
WTO News

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Comment

Rules and Specific Commitments – A Neglected Relationship

The Doha Round negotiations are not proceeding as planned. Until now not one of the deadlines has been met. Consensus on modalities for agricultural negotiations would have been due at the end of March 2003. Without such agreement, the negotiations on non-agricultural goods seem also to be blocked. The agreement on pharmaceutical imports produced under compulsory licensing into countries without adequate production capacity was due on December 31, 2002 and is still pending. The Uruguay Round Agreement on Trade in Services (GATS) called for negotiations in important rules-based areas, namely subsidies, public procurement, emergency safeguards, and domestic regulation. Intermediate deadlines have not been kept, and the most recent commitments are March 15, 2004 for the safeguard clause, and January 1, 2005 for the other three dossiers. Negotiations on a review of the Dispute Settlement Understanding (DSU), which would have been due for 31 May, 2003, did not yield any result either (see the following contribution by Thomas A. Zimmermann).

Market access and domestic support for agricultural products, the conflict between industrialised and de-

veloping countries, and rising tensions in the transatlantic relationship between the EU and the US are often cited as the main reasons for the slow progress of the Doha Round. These are clearly important points. Nevertheless, I would like to concentrate on an often-neglected relationship, which also has strong impact on the dynamics of trade negotiations: Uncertainty about general rules creates additional risks for governments when entering specific commitments on market access, thereby slowing down the process of progressive liberalisation.

Rules and Specific Commitments in the GATS

The tension between rules and specific commitments is particularly apparent in the GATS. Article X GATS provides that the results of negotiations on an emergency safeguard clause should enter into force no later than three years after the GATS entered into force. Until now, there has been no agreement. The US and other industrialised countries are of the opinion that the scheduling approach of the GATS leaves sufficient flexibility for country-specific solutions and see no need for a special safeguard clause. In addition, they fear that a newly-introduced safeguard clause would reduce the value of existing commitments. Developing countries on their side emphasise that they are not willing to make substantial new market access commitments if they have no opportunity to react properly should need arise. They also note that industrialised countries use such instruments in the goods sector, as exemplified by the safeguard clause in Article XIX GATT or the special safeguard provisions in the Agreement on Agriculture. The dispute over the safeguard clause and the resulting uncertainty concerning the strength of specific commitments in the GATS are important impediments to further progress.

Another area of uncertainty concerns public services which are provided in actual or potential competition with private suppliers (e.g. public hospitals, schools or universities, public utilities). Do these services fall under the GATS, or are they outside the agreement as services supplied in the exercise of governmental authority according to Article I:3(b)? If they are covered by the GATS, we have to ask whether the respective country has made specific commitments for national treatment. If so, private foreign suppliers might ask for treatment no less favourable than for their public domestic competitors. It is very unlikely that such an outcome was intended by the respective country, and in the case of a dispute, panel and Appellate Body would have to decide whether public institutions provide a like service to one of private suppliers. But even if the country has not yet made specific commitments, there remains the risk that a general subsidy agreement, which is called for by Article XV of the GATS, could introduce additional subsidy disciplines. This great uncertainty with regard to publicly-financed services makes it extremely difficult to reach further progress in the Doha-Round negotiations.

Trade Remedies and Tariff Bindings

The tension between rules and specific commitments is not only relevant for services but also for the goods sector. Prohibition of quantitative restrictions, most favoured nation principle, and national treatment jointly form a set of general rules which restrict governments in their trade policies. The tariff structure which has been negotiated defines market entry conditions and corresponds to the schedule of specific commitments for the different segments of production. Tariff concessions during several multilateral rounds resulted in greater impact of the general rules, with increased risk of harming import-competing industries. Against this background, it is understandable, albeit not economically efficient, that Members made increasing use of trade remedies (antidumping, safeguard clause, and countervailing duties) which counteract specific tariff concessions under a broad set of conditions.

The wording of the Doha Declaration with regard to the Antidumping and Safeguard Agreements fits well into my line of reasoning: "We agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives..." The conclusion seems clear: In the light of advanced tariff concessions, Members are not willing to forego the flexibility of trade remedy instruments.

High Structural Relevance

The relationship between general rules and specific commitments is one of the main structural challenges for the design of the multilateral trade agreements. The interpretation of existing agreements as well as future negotiations both have to find a good balance between rules and specific commitments for market access. If agreements allow only restricted flexibility and if con-

tractual commitments are enforced rigidly, governments will be reluctant to subscribe to far-reaching specific commitments. This could severely retard the process of progressive liberalisation. On the other hand, specific market access commitments are of low value if they can be circumvented easily – be it by using special flexibility clauses of the agreements or by reneging on existing commitments.

