedy Round codes two decades later.

Of course, each of these points only addresses the broad dynamics of the negotiations: there is still the not insignificant matter of addressing the detail of the Doha Development Agenda, which takes in not only market access negotiations for agricultural and non-agricultural goods and services, but also discussion of trade rules and institutional reform, all of which present their own challenges for negotiators.

There is certainly scope to be sceptical on the question whether the Round can conclude successfully any time soon.

### 2.2 What this will do to dispute settlement

When the round was going relatively well, the level of activity under the WTO's *Understanding on Rules and Procedures for the Settlement of Disputes* (DSU) reached historical lows. Between 2002 and 2005, the level of dispute settlement activity dropped from around 35 cases a year to around 10.\(^4\)

In 2006, as the round hit real trouble, that number doubled. Based on projections for this year, it may be higher again.

A good case can be made for the proposition that the main reason why a larger number of disputes were not filed between 2002 and 2005 is that countries were choosing to *negotiate not*

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litigate. Careful and subtle negotiations were seen as a better option for pursuing national trade interests than the blunt instrument of a requesting a panel to adjudicate the matter.

That trend seems to be gradually reversing. Arguably, the increased dispute settlement activity is resulting, at least in part, because disputes are now being perceived as effective in a way that negotiations in the Round is not. Canada's wide ranging challenge to US farm subsidy programmes initiated earlier this year (United States — Subsidies and Other Domestic Support for Corn and Other Agricultural Products) is a good example of a case that is designed to exert pressure on the negotiations, or provide a possible remedy, if they fail. More such wide ranging and significant challenges are likely to follow further stagnation in the Round. In some ways, the dispute settlement system remains the WTO's one good lung.

3. The importance of transparency in the WTO dispute settlement system

3.1 Legitimacy and credibility

The failure of negotiators to make a break through in the Round means that the WTO is coming under increasing pressure. Having one bad lung is not good for a creature's overall wellbeing.

Questions are being raised about the relevance of the WTO going forward. These are very serious questions because alternative strategies are already being pursued by governments to address the concerns of their trade-focussed stakeholders, namely FTAs.

The pressure on the WTO system also highlights further some of the pre-existing complaints about the way in which the organisation operates, and raises ever-louder questions about the WTO's legitimacy and credibility.

This is particularly true of the dispute settlement system. This is partly because the WTO dispute settlement system is a uniquely powerful forum, relative to other dispute resolution

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5 US Congressional Research Service analysis indicates that "factors motivating Canada’s case against U.S. corn programs include the current suspension of Doha Round negotiations": see CRS Report for Congress: US Canada Corn Trade Dispute (31 January 2007), p.8.
forums in international law. It is also because the outcomes of dispute cases potentially have a very focussed impact on affected industries. Consider, for example:

- **Australia – Subsidies Provided to Producers of Automotive Leather**\(^6\), the result of which was a finding that repayment in full of AusIndustry subsidies to the Victorian company Howe Leather was the only way to comply with relevant WTO subsidies disciplines; or

- **Australia – Measures Affecting the Importation of Salmon**\(^7\), in which an Australian import risk assessment denying access for Canadian salmon on sanitary grounds was found to be flawed, resulting ultimately in access for Canadian salmon.

Why should the WTO be allowed to play such an influential role in the economic affairs of countries like Australia; in industries such as the automotive sector; or with the manner in which a sovereign government analyses the incidence of pests and disease?

These are important issues, the answers to which depend significantly on the degree to which the process is seen by the government concerned, on the one hand, and affected stakeholder, on the other, as legitimate and credible.

### 3.2 Transparency in WTO dispute settlement

Transparency is a crucial component in promoting the legitimacy and credibility of the WTO dispute settlement system going forward. "Internal" transparency, that is, transparency for the WTO membership, helps ensure that the process is perceived as valid by member governments. "External" transparency, transparency vis-à-vis the wider public, helps secure understanding and support amongst affected stakeholders. Transparency generally helps ensure that the system operates in a robust and proper fashion, and avoids any inkling of corruption: as Justice Louis Brandeis once said "sunlight is a great disinfectant".

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\(^6\) WT/DS126.

\(^7\) WT/DS18.
Without the innovations and improvements in transparency that have taken place since the conclusion of the Uruguay Round, the dispute settlement system would not be as successful as it has been. Further institutional transparency will make the system even more robust.

There needs, however, to be careful management of how the transparency agenda is advanced, because transparency is not the only factor contributing to the legitimacy and credibility of the system. Other, potentially competing interests, also come into play. For example, the system also needs to be effective in protecting confidential commercial information and confidential governmental information. It also needs to take into account the opportunity for member governments to seek negotiated solutions or accommodations at any stage of a dispute.\(^8\) Sometimes, in the light of these kinds of concerns, it will be important to allow disputing members or a panel or the Appellate Body to impose a degree of confidentiality over proceedings, in much the same way sensitive issues are handled by domestic courts in countries like Australia.

