



**DISPUTE SETTLEMENT DURING A DDA STALL:
WHAT ARE MEMBERS ASKING OF THE DS
SYSTEM, AND HOW IS IT PERFORMING?**

-- SPEAKING NOTES --

**Presentation to Roundtable Hosted by
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Good afternoon and thanks for attending this session organized by the ABA Section of International Law. I am honored to represent the ABA-SIL here, along with Ron Cass, and to have the chance to make some brief stage-setting (perhaps pot-stirring) remarks.

This 7th Ministerial Conference has as a core focus the “normal,” day-to-day business of the WTO. No category of regular WTO activity is a more fitting topic of discussion than the one we will linger over for the next hour – the Organization’s dispute settlement system.

This period of negotiating stalemate has been in some senses a difficult one for the DS system.

- There is in the atmosphere none of the good will that would flow from a sense of progress and promise on the negotiating front, and it is commonly assumed that negotiating delays create a vacuum drawing in disputes.
- There is the related stress associated with efforts, or perceived efforts, by Members to capture through litigation ground that would otherwise have to be paid for at the negotiating table.
- Recent and current disputes reach deep inside sensitive areas of the sovereign preserve – challenging the ways in which governments have chosen to raise money, and to spend money, and to regulate in what they perceive to be the public interest.
- And – while it’s not yet clear how much significance this last development has had or will acquire in the future – the United States has recently joined the European Communities as a giant Member who “just said no” in a dispute settlement case. That is, for the first time, when presented with an adverse WTO decision, the United States did not declare an intention to modify the offending measure (a ban on internet gambling). While the United States took additional steps to dull its sharp edge, this episode has caused some amount of stress and concern about the DS system’s integrity. (The impact was limited by a further US decision to withdraw, with compensation satisfactory to affected trading partners, the scheduled

GATS commitment that in its view had been mis-interpreted. Still, the answer given in this case was that US behavior would not change; rather, the WTO obligations would have to be changed.)

At the same time, looking at other factors, you could say this has been a superb time for the DS system.

- The system recently received its 400th complaint, reflecting a high level of usage by apparently satisfied repeat customers. A wide range of WTO Members at varying levels of development are using, and acquiring experience with, the DS system.
- The rate of compliance with adverse decisions, and the rate of amicable settlements short of a full litigated result, both remain very high.
- The system's use by and against China, as that country continues its marathon-like integration into the WTO community, has to be counted as a plus -- especially in comparison with the alternatives.
- Transparency is creeping into the system, with accompanying growth in the system's credibility and without the sky falling. (I would recommend to anyone interested in this topic the very thorough CIEL research paper available on the literature tables here in the NGO Center.)
- And contentedness is surely reflected in the very modest character of the changes being pushed by Members -- even Members greatly aggrieved by individual case results -- in the DSU review.

Peering forward, there are reasons for hope and also for caution. I'll conclude with the latter.

- It could indeed be true that the negotiating stall -- which the current Ministerial gathering does not seem to be removing -- will attract more disputes, including difficult disputes, into the system.
- A wave of new disputes may, as some observers have predicted, materialize in response to measures (some of which have affected trade) implemented by governments in response to the recent financial and economic crisis.
- Environmental measures -- perhaps especially carbon control schemes, whether or not they feature anti-leakage border measures -- may give rise to new and politically-charged disputes.

- The expiry of key transition periods in China's WTO accession package – some occurring after 12 years and others after 15 years – could create new stresses and disputes.
- And then there are some exceptionally tough cases now in the system and edging toward decision – the Large Civil Aircraft subsidy cases being an obvious, but by no means the only, example.

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I hope that's enough to get the juices flowing in the room. Let's now turn this into a true roundtable, and hear from those present what cases they are following and what issues – narrow or systemic – have spurred their interest.