In addition to the questions already alluded to, the issue of Special and Differential Treatment of developing countries is part of the general discussion on rules and specific commitments. If general rules were strictly binding for developing countries, the latter might not be willing to make market access commitments of any reach. On the other hand, if they can evade general principles too easily, their special commitments are of low value.

The discussion on the reform of the DSU is also part of this broader debate. The new Dispute Settlement Understanding has clearly increased the quality of the legal interpretation of the multilateral trade agreements, but there are still serious flaws in the implementation phase. Should the conclusion be that we need to strengthen legal instruments and disciplines of implementation with greatest priority? In the interest of strengthening existing agreements, the answer should be yes. But if one takes a broader systemic view, the recipe is not that clear-cut. Stricter enforcement mechanisms would shift the balance between rules and specific market access commitments towards stronger rule-orientation. This might unduly undermine incentives to negotiate further specific commitments.

The great challenge for future negotiations will be to find an institutional design which gives private market participants sufficient stability in their expectations for market access, but which preserves the flexibility of governments to react to unforeseen developments. Otherwise they might not be willing to continue the process of liberalisation. *Heinz Hauser*

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Dispute Settlement

The DSU Review: A Never-Ending Story

Another item has recently been added to the long list of missed deadlines in the Doha Round of multilateral trade negotiations: Member countries failed to deliver on their mandate for negotiations on improvements and clarifications of the Dispute Settlement Understanding (DSU). What should have been completed as an “early harvest” by May 2003 under the Doha mandate will now likely be another cause of headache for trade ministers meeting in Cancún later this year. This article briefly looks back on the past six years of negotiations on the DSU review, the key issues, and the implications of the current deadlock.

Six Years of Consecutive Failures

Originally, a 1994 Ministerial Declaration had called upon members to complete a full review of the DSU by 1 January 1999, and to take a decision whether to continue, modify, or terminate the DSU at the Seattle Ministerial Conference. Despite intense discussions in informal meetings and an extension of the deadline until July 1999, no result was achieved. In further informal consultations organised by Japan, a proposal was hammered out and later submitted to the December 1999 Ministerial meeting in Seattle. Co-sponsored by the EC, Canada, Korea, Switzerland and ten other industrial and developing countries, this so-called Suzuki text sought to clarify the “sequencing issue” (see below) and certain other problems of the DSU. The proposal, however, did not enjoy sufficient support among members, and ministers failed to take the decision which would have been required. A review of the DSU came back on to the agenda of the WTO in September 2000, when Japan and some of the original co-sponsors basically re-submitted their text, this time as a proposal for an amendment of the DSU pursuant to Article X WTO Agreement. Again, discussions held during much of 2000 and 2001 were unsuccessful. At least a mandate for further negotiations was included in the 2001 Doha Ministerial Declaration.

Broad Scope of Negotiations Under the Doha Mandate

Negotiations under the Doha mandate have covered a much broader range of topics than previous discussions. Between spring 2002 and May 2003, 42 specific proposals were submitted by members, covering virtually all provisions of the DSU. The “Chairman’s text” of 28 May 2003, named after the Chairman of the negotiations Péter Balás, incorporates many of these proposals and was meant to serve as a basis for agreement (Document TN/DS/9, available at the WTO website). Despite the fact that it was not accepted by the negotiators, it is worth looking at in some detail.

One of the issues that the Balás text deals with is the sequencing issue. It had risen for the first time during the Bananas case, where a dispute arose about the consistency of the EU implementation measures with WTO rules. The main question is whether a “compliance panel” must first review the implementation measures undertaken by a defendant before a complainant may seek authorisation to retaliate on grounds of the defendant’s alleged non-compliance. The text of the DSU on this issue is not clear, giving rise to different interpretations. Whereas the US initially opposed any idea of sequencing and favoured immediate retaliation, the EU and many other members argued in favour of the completion of such a compliance panel procedure as a prerequisite to seeking an authorisation to retaliate. Over time, however, this debate lost some of its acrimony after the US had been defeated in the Foreign Sales Corporations (FSC) case, finding itself unable to implement the rulings in a timely and WTO-consistent manner. The EU and the US then agreed bilaterally on a procedure filling the gaps of the DSU. According to the general procedure proposed by the Balás text, a compliance panel would have to review implementing measures in the case of disagreement on their WTO consistency, before the complainant could seek authorisation to retaliate. Reports of this compliance panel would be subject to appeal. A similar procedure would also be applied for the termination of the suspension of concessions: If there were disagreement between the complainant and the defendant on whether the defendant complied after retaliatory measures had been taken, a compliance panel would review the implementation measures. If it found them to be consistent with WTO obligations, the suspension of concessions would be terminated.

The Balás text would also have brought noteworthy modifications at the appellate stage, introducing an interim review, and a procedure according to which an issue may be remanded to the original panel in case the Appellate Body is not able to fully address an issue due to a lack of factual information in the panel report. Remand panel reports could be appealed as well. Furthermore, the Balás text would have introduced numerous amendments in other areas, including enhanced third party rights, enhanced compensation, strengthened notification requirements for bilateral solutions, and special and differential treatment of developing countries.