More generally, because the WTO is driven by its members, the introduction of greater transparency into the dispute settlement system needs to be cognizant of the concerns of the membership. Some of these concerns do not favour full external transparency and engagement with non-members.

### 3.3 What are the problems of non-transparency in WTO dispute settlement?

Problems of non-transparency arise in the context of WTO dispute settlement in a number of ways. These include:

- non-access by interested WTO members or non-governmental stakeholders to proceedings;
- non-access (or access that is not timely) to reports or other dispute settlement documents;
- lack of understanding of the functioning of the system and the significance of certain elements by either interested WTO members, other stakeholders, or both; and

\(^8\) See, for example, Article 11 of the DSU: "… Panels should consult regularly with the parties and give them adequate opportunity to develop a mutually satisfactory solution".
• the impenetrability of complex and lengthy reports or other dispute settlement documents.

3.4 Innovations within the existing framework

Before conclusion of the Uruguay Round, dispute settlement under the General Agreement on Tariffs and Trade (GATT) was difficult to access.

GATT Contracting Parties not party to a panel proceeding accessed panel reports only once they were circulated for consideration by the GATT Council. Public access was even more limited: in principle, reports became available to the public only if they were adopted by the GATT Council and subsequently published in the Basic Instruments and Selected Documents series – usually several years after the case was heard. Even then, published GATT panel reports (particularly early ones) are fairly perfunctory, and appear more aimed at recording outcomes than giving transparent or comprehensive insights into the process.

Transparency, both internal and external, improved considerably with the adoption of the DSU. Third party rights of participation for WTO members were clarified and expanded in Article 10 (although there remained limitations); WTO dispute reports have, since the beginning, been de-restricted and publicly available upon circulation to the WTO membership. The WTO has been active in placing material on its website, and Panel and Appellate Body reports are usually available on that site shortly after paper copies are distributed to diplomatic missions in Geneva. In addition, Panel and Appellate Body reports are on the whole more detailed and more thoroughly reasoned than earlier GATT reports.

There have been further innovations regarding transparency as experience with the system has developed. The WTO dispute settlement system is unique in international law because its jurisdiction on matters arising under the WTO covered agreements is virtually compulsory, its process is virtually automatic and its results are ultimately enforceable. In each of these respects, the WTO DSU moves away from the GATT system on which it was built.

The significance of these features began to attract attention, both within WTO circles and in the wider global community, with early high-profile cases such as:

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the EC – Hormones dispute\(^9\), in which longstanding European bans on hormone treated beef were found to be unlawful;

the EC – Bananas dispute\(^10\), in which one group of developing countries challenged the trade preferences given by the EU to another group of developing countries, and which ultimately has led to substantial pressures on producers of bananas in parts of the world, particularly in the Caribbean;

the so-called Shrimp-Turtle\(^11\) and Asbestos\(^12\) cases, which challenged environmental and health protection measures by American and European governments.

As a result of these cases, and others, a number of innovations have arisen:

• Third party rights have been expanded, although there remain limits. A good example of this was in the context of the 2005 arbitration of the EU’s new tariff regime for bananas. The relevant provisions for arbitration did not provide for any third-party rights, but the Arbitrator determined that it would allow participation by the African Caribbean and Pacific group of countries in any event.\(^13\) Another example is to be found in the 2005 amendments made by the Appellate Body to its Working Procedures, in order to allow more flexible participation by interested WTO members.\(^14\)

• So-called "amicus curiae" briefs have been allowed from non-government actors in a number of cases, as well as a WTO member in one case.\(^15\)

• Recently, hearings in a case following on from the EC – Hormones dispute have been made public upon agreement by the parties.\(^16\)

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\(^10\) WT/DS27.

\(^11\) United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS68.

\(^12\) European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135.

\(^13\) See: European Communities – the ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001, WT/L/616, para 10

\(^14\) See WT/AB/WP/9.

\(^15\) Morocco submitted an amicus brief to the Appellate Body in European Communities – Trade Description of Sardines, WT/DS231. At the DSB meeting adopting that report, Morocco explained that it had submitted an amicus brief because the DSU rules for third parties did not allow it to intervene in the proceedings at the appellate stage, having not done so before the panel.

\(^16\) United States — Continued Suspension of Obligations in the EC — Hormones Dispute, WT/DS320. See also www.wto.org/english/news_e/news05_e/openpanel_12_sep_e.htm, for WTO news release on the open hearing.
• The secretariat's communication role has expanded. This is evidenced by the plethora of material available on the WTO website.