Contentious Issues

Whereas even the Balás document contains much bracketed text indicating disagreements between negotiators, some proposals, however, have not even been taken up in the draft due to a lack of consensus among parties. Among these, most elements of a proposal by the United States and Chile on “improving flexibility and member control in WTO dispute settlement” have been left out. This proposal had obviously been motivated by a series of defeats in trade remedy cases and a surge of criticism of WTO dispute settlement from US Congress. It would have allowed the deletion of findings in panel or Appellate Body reports by mutual agreement of the parties. Furthermore, it would have provided for the partial adoption of panel and Appellate Body reports, and it

called for “some form of additional guidance to WTO adjudicative bodies”.

Another proposal that was not taken into account is the EU call for a permanent panel body. The EU also failed in introducing a prohibition on “carousel” retaliation (i.e. where lists of products subject to retaliation may be periodically modified as provided for by US law) into the Chairman’s text. The same fate was shared by US proposals for increased transparency, according to which submissions of parties to panels and the Appellate Body would have been made public, and public observance of panel and Appellate Body meetings would have been allowed. Proponents of an explicit authority for panels and the Appellate Body to accept amicus curiae or “friends of the court” briefs were equally disappointed. Many developing countries staunchly opposed such forms of “civil participation” in the WTO system, stressing the intergovernmental nature of the WTO. Developing countries, in turn, failed to introduce the possibility of collective retaliation into the draft. It was meant to overcome the problems caused by the lack of retaliatory power of many small developing economies, such as those experienced by Ecuador in the Bananas case.

Is the Deadlock on the DSU Review Harmful?

The inability of WTO members to agree on clarifications and improvements to the dispute settlement system reflects a lack of political will to seek for a compromise. Negotiators seem to be captured in a very narrow corset determined by their national interests and experiences

under the DSU, with no room left for a settlement on a mini-package that would, however, lie in the interest of the system. In addition, positions taken on the DSU are vulnerable to change with every new case that is brought to Geneva, making negotiations and an agreement even more difficult. From this perspective, and in the light of the wide spectrum of conflicting propositions, fruitless DSU review exercises are likely to continue for another six or more years.

Yet, this deadlock does not necessarily need to impair the functioning of the DSU. With regard to sequencing, for instance, parties are de facto applying the new rules which have been proposed on a case-by-case basis by agreeing bilaterally on similar procedures. With regard to amicus curiae briefs, the Appellate Body has found ways to deal with such submissions while retaining flexibility and independence. Moreover, some proposals of the Balás text might have doubtful consequences. It could be argued, for instance, that introducing compliance panels which are subject to appeal, and introducing remand panels whose reports could also be appealed, could eventually lead to lengthy and kafkaesque procedural tangles, doing little to address the fundamental problem of insufficient political will towards real compliance. Even worse, some proposals outside the Balás text, such as US calls for increased flexibility and member control, would constitute an outright step back from a rule-oriented towards a more power-oriented system, accommodating negotiators from the US and other powerful nations, but doing little to improve the DSU.

Thomas A. Zimmermann



From the Book Shelf

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD): Course on Dispute Settlement in International Trade, Investment and Intellectual Property, Geneva and New York: United Nations, 2003; Documentation consisting of 41 modules

The network of multilateral economic agreements that include an international, independent arbitration mechanism has recently become denser and much more complex. External observers easily lose the overview on a topic that decisively affects national sovereignty.

A documentation by UNCTAD, which for the time being is available only in part but will be completed in the near future, analyses a variety of multilateral institutions established for the settlement of economic disputes. These institutions currently enjoy rising popularity, not least because more and more developing countries are actively engaged in their procedures. The documentation consists

of 41 paperback modules and can also be downloaded (free of charge) at <http://r0.unctad.org/dispsett/>. Besides the International Center for Settlement of Investment Disputes (ICSID) and the Arbitration and Mediation Center of the World Intellectual Property Organisation (WIPO), it also scrutinises the dispute settlement mechanism of the WTO.

The first four modules provide a profound insight into many procedural questions. There are separate modules for panels, the Appellate Body and for issues concerning the implementation of Dispute Settlement Body decisions. A couple of topic-specific modules subsequently focus on the most important agreements of the WTO (GATT, GATS, and the agreements on antidumping, subsidies and countervailing measures, agriculture, and technical barriers to trade). The comprehensive analysis of agreement components is, as appropriate, supplemented by the relevant case law of the past seven years. The reader, who does not need to have any previous knowledge in the field, gains a comprehensive understanding of the WTO legal framework. Furthermore, he will realise how a fairly young institution has been able to strongly influence international trade relations.

Alexander Rottinger