• Finally, panels and the Appellate Body have become very careful in documenting all important aspects of their proceedings in their public reports. The front part of Appellate Body reports, for example, now systematically addresses all procedural and related matters that arise in a proceeding. This detail is sometimes difficult to extract or understand in earlier reports.

3.5 Remaining challenges

Some WTO members are highly sceptical about the appropriateness of opening up the process to influences outside of the WTO membership itself.

For this reason, the Appellate Body's acceptance of amicus briefs has been strongly criticised. Indeed, its establishment in EC – Asbestos of a formal procedure for dealing with such briefs led to unprecedented and vociferous criticism by Members of the Dispute Settlement Body (DSB). There is evidence that the views expressed in the DSB have chastened panels and the Appellate Body in their approach to accepting such briefs. Panels now routinely decline to accept such submissions. The Appellate Body now deals with such briefs in its reports formulaically, without much indication of how such briefs actually influence the process, or how they do not.

In addition, as transparent reasoning and wide availability of reports have encouraged lively critiques of panel and Appellate Body decisions, panels and the Appellate Body have become ever more cautious in reasoning their reports. Sometimes this means that the timeframes prescribed by the DSU cannot be met. As importantly, it means that the size and complexity of WTO reports are constantly expanding. The dispute settlement organs are in an unenviable position in this regard: full reasoning and consideration is fundamental to the credibility (and the transparency) of the system; nevertheless, the expansion of panel reports in cases such as US – Upland Cotton or EC – Biotech means effectively that no more than a handful of closely interested officials or academics ever read the full 5000-odd pages of panel report and annexures.

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17 See Minutes of Meeting, WT/DSB/M/102 & 103.
The secretariat and institutions such as the Appellate Body have sought to address this problem to some extent by condensing some of the information flowing out of the process for dissemination. Good examples of this process are found in the Appellate Body's Annual Reports and Repertory of Reports and Awards\textsuperscript{18} or in the Legal Affairs Division's One Page Case Summaries. All of these useful publications are available free of charge on the WTO website.

### 3.6 Further proposed innovations

Negotiations on clarification and improvement of the DSU predate the Doha Round. A number of proposals have been made in that context to address internal and external transparency issues, such as proposals for:\textsuperscript{19}

- open hearings;
- more timely access to submissions and better access to documents for third parties;
- webcast hearings;
- the opportunity for Members to observe proceedings, or to join proceedings at the Appellate Stage;
- Publication of submissions, or the creation of a publicly accessible registry of dispute settlement filings.\textsuperscript{20}

Whether these budding proposals will flower into amendments to the DSU is an open question that is now related to the broader fortunes of the Doha Round. There is, however, thoughtful support for these proposals. The Sutherland Report on the Future of the WTO\textsuperscript{21} – a study for the former Director General Supachai Panitchpakdi by eight leading international trade figures – made a number of relevant findings and recommendations, in particular that:


\textsuperscript{19} See in particular the proposals of the United States: TN/DS/W/86, TN/DS/W/79, TN/DS/W/46, and TN/DS/W/13. Other notable contributions have been made by Canada.

\textsuperscript{20} At present only five WTO members appear systematically make public their submissions in WTO proceedings, and even then, they are sometimes slow in putting them on the internet. The countries are New Zealand, Australia, the US, the EU and Canada. A useful link to this material is on the website of the Advisory Centre on WTO Law: www.acwl.ch/e/dispute/dispute_e.aspx.

\textsuperscript{21} The Future of the WTO: Addressing Institutional Challenges in the New Millenium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (2005).
• "the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution"\textsuperscript{22};

• "as a matter of course, the first level panel and Appellate Body hearings be open to the public"\textsuperscript{23};

• Secretariat should undertake more technical assistance work in helping stakeholders understand the functioning of the system\textsuperscript{24}; and

• the nature and value of the system be sold to a wide public and political audience.\textsuperscript{25}

All of these suggestions warrant close consideration by WTO members, as they would further enhance the credibility and legitimacy of the WTO dispute settlement system in a period when the system promises to face increasing pressures.

4. Conclusion

The usage of the WTO dispute settlement system is likely to increase in the coming period. This is particularly the case if the Doha Round negotiations fail to reach a breakthrough. If that happens, the dispute settlement system is likely to become a forum for addressing trade concerns that have been building up for some time.

In order to cope with such an increased burden, it is of crucial importance that the WTO dispute settlement system be seen as legitimate and credible, both by WTO member governments and by stakeholders in business, industry and stakeholders more broadly.

The WTO dispute settlement system has nothing to hide. Transparency will be a useful tool in promoting the credibility, legitimacy – and indeed the longevity – of this innovative and important international system.

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\textsuperscript{22} Ibid., Recommendation 261.
\textsuperscript{23} Ibid., Recommendation 262.
\textsuperscript{24} Ibid., Recommendation 264
\textsuperscript{25} Ibid., Recommendation 